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23 Cal.2d 761

In re AXCELROD'S ESTATE.

WILENCE v. POCKER et al.
L. A. 18708.

Supreme Court of California.
March 11, 1944.

1. Wills 🔑439, 440

In construing will, the ultimate question is testator's intention as expressed in will, and technical rules of interpretation must yield to an intention clearly expressed.

2. Wills 🔑481

Testatrix' intention was to be determined only as of date of execution of the will. Probate Code, § 70.

3. Marriage 🔑1

"Marriage" is a civil contract which not only creates reciprocal rights and obligations as between contracting parties, but which also affects their status.

See Words and Phrases, Permanent Edition, for all other definitions of "Marriage".

4. Wills 🔑191

The law presumes that subsequent marriage of a testator has wrought such a change in his condition of life as to cause him to destroy or cancel a previous will. Probate Code, § 70.

5. Wills 🔑191

Mere general phraseology in will cannot be construed to mention subsequently acquired spouse within statute providing for revocation of will as to surviving spouse if marriage occurs after making of will, unless spouse has been provided for or mentioned in the will. Probate Code, § 70.

6. Wills 🔑191, 658

The word "heir", as used in an in terrorem provision in will, could not be construed as intending to include a subsequently acquired husband, and hence will was revoked under statute as to husband. Probate Code, § 70.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir".

7. Appeal and error 🔑907(3)

On judgment roll appeal, Supreme Court was not required to presume that competent evidence supported trial court's findings, where respondents themselves predicated part of their argument on assertion that no evidence was introduced, and only fair construction of entire record was that findings and conclusions of trial court were based exclusively on an interpretation of quoted portions of a will and application of statute thereto. Probate Code, § 70.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Diane Axcelrod. On a petition by Ben Wilence to determine heirship. From an order establishing the heirship of Etta Pocker and others, the petitioner appeals.

Reversed.

Prior opinion 139 P.2d 24.

Ralph Bernstein, of Huntington Park, for appellant.

Louise Mason, of Los Angeles, for respondents.

SCHAUER, Justice.

This is an appeal, upon the judgment roll alone, by a surviving husband from an "Order Establishing Heirship" and denying to appellant the one-half interest in the estate of his deceased wife to which he claims that the provisions of section 70 of the Probate Code entitle him. His chief attack on the order is made upon the ground that the trial court erred in its construction of certain provisions contained in the last will and testament of the deceased wife and in its application of the above mentioned section of the Probate Code to the admitted facts.

It appears to us that such attack is meritorious and that the order must be reversed.

Appellant's verified petition for determination of heirship, filed in the court below, alleges, so far as material to the issues presented on this appeal, that decedent, Diane Axcelrod, also known as Diane Wilence, died testate on November 3, 1941; that "Petitioner [appellant] is the surviving spouse of the decedent, and is one of her heirs by virtue of a marriage entered into with decedent on the 17th day of April, 1936, * * * after the execution of decedent's will on December 9, 1935, in which Petitioner is not named or provided for therein, nor was any provision made for your Petitioner by marriage contract"; that decedent's other heirs are nine brothers and sisters (named), including respondents herein; and that the will is "revoked as to Petitioner, the surviving spouse of decedent, and Petitioner is entitled to distribution of one-half of" decedent's estate. No responsive pleading was filed by any person.

Section 70 of the Probate Code, upon which appellant relies as legal ground for his claim, provides as follows: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

The will here involved devises and bequeaths the entire estate, except as provided by paragraph "Sixth" of such will, to four named sisters of decedent. Respondents are two of such sisters. Paragraph "Sixth" reads as follows: "I have intentionally omitted all of my heirs who are not specifically mentioned herein, intending thereby to disinherit them, and if any such persons, or heirs, or any devisees or legatees under this Will * * * shall * * * seek to establish or assert any claims to my estate or any part thereof, excepting under this Will, or attack [etc.] * * *, then * * * I hereby give and beqeuath to such person or persons the sum of One ($1.00) Dollar and no more, in lieu of any other share or interest in my said estate. * * *"

In their briefs the parties to this appeal agree, in effect, that no evidence was offered to or received by the trial court. Despite the absence of such evidence and of any pleading by respondents in answer to appellant's petition to determine heirship, that court signed and filed a document entitled "Findings of Fact and Conclusions of Law" in which it is recited that "the court * * * found and ordered * * * that under the proper construction of Section Sixth of the decedent's Will that the petitioner * * * would be entitled to the sum of One Dollar ($1.00) and no more should he claim any part of this estate"; that a motion for a new trial was made and granted "for the purpose of further considering said matter, and after further considering said matter and having heard the additional arguments of counsel" the court makes "findings of fact" that, among other things, decedent's will "was not drawn by the decedent but was drawn by a person trained in the law and the various words therein were used in their technical sense and meaning and were intended by the decedent to have the technical sense and meaning which would be attributed to said words by a person trained in the law. That the word 'heirs' as used in section Sixth of said Will was used by the decedent in its technical sense and meaning"; "That the decedent and petitioner, Ben Wilence, were married subsequent to the execution of said Will and no provision was made for Ben Wilence by marriage contract; that had the decedent died intestate, petitioner * * * would have succeeded to a portion of the decedent's estate; that said petitioner would have been an heir of the decedent had the decedent did intestate and was one of the class of persons included within the meaning of the word 'heirs' as used in Section Sixth of said Will * * *"; "That said petitioner was provided for in said Will to the extent of One Dollar ($1.00) should he do or seek to do any of the things described in section Sixth of said Will and said petitioner was mentioned in said Will in section Sixth thereof in such manner as to show the intention on the part of the decedent to make no further or other provision for him"; "That it is not true that said Will is revoked as to the petitioner, Ben Wilence and it is not true that said Ben Wilence is entitled to distribution of one-half of said estate or any part thereof other than said sum of One Dollar ($1.00) which he shall be entitled to should he do or seek to do any of the things mentioned in section Sixth of said Will." As conclusions of law the trial court then declares "That petitioner, Ben Wilence, is and shall be entitled to the sum of One Dollar ($1.00) and no more should he do or seek to do any of the things mentioned in section Sixth of said Will," and that the entire remainder of the estate shall be distributed to the persons named in the will. An "Order Establishing Heirship" was entered accordingly. Regardless of whether the making of findings of fact was proper under the recited circumstances (see 24 Cal.Jur. 950-953, § 191; Welch v. Alcott (1921), 185 Cal. 731, 754, 198 P. 626; cf. O'Day v. Superior Court (1941), 18 Cal.2d 540, 116 P.2d 621; Bales v. Superior Court (1942), 21 Cal.2d 17, 129 P.2d 685), we are of the opinion that the controlling conclusions of law declared by the trial court in this case cannot be sustained. (Some of the quoted "findings of fact" are obviously conclusions of law.)

In support of the conclusion that the "one dollar" clause in decedent's will constituted a "provision" for appellant and that therefore he is entitled to no more than that sum, respondents rely upon In re Estate of Kurtz (1922), 190 Cal. 146, 210 P. 959. But in that case there was different testamentary language to be construed, and an extrinsic factual basis upon which to interpret it was held admissible in evidence. The pertinent portion of the will there involved provided that (see page 148 of 190 Cal., page 960 of 210 P.): "if * * *any person whomsover who, if I died intestate,* would be entitled to any part of my estate, shall * * * establish or assert any claim to my estate, or any part thereof, excepting under this will, or attack or oppose or seek to set aside the probate of this will * * * or endeavor to secure or procure any part of my estate other than through or under this will; then * * * I hereby give * * * to said person * * * the sum of one ($1.00) dollar and no more in lieu of any other share or interest in my estate, and all the rest of the * * * share * * * which would otherwise have gone to such person or persons by devise or inheritance, *or which they might be entitled to take under any provision of law* shall go * * * to my said father * * *." (Italics added.)

The above quoted language, "any person whomsoever who, if I died intestate, would be entitled to any part of my estate," in the light of the subsequent phrase referring to any interest in the estate "which they might be entitled to take under any provision of law," and other circumstances appearing, was construed by the court to be "somewhat ambiguous" and was said to justify the taking of oral evidence to explain it. The court said (page 149 of 190 Cal., page 960 of 210 P.): "The appellant sought to show that at the time the will was made the testator was already engaged to be married to the contestant, as indeed would almost be presumed so short a time before [the will there was executed on the day preceding the marriage of the contestant and the testator]; but the court sustained an objection of the respondent to the evidence. This was clearly error. It was admissible for the purpose of showing who the maker of the will intended to include by the phrase 'any person whomsoever who, if I died intestate, would be entitled to any part of my estate,' a phrase which, if he had not been then engaged to marry the contestant, would be somewhat ambiguous, but which would be made certain by showing the fact of such engagement. Evidence is always admissible to show extrinsic facts which serve to explain the meaning of ambiguous words appearing on the face of a will, and this evidence was admissible for that purpose.

"The wife of the testator is therefore 'provided for' in the will."

We are not here concerned with either questioning or approving the above quoted holding that extrinsic evidence was admissible notwithstanding the provisions of the then section 1299 of the Civil Code (now section 70 of the Probate Code, hereinabove quoted) purporting to limit the evidence, which could be received to rebut the presumption of revocation. It is sufficient to point out that in their briefs the parties here agree, in effect, that no extrinsic evidence whatsoever was offered to or received by the trial court; there is, hence, no claim that the testatrix and contestant were even acquainted at the time the will was executed, much less engaged to marry, and there is no language in the will which is the equivalent of "any person whomsoever who, if I died intestate, would be entitled to any part of my estate," or the further phrase disposing of any interest "which they [any person or persons not specifically named in the will] might be entitled to take under any provision of law."

[1] Respondents also cite to us the cases of In re Estate of Wilson (1920), 184 Cal. 63, 67, 193 P. 581, and In re Estate of Newman (1924), 68 Cal.App. 420, 425, 229 P. 898, 900, to the effect that "The word 'heirs' is a technical term, and in its 'technical sense' one's 'heirs' means the persons who

would be entitled to succeed at his death to his estate, in case of intestacy, by virtue of our statutes relative to succession." However, in neither of those cases were the claims of an after-acquired spouse involved; the court was not there concerned with interpreting the wills in respect to the application and operation of section 70 of the Probate Code or its predecessor section in the Civil Code (§ 1299). The same observation is true in regard to In re Estate of Watts (1918), 179 Cal. 20, 175 P. 415. Moreover, as stated in the Wilson case (pages 67, 68 of 184 Cal., page 582 of 193 P.), "* * * the paramount rule [is] that the ultimate question is the intention of the testator as expressed in the will, and that technical rules of interpretation must yield to an intention clearly expressed. The real question * * * is, What did the testator mean in view of the language he has used in his will, in the light afforded by certain rules of interpretation which must prevail where a contrary intent does not clearly appear on the face of the will? Such is the question here involved. We have said: 'Of this class of questions it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills.' [Citations.]"

[2] In the case now before us the testatrix, in using the language (hereinabove quoted) relied upon by respondents, apparently had in contemplation only the persons, or claimants under persons, who at the time of execution of the will stood in such relationship to the testatrix that they could *then* conceivably come within the classification of "heirs" or potential heirs. A person who was then a stranger, both in consanguinity and affinity, and whose subsequent relationship was yet to be projected, could scarcely have been considered by the testatrix as an "heir," much less, a surviving husband. She said in her will, "I *have* intentionally *omitted* all of my *heirs* who are not specifically mentioned herein, *intending thereby* to *disinherit* them * * *." (Italics added.) Insofar as the operation of section 70 of the Probate Code is concerned her intention is to be determined only as of the date of the execution of the instrument. (See In re Estate of Carter (1942), 49 Cal. App.2d 251, 254, 121 P.2d 540.) A man does not "omit" the name of his child from a document if he has no child; a woman does not "omit" her husband from her will if she has no husband in fact or in contemplation.

[3, 4] Marriage is a civil contract which not only creates reciprocal rights and obligations as between the contracting parties but which also affects their statuses. "The law presumes that the subsequent marriage of a testator has wrought such a change in his condition of life as to cause him to destroy or cancel a previous will * * *." (Sanders v. Simcich (1884), 65 Cal. 50, 52, 2 P. 741, 742.) It is the general policy of the law, and the general rule, that upon marriage a previously executed will shall be revoked. (Probate Code, § 70.)

[5, 6] Freedom is left, however, for the person who, *having the intended spouse in mind,* desires, by will or marriage contract executed before the wedding, to make "provision * * * for the spouse" or to mention the spouse in the will "in such way * * * therein as to show an intention not to make such provision." Mere general phraseology such as that which is employed in the will now before us cannot be construed to mention the appellant—a subsequently acquired husband—"in such way * * * as to show an intention not to make" provision for him. He is not mentioned at all. The only word used which could possibly include him is the word "heirs." But at the time the will was executed the testatrix had no husband who could become an "heir." If she was at that time contemplating marrying anyone it may have been someone other than appellant. The will does not mention appellant by name or by contemplated relationship or otherwise in any way by which he can be identified as a particular person who was in her mind at that time. Since it does not identify him by name or by contemplated relationship, or designate a classification which shows on its face that it necessarily was then the intention of the testatrix to include therein a subsequently to be acquired husband, it cannot be held that such a subsequently acquired husband has been mentioned. If he has not been mentioned it is obvious that provision has not been made for him. Even were there otherwise doubt as to the contention that, by the "one dollar" clause, provision was made for appellant, that doubt is dispelled by consideration of the contextive language in paragraph "Sixth." Therein, the testatrix expressly avows, as to all "heirs who are not specifi-

cally mentioned herein," such heirs being persons who are bequeathed one dollar if they contest the will or seek to take otherwise than under it, that it was her intention "to disinherit them." An intention to *disinherit* a husband would be the direct opposite of an intention to *make provision for* him within the purview of the word "provision" as it is used in section 70. Appellant therefore is not in any event, by the terms of decedent's will, either provided for or mentioned as excluded from inheritance.

The facts here involved, insofar as they are disclosed by the record, appear to be more similar to those which were before the District Court of Appeal in Re Estate of Rozen-Goldenberg (1934), 1 Cal.App.2d 631, 37 P.2d 132, than to those which were the basis of the decision in Re Estate of Kurtz (1922), supra, 190 Cal. 146, 210 P. 959. We adopt here the language used by Judge Scott in speaking for his court in the Rozen-Goldenberg case (page 633 of 1 Cal.App.2d, page 133 of 37 P.2d): "It would appear that the intention [if any] to make no provision for the future surviving spouse would have to be set out with greater certainty and explicitness than in the instant case if the revocation provided by section 70 of the Probate Code is to be averted, where, as here, there is no marriage contract and no provision for such survivor in the will."

[7] The contention of respondents that the findings of fact justify the order and that, on this judgment roll appeal, we must presume that competent evidence supports the findings, cannot be sustained in the light of the circumstances shown. Respondents themselves predicate part of their argument on the assertion that no evidence was introduced, and it is apparent that the only fair construction of the entire record is that the findings and conclusions of the trial court are based exclusively on an interpretation of the quoted portions of the will and the application of section 70 of the Probate Code. Moreover, even if we accept the findings as drawn as being supported by the evidence to the extent that they are findings of *facts,* they do not justify the conclusions of law drawn therefrom or the order from which the appeal is taken. It is therefore unnecessary to consider either appellant's or respondents' further arguments relative to the proposition mentioned.

The order appealed from is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

CARTER, Justice.

I concur in the judgment of reversal and in the views expressed in the majority opinion with the exception of what is said therein with respect to In re Estate of Kurtz, 190 Cal. 146, 210 P. 959. In my opinion In re Estate of Kurtz was erroneously decided, and should be expressly overruled. I do not believe that it can fairly be said that the will which was interpreted in that case made provision for the surviving spouse or unborn child of the testator, "or in such way mentioned [them] therein as to show an intention not to make such provision." As I read section 70 of the Probate Code (formerly section 1299 of the Civ.Code) it appears to have been clearly the intention of the Legislature to make mandatory the revocation of a will made prior to marriage where the spouse survives the maker, "unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision"; and I do not believe that this provision can be satisfied by the use of general language in a will such as "all of my heirs," "any person whomsoever" and the like as indicating an intention on the part of the testator not to make provision for such surviving spouse.

While it may be true that there is a sound basis for a factual distinction between the instant case and In re Estate of Kurtz, I prefer to base my conclusion in this case upon an interpretation of section 70 of the Probate Code (formerly section 1299, Civ. Code) in direct conflict with that expressed in the opinion of this court in Re Estate of Kurtz, and consider that case as no longer an authority.

23 Cal.2d 770

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. ADAMS et al.

L. A. No. 16507.

Supreme Court of California.

March 15, 1944.

1. Eminent domain 🔑265(3)
Witnesses 🔑28(2), 246(2)

The statute authorizing the court to appoint and fix the compensation of expert witnesses applies to a condemnation action, and hence a party thereto must secure before trial an order in statutory form, to be entitled to an award as costs for an expert's witness fees or expenses incurred in connection with the giving of testimony. Code Civ.Proc. § 1871.

2. Eminent domain 🔑262(4)

Under the statute authorizing reimbursement for necessary expenses in preparing for trial of a condemnation action later abandoned, whether expert advice obtained by the owner of land to show its value was "necessary" presents a fact question for the trial court. Code Civ.Proc. § 1255a.

3. Eminent domain 🔑265(5)

Under the statute authorizing reimbursement for necessary expenses in preparing for trial of a condemnation action later abandoned, on a finding that the landowner acted in good faith to obtain information or expert advice necessary properly to protect his property rights, his reasonable expense is taxable as costs. Code Civ. Proc. § 1255a.

4. Eminent domain 🔑265(5)

In a condemnation action, where partial abandonment of landowners' claims eliminated the question of value of minerals, the landowners could recover as costs the reasonable value of services rendered to them in preparing for trial, and expenses of persons performing such services, including mining experts employed to advise on value of tin ores, but could not recover for fees and expenses of such experts as witnesses, in the absence of a statutory order appointing them as expert witnesses. Code Civ.Proc. §§ 1255a, 1871.

◆

In Bank.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Consolidated condemnation action by the Metropolitan Water District of Southern California against E. Bennett Adams and others. From an order refusing to tax certain costs claimed by two of the property owners, Lawrence Holmes and wife, such claimants appeal.

Affirmed in part and reversed in part, with directions.

Prior opinion, 141 P.2d 517.

Miguel Estudillo, of Riverside, Oliver O. Clark and Robert A. Smith, both of Los Angeles, and C. L. McFarland, of Riverside, for appellants.

James H. Howard and Charles C. Cooper, Jr., both of Los Angeles, for respondent.

EDMONDS, Justice.

During the trial of a consolidated condemnation action, a compromise was reached providing for an abandonment of the litigation insofar as compensation was sought by Lawrence and Gertrude E. Holmes, two of the property owners, for any minerals lying 300 or more feet below the surface of the ground. By this agreement, there was eliminated from further consideration the value of mineral deposits upon the Holmes property.

After judgment was rendered, Holmes and his wife filed cost bills claiming a total amount of about $13,000 for the fees and expenses of four mining experts. Concededly, the persons named in these cost bills are qualified to advise upon the extent and value of the tin ores which, the Holmes alleged, underlie their land. The cost bills show a total of about $4,000 charged for compensation and expenses of the experts as witnesses in court. Approximately $9,000 is included for the same persons as compensation and expenses other than as witnesses in court. Upon motion, the trial court refused to tax any of these items and the property owners have appealed from the order to that effect.

The appellants assert that because there is little or no tin mined in the United States and it is difficult to obtain information concerning the tin industry, they had to expend large sums for a study of geological conditions and data concerning the comparability of their deposits to those in Bolivia and Cornwall, from which the world's tin supply has been obtained for centuries. All of the experts employed by them appeared as witnesses, but the appellants claim the right to recover the total amount of their costs bills as "necessary expenses incurred in preparing for trial" of a condemnation action. The respondent takes the position that the fees and expenses of an expert witness employed by a property owner to testify in court or for work done outside of court, are not taxable as costs. Further says the respondent, the trial court determined that the persons for whom compensation and expenses are claimed were employed as witnesses and not as investigators or assistants to counsel, and its order is conclusive upon appeal.

Section 1255a of the Code of Civil Procedure provides that condemnation proceedings may be abandoned and "upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceeding and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees. * * *" Section 1871 of the same Code, a general statute, empowers the trial court in any proceeding, civil or criminal, to appoint and fix the compensation of expert witnesses whenever it appears that their evidence will be required by the court or any party to the action, and further specifies: "Nothing contained in this section shall be deemed or construed so as to prevent any party to any action or proceeding from producing other expert evidence as to such matter or matters, but where other expert witnesses are called by a party to an action or proceeding they shall be entitled to the ordinary witness fees only and such witness fees shall be taxed and allowed in like manner as other witness fees."

[1] According to its minute order, the trial court disallowed all amounts claimed for the fees or expenses of the experts "on the grounds set out in the decision" of City of Los Angeles v. Clay, 126 Cal.App. 465, 14 P.2d 926, and of City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 25 P.2d 224. Clearly the court determined no issue of fact. But the Clay case is in point only as to the right of a property owner to recover for the compensation and expenses incurred in behalf of a witness who testified as an expert. It was there correctly held that section 1871 of the Code of Civil Procedure applies to a condemnation action, and to be entitled to an award as costs for the expense of an expert witness, a party must secure, in advance of the trial, an order in the form specified by that statute.

The second decision relied upon by the trial court, Los Angeles v. Los Angeles-Inyo Farms Co., supra, is likewise inapplicable to the facts of the present action. In that case a condemnation action was abandoned before trial. The property owner claimed as costs the fees of expert witnesses who were to testify had the litigation continued. Upon the authority of the Clay case the amount was disallowed, but in reaching that determination the district court of appeal failed to distinguish between the situation of a property owner who seeks an allowance for, as stated in the statute, "all necessary expenses incurred in preparing for trial" and one who includes as taxable costs the fees and expenses of experts called by him without an order of court as contemplated by section 1871 of the Code of Civil Procedure. The decision in the Los Angeles-Inyo Farms Co. case, so far as it concerns the right to tax as costs the compensation of persons employed in preparing for trial is therefore disapproved.

[2, 3] The quoted sections of the Code of Civil Procedure define with particularity the right of a litigant to recover as costs the expense incurred in obtaining and presenting what is termed "expert evidence." The statute concerning condemnation actions recognizes that one who owns property sought to be condemned, upon abandonment of the action, should be reimbursed for "all necessary expenses incurred in preparing for trial" as well as for "reasonable attorney fees." In such an action, for the purpose of procuring evidence tending to show the value of the land proposed to be taken, it may be necessary for the property owner to consult one having expert knowledge of its peculiar characteristics. Whether such advice is necessary presents a question of fact for the trial court to determine. Upon a finding that the property owner acted in good faith to obtain information without which he could not properly have protected his property rights, the reasonable expense incurred by him is taxable as costs.

But when the expert is called to testify in the action, the property owner's right to recover for witness fees or expenses incurred in connection with the giving of testimony is governed by section 1871 of the Code of Civil Procedure. In the absence of an order of appointment, the statute expressly provides, only the statutory fees shall be recoverable. In each of two cases relied upon by the respondent, City of

Long Beach v. Anderson, 139 Cal.App. 130, 33 P.2d 875, and City of Long Beach v. Anderson, 139 Cal.App. 789, 33 P.2d 876, the statute was applied and an order disallowing an amount charged for the services of an expert witness was affirmed. Although in reaching its determinations the district court of appeal erroneously cited the Clay case as authority, the conclusion that, without an order of court, a party may not recover for the services of a person who testified as an expert, was correct.

[4] Because the trial court made no order appointing as an expert any one of the four persons for whom compensation is claimed, there can be no recovery for amounts paid or incurred as the expense of expert witnesses. But the appellants are entitled to recover the reasonable value of services rendered to them in preparing for trial, including the expenses of the persons performing such services.

As to the items charged for the compensation and expense of experts in connection with their appearance and testimony upon the trial of the action, the order is affirmed; as to the items charged for the compensation and expenses of the named experts out of court, the order is reversed, with directions to determine what amounts, if any, were necessarily incurred in preparing for trial, and to tax costs accordingly. The appellant shall recover costs upon this appeal.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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63 Cal.App.2d 611

WALLACE v. BOARD OF EDUCATION OF CITY OF LOS ANGELES et al.

Civ. 14320.

District Court of Appeal, Second District, Division 2, California.

March 30, 1944.

Rehearing Denied April 20, 1944.

1. Municipal corporations 🔑211

Where evidence was conflicting, board of education did not act arbitrarily in determining that building engineer had reached retirement age, and court would not overturn such finding. School Code, § 5.773a, as added by St.1939, p. 2038.

2. Mandamus 🔑7

Mandamus is issued not as a matter of right but in exercise of sound judicial discretion. Code Civ.Proc. § 1085.

3. Mandamus 🔑10

An applicant for mandamus must show that his right thereto is clear. Code Civ. Proc. § 1085.

4. Mandamus 🔑28

Mandamus will not issue to control exercise of discretion of judicial or quasi-judicial tribunal in determination of controversy dependent on disputed facts, nor to review proceedings in which a board acted on conflicting evidence. Code Civ. Proc. § 1085.

5. Officers 🔑108

Local boards may act in judicial capacity as a quasi-judicial body.

6. Officers 🔑103

A decision of local board acting as quasi-judicial body will not be rejected by the court unless there is proof of fraud or of such arbitrary action as amounts to constructive fraud.

7. Mandamus 🔑72

Mandamus cannot be used to control discretion of a board, but will lie to correct an abuse of discretion. Code Civ.Proc. § 1085.

8. Mandamus 🔑167

On application for mandamus to compel board of education to reinstate plaintiff as building engineer in city school department after he had been retired because of age, plaintiff was required to plead and prove that defendants acted arbitrarily, fraudulently or illegally. Code Civ.Proc. § 1085; School Code, § 5.773a, as added by St.1939, p. 2038.

9. Mandamus 🔑154(7)

A complaint for mandamus to compel board of education to reinstate plaintiff, who had been retired because of age, as building engineer in city school department was defective for failure to plead that board acted arbitrarily, fraudulently or illegally. Code Civ.Proc. § 1085; School Code, § 5.773a, as added by St.1939, p. 2038.

10. Officers 🔑103

When board has authority to determine a question, determination is in effect a judgment having all incidents of a court of limited jurisdiction, and if there is no charge of fraud, breach of faith or abuse of discretion, board's finding is conclusive.

11. Mandamus 🔑1

While mandate is ordinarily classed as a legal remedy it has the effect of an equitable interference supplementing deficiencies of the common law, and issuance of the writ is largely controlled by equitable principles. Code Civ.Proc. § 1085.

12. Mandamus 🔑15

Mandamus will not issue in aid of one not coming into court with clean hands. Code Civ.Proc. § 1085.

13. Mandamus 🔑15

A school building engineer's representations to previous employers concerning date of his birth did not bar his action, for want of "clean hands," to compel board of education to reinstate him on ground that he had not reached the retirement age when he was retired by the board. Code Civ.Proc. § 1085; School Code, § 5.773a, as added by St.1939, p. 2038.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

14. Mandamus 🔑15

A school building engineer who had been retired in 1941 upon reaching retirement age of 67 years was precluded, because of want of "clean hands," from maintaining mandamus action to compel board to reinstate him on ground that he was born in 1877 and not in 1873, in view of his verified statements to board and in his application for membership in retirement system that he had been born in 1873. Code Civ.Proc. § 1085; School Code, § 5.773a, as added by St.1939, p. 2038.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action in mandamus by Leo G. Wallace against the Board of Education of the City of Los Angeles and others to compel defendants to reinstate the plaintiff as building engineer in the Los Angeles School Department and to draw a warrant for salary alleged to be due him. From a judgment denying the application, the plaintiff **appeals.**

Affirmed.

E. C. Purpus, of Los Angeles, for appellant.

J. H. O'Conner and W. D. McKesson, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment denying his application for a writ of mandate to compel respondents to (1) reinstate him to a position he had formerly held with the Board of Education, and (2) draw a warrant for salary alleged to be due him, plaintiff appeals.

At the time of the rendition of the judgment from which the appeal is taken, The Honorable Emmet H. Wilson, who presided at the trial, filed with the clerk of the superior court a memorandum opinion in which he clearly set forth the pertinent facts, the issues, the principles of law involved, and the reasons for the judgment. We are in accord with the views therein expressed, and we adopt the opinion of Judge Wilson as and for the opinion of this court. It is as follows:

"Mandamus to compel the defendants to reinstate plaintiff as building engineer in the Los Angeles City School Department.

"Defendants having determined that plaintiff had reached the retirement age of sixty-seven years, that being the age at which compulsory termination of service is prescribed by the retirement system of the Los Angeles City School department, retired him from service as of June 30, 1941. (See section 5.773a, School Code; Stats. 1939, ch. 620, p. 2038.) Plaintiff now claims that he was born on September 11, 1877, and therefore had not reached the retirement age when his service was terminated.

"Under date of June 13, 1935, plaintiff filed with the Personnel Section of the Division of Service of defendant Board of Education an employee's confidential personal report, verified by him, in which the date of his birth was written as September 11, 1871. The figures "1871" have been deleted and "1873" substituted. Plaintiff's initials appear opposite the changed numerals. He testified that he made the change at the time the statement was filed. In the margin the following appears written with red pencil: "9-11-1873; Statement of Divorce of father dated Nov. 27, 1882 seen by RRJ 9-28-39." This notation, while not positive evidence, is at least an indication that the change was made at the date written in red and not at the time the document was filed, as testified by plaintiff. In his application for enrollment as a member of the retirement system of the School Department, verified January 25, 1938, plaintiff gave his birth date as September 11, 1874. A line is drawn through the figures "1874" and "1873" substituted, plaintiff initialing the change. Opposite these figures appears the following in red: "9–1871 CR corrected."

"Plaintiff acquiesced in the termination of his service by presenting a verified application for refund of his accumulated contributions to the retirement system dated July 8, 1941, stating "I am no longer employed in the Los Angeles City School Districts. You are hereby authorized to mail my warrant to the address given below." He testified that early in life he gave the date of his birth as September 11, 1871, in order to obtain employment with the Northern Pacific Railway which he could not have obtained if he had been under twenty-one years of age, and that he continued thereafter to give the same date whenever it became necessary for him to furnish information concerning his birth.

"Even though plaintiff was not born in 1871 but in 1873, as stated (after the dates were changed as above described) in the two verified documents filed with defendant board, he had reached the retirement age in 1941. He was advised by the board in June, 1940, that his services would be terminated in June, 1941, by reason of his age. He assented to the order by applying for and receiving his accumulated contributions and took no steps to establish a later birth date until September 23, 1941, fifteen months after he had been given notice that he would be retired and three months after he was actually retired, when he filed in the superior court of Thurston County, Washington, an application for a delayed birth certificate in which he stated that he was born in 1877. Said application was not supported by positive evidence of the date of his birth but principally by affidavits of persons that in 1882 he was apparently about five years of age. The birth certificate obtained pursuant to said application is the only evidence produced by plaintiff in substantiation of his claim that he was born in the said year.

"When the retirement order was made the only evidence before the board as to plaintiff's age was that he was born in 1873. After he obtained the delayed birth certificate he made an application for reinstatement in his former employment and presented the birth certificate as evidence that he had not reached the retirement age. When said application was heard the board had before it conflicting evidence consisting on the one hand of statements verified by plaintiff asserting that he was born in 1873, together with his confirmation of said statements by the acceptance of the refund of his contributions under the retirement system and on the other hand the delayed birth certificate reciting that he was born in 1877.

[1] "The board was authorized to draw its own conclusions from the evidence as a whole. It was entitled to consider the manner in which the delayed birth certificate was obtained and was justified in refusing to adopt the same as conclusive evidence of the date of plaintiff's birth and in accepting and acting upon his verified statements filed with the board. Whether or not his lifelong declarations that he had been born at an earlier date were made known to the board does not appear from the evidence before the court. When evidence is conflicting and would sustain a finding either way the board cannot be said to have acted arbitrarily, capriciously, or without cause or justification, and the court will not overturn the finding of the board. (McDonough v. Goodcell, 13 Cal.2d 741 [91 P.2d 1035, 123 A.L.R. 1205].)

[2-6] "A writ of mandate will issue to a board only 'to compel the performance of an act which the law specially enjoins' upon such board as a duty resulting from its office. (Code Civ.Proc., sec. 1085.) The remedy is not a matter of right but is awarded in the exercise of sound judicial discretion. (Duncan Townsite Co. v. Lane, 245 U.S. 308, [38 S.Ct. 99], 62 L.Ed. 309; Irvine v. Gibson, 19 Cal.2d 14 [118 P.2d 812].) An applicant for a writ must show that his right thereto is clear and certain. (Dobyns v. Cheshire, 9 Cal.App. 2d 77 [48 P.2d 743]; Perrin v. Honeycutt, 144 Cal. 87 [77 P. 776].) The writ will not issue to control the exercise of the discretion of a judicial or quasi-judicial tribunal in the determination of a controversy that is dependent on disputed facts nor to review proceedings in which the board acted on conflicting evidence. (Bandini Estate Co. v. Payne, 10 Cal.App.2d 623 [52

P.2d 959].) Local boards (not those having statewide authority) may act in a judicial capacity as a quasi-judicial body. (Nider v. Homan, 32 Cal.App.2d 11 [89 P. 2d 136], and cases cited.) A decision of such a tribunal will not be rejected by the court unless there is proof of fraud or of such arbitrary and unreasonable action in wilful disregard of the law as amounts to constructive fraud. (Sullivan v. Gage, 145 Cal. 759 [79 P. 537]; Hammond Lumber Co. v. County of Los Angeles, 104 Cal.App. 235 [285 P. 896].

[7-10] "Mandamus cannot be used to control the discretion of a board, that is, it will not lie to compel the exercise of discretion in a particular manner, but the court will, by mandate, correct an abuse of discretion. (Inglin v. Hoppin, 156 Cal. 483 [105 P. 582]; Klevesahl v. Byington, 1 Cal.App.2d 671 [37 P.2d 179].) To have any standing in court it was incumbent on plaintiff to plead and prove that defendants acted arbitrarily, capriciously, fraudulently, or illegally. (Sevina v. Hickok, 113 Cal.App. 301 [298 P. 116]). Plaintiff has not met this issue and his complaint in this respect is defective. (Hogan v. Retirement Board, 13 Cal.App.2d 676 [57 P.2d 520]; Vicent Petroleum Corp. v. Culver City, 43 Cal.App.2d 511 [111 P.2d 433].) No evidence was introduced at the trial to the effect that defendants acted otherwise than honestly and in good faith on the facts presented to them either in ordering plaintiff's retirement or in refusing to reconsider their order. When a board has authority to hear and determine a question its determination is, in effect, a judgment having all the incidents of a court of limited jurisdiction, and if there is no charge of fraud, breach of faith, or abuse of discretion, the finding of the board is final and conclusive. (Mogan v. Board of Police Com'rs, 100 Cal.App. 270 [279 P. 1080]; McColgan v. Board of Police Com'rs, 130 Cal.App. 66 [19 P.2d 815].)

[11-14] "In several previous mandamus proceedings I have held that while mandate is ordinarily classed as a legal remedy it has the effect of an equitable interference supplementing the deficiencies of the common law (Potomac Oil Co. v. Dye, 10 Cal. App. 534 [102 P. 677]), that the issuance of the writ is largely controlled by equitable principles (Duncan Townsite Co. v. Lane, supra; United States v. Lane, 249 U.S. 367, 39 S.Ct. 293, 63 L.Ed. 650), and that a writ of mandate will not issue in aid of one who does not come into court with clean hands. (U. S. v. Fisher, 222 U.S. 204, 32 S.Ct. 37, 56 L.Ed. 165; Bashore v. Superior Court, 152 Cal. 1, 91 P. 801). These principles are applicable to the instant proceeding. Although plaintiff's representations made to previous employers concerning the date of his birth are not germane to the issue here and have no reference to the transaction between plaintiff and defendants and therefore do not bar plaintiff's action for want of clean hands, his two verified statements are directly a part of his representations to defendants, especially his application for membership in the retirement system. Here was a positive declaration of his age from which the date of his retirement was to be determined.

"Plaintiff's petition for a writ of mandate is denied and the alternative writ is discharged. Judgment is ordered in favor of defendants."

The judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

63 Cal.App.2d 655

In re KAUFFMAN'S ESTATE.

MEYBERG v. KAUFFMAN.

Civ. No. 14360.

District Court of Appeal, Second District, Division 2, California.

March 31. 1944.

Rehearing Denied April 20, 1944.

1. Executors and administrators 🔑510(6)

Where document purporting to settle administrator's accounts was intended merely as a memorandum opinion and was not final order, appeal therefrom was a nullity, and hence case was still on trial court's calendar, and court had jurisdiction to deny administrator's motion to strike findings subsequently proposed by contestant.

2. Executors and administrators 🔑507

Where document purporting to settle administrator's accounts omitted ultimate facts essential to findings as basis of a final judgment, such omission was even more conclusive than judge's subsequent declaration that document was merely memorandum opinion and not judgment from which appeal lay. Probate Code, § 1230.

3. Judgment 🔑219

Failure to describe written instrument referred to in judgment renders judgment nonenforceable with respect to such instrument.

4. Executors and administrators 🔑507

A finding of service of notice of settlement of administrator's accounts is necessary part of record to show acquisition of jurisdiction to settle accounts. Probate Code, §§ 1200, 1202.

5. Executors and administrators 🔑507

That document purporting to settle administrator's accounts was never entered and hence was not made part of judgment roll, and that judge intended it merely as memorandum opinion, and later required formal findings and judgment, showed that document was not "final judgment." Probate Code, § 1230.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

6. Executors and administrators 🔑507

In proceedings to settle accounts of administrator, charged with improperly disposing of large sums on several occasions, trial judge exercised wise discretion in requiring and making findings on the unusual and complex issues. Probate Code, § 1230.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceedings in the matter of the separate estates of Clemence Kauffman, deceased, and of Leon E. Kauffman, deceased, wherein Lazare M. Kauffman, administrator with will annexed of the respective estates, filed certain accounts, to which objections were filed by Lorraine K. Meyberg, contestant. From an order or judgment settling accounts, contestant appeals. Motion by the administrator, petitioner-respondent, to dismiss the appeal.

Motion denied.

O'Melveny & Myers and Pierce Works, both of Los Angeles, for petitioner and respondent.

Mitchell S. Meyberg and Leonard Meyberg, both of Los Angeles, for appellant and contestant.

MOORE, Presiding Justice.

Respondent moves to dismiss the appeal from an order settling certain accounts after hearing on appellant's objections. The primary basis of the motion is the claim that the court had, some two months prior to the entry of the judgment appealed from, made a final order from which the contestant had taken an appeal, thereby conferring jurisdiction upon the Supreme Court.

Respondent is the administrator with will annexed of the respective estates of his parents, Clemence and Leon Kauffman. In due course of administration he filed his first and second accounts in the estate of Clemence and his second and third accounts in the estate of Leon. Appellant, his sister, co-executrix, and co-heir, filed twelve objections to the account in Clemence's estate and sixteen objections to the account in Leon's estate. Following a hearing on the issues created by the accounts and the objections thereto the court signed and the clerk filed a document in words and figures as follows:

"In the Superior Court of the State of California in and for the County of Los Angeles.

"In re Estate of Leon E. Kauffman, Deceased. No. 154698—file.

"In re Estate of Clemence Kauffman, Deceased.

"No. ~~132565.~~

"Heretofore submitted.

"The accounts under consideration are surcharged as follows:

"In the sum of $8,094.27 as shown in item 'B' of 'Statement of Contentions of Proponent Lazare M. Kauffman'.

"In the sums of $353.55, $149.16, $557.08, $24.40 and $69.42 as shown in item 'H' of said statement.

"In the sum of $1000.00 on account of the Grossman note to Leon E. Kauffman, deceased.

"In the sum of $250.00 on account of the Grossman Plymouth automobile.

"In the sum of $1,040.00 for proponent's chauffeur Howard Enright.

"The item of $5069.47 (Item 'A'), the court finds, appears in the account, and for that reason objection thereto is disallowed.

"No surcharge is involved in the Boswell note which should be retained as an asset of the estate, pending settlement or payment thereof.

"The parties agree that the Richards note is twice accounted for. Such finding is made by the court and the proper correction should be made.

"As to uncollectible accounts receivable, admitted by both parties to be uncollectible, such should be deleted from the accounts and credit taken therefor. The court agrees with proponent that the Santa Ana Woolen Mills account should be retained as a live item pending final outcome of the reorganization proceedings of that debtor, at which time proper accounting should be had as to that item.

"Attorneys fee on account to proponent's attorneys is approved as set forth in the report.

"No surcharge is made as to ample salary and bonus payments to Henry Grossman. The evidence was without contradiction that the sums paid represent the reasonable value of services rendered.

"No surcharge is allowed as to asserted $52,000.00 'loss' in 1939, and no action is taken as to the item of 'pricing.' The court is satisfied that the estate has suffered no actual loss on account of these items, and the controversy is at most a difference in bookkeeping and accounting.

"The court suggests to the parties the advisability of closing up these estates without delay and thus bringing to a close the acrimonious contentions attendant upon the conduct of the administration of the estates.

"As modified by the foregoing the accounts are allowed, approved and settled.

"December 28, 1942.

"Thomas C. Gould
"Judge"

This instrument will hereinafter be referred to as the "memo."

Conceiving the quoted instrument to be the court's judgment on the contested accounts, the contestant on February 25, 1943, gave notice of appeal and requested a transcript. Having concluded that the memo had not been intended as the final order settling the accounts, contestant prepared findings and decision and, on March 12, 1943, served them on respondent's counsel. Respondent promptly served notice of motion to strike the findings proposed by contestant and fixed March 19, 1943 as the date of hearing. His motion was based upon several grounds, including: (1) that the matters are on appeal and the court is therefore without jurisdiction to sign such findings; (2) that an order settling the accounts has already been made; (3) that such findings, conclusions and judgment are unnecessary.

Following a hearing of the motion on April 2, 1943, the following minute entry was made by the clerk:

"Petr's motion to strike proposed findings and judgment denied.

"Decision filed Dec. 28, 1942, is declared to be only a memo of opinion and court orders findings of fact and conclusions of law and judgment to follow in accordance therewith. Objectors agree in open court to dismiss appeal attempted to be taken from said memo of opinion on Dec. 28, 1942, as a premature appeal and a nullity. Court instructs petr. to prepare findings and Judgment."

On April 7th, 1943, appellant abandoned her appeal of February 25 as premature.

A hearing on the settlement of the findings prepared by respondent on the court's request was had on May 27, 1943, at which time the following minute entry was made by the clerk:

"Hearing on objections to findings. Counsel for proponent states findings were prepared as courtesy to Court and pursuant to direction of Court as shown on minutes of April 2, 1943, but that proponent respectfully excepts and objects to hearing on or settlement of findings on ground that all accounts involved were settled by order duly entered in these estates on December 28, 1942; that notice of appeal from said order was duly filed by objector on February 25, 1943; that said notice of appeal was duly withdrawn and dismissed by objector on April 7, 1943; and that court order on December 28, 1942, is a definitive adfinal. Said exceptions and objections, having been duly noticed and overruled, said findings are duly settled, and exception allowed to proponent."

The findings and decision were thereupon filed and the judgment was entered on June 8, 1943.

In support of the instant motion respondent contends: (1) that the instrument filed on December 28, 1942, is a definitve adjudication of the accounts of respondent;

(2) that the present appeal is moot and constitutes a "collateral attack upon the adjudication of December 28, 1942;" (3) that findings on an account are not necessary to a final order; (4) that exceptions to an account do not create issues of fact.

At the hearing on respondent's motion on April 2, 1943, the judge declared and held that the memo was only a memorandum opinion and ordered findings, decision and judgment to follow in accordance therewith. Thereupon appellant withdrew her proposed findings, dismissed her appeal and in compliance with the court's request respondent presented the findings, conclusions and judgment which were signed and filed.

[1-3] The trial court had jurisdiction to deny respondent's motion to strike for the reason that the case was still on its calendar. No final order had been made, as we shall presently show; hence the appeal of February 25 was a nullity. No prejudice could be suffered by respondent on account of the court's denial of his motion or by its requirement that findings and decision be prepared for filing. That which is more conclusive than the declaration of the judge is the absence from the document of those ultimate facts essential to findings as the basis of a final judgment in a civil action. Sec. 1230, Probate Code. The memo herein refers to "items B and H of proponent's contentions" and surcharges "the accounts in sum of $8,094.27, as shown by item B and in the sums of $353.55," etc., as shown by item H, but no person is specified to be surcharged. It says the accounts are surcharged in the sum of $1,000, $250, etc., but it does not make clear who must pay those sums or that any one is to pay them. The memo approves proponent's attorney's fees but there is no finding as to who was the attorney, what service he performed, or what was its value. Neither does the memo provide for the payment of any sum as counsel fees. In addition, the documents mentioned in the memo are neither attached to it nor described. Failure to describe an instrument referred to in a judgment renders the decree non-enforceable with respect to such instrument. See Queen v. Queen, 44 Cal.App.2d 475, 482, 112 P.2d 755.

[4] While the court was obliged to find that service was made of notice of settlement of the accounts (Sec. 1200, Probate Code), the memo contains no such finding. A finding that due notice had been given became a necessary part of the record to show that jurisdiction had been acquired to settle the accounts. In re Estate of Isaac, 30 Cal. 105. The findings and conclusions prepared by respondent and filed fill 13 pages of the transcript and recite that "due notice and special notice" has been given as required by law. Secs. 1200, 1202, Probate Code. This is followed by findings on each of all controverted facts, which are set forth with such particularity as to leave no uncertainty as to the court's meaning.

[5] The memo was never entered and consequently was not made a part of the judgment roll. The facts that it was not entered, that the judge intended it merely as an opinion, that he required formal findings, decision, and judgment, are insuperable facts which defeat the contention that the document of December 28 is a final judgment. Gullick v. Interstate Drilling Co., 100 Cal.App. 243, 244, 279 P. 828. Its function was comparable to that of the usual minute entries made by the clerk to guide in the preparation of a formal order. See Estate of Yale, 208 Cal. 102, 280 P. 358.

[6] In support of his contention that findings were not necessary respondent cites Estate of Levinson, 108 Cal. 450, 41 P. 483, 42 P. 479, and Estate of McPhee, 156 Cal. 335, 104 P. 455, Ann.Cas.1913E, 899. These authorities do not hold that findings may not be required by the court. In view of the provision of Section 1230, Probate Code, requiring conformance with Section 632, Code of Civil Procedure, in the trials of issues of fact joined in probate proceedings, we are satisfied that the trial judge exercised a wise discretion in making findings on the unusual and complex issues joined in the instant case. For illustration: It was alleged that respondent had failed to charge himself with $14,936.18 which had been surcharged against him on account of funds wrongfully taken; that he had transferred about $50,000 of estate funds to his Boston corporation; that he had given one Grossman $25,125 out of estate funds; that he had paid his attorney $6,750 without authorization. These and similar accusations created such issues as would take the trial of the accounts in question out of the class of the ordinary settlements of accounts.

The motion to dismiss the appeal is denied.

W. J. WOOD and McCOMB, JJ., concur.

63 Cal.App.2d 518

Ex parte PORTERFIELD.*

Cr. 1832.

District Court of Appeal, Third District, California.

March 28, 1944.

Rehearing Denied April 11, 1944.

1. Habeas corpus 🔑32

The constitutionality of a city ordinance may be challenged by habeas corpus.

2. Habeas corpus 🔑94

The office of the writ of habeas corpus is confined to question of jurisdiction of court or officer to render judgment or order by means of which petitioner is restrained of his liberty.

3. Habeas corpus 🔑94

When jurisdiction of court depends on adjudicated facts, determination of court in that regard is ordinarily conclusive on hearing of writ of habeas corpus.

4. Habeas corpus 🔑4

The writ of habeas corpus is not designed to serve the purpose of an appeal or to retry issues of fact.

5. Habeas corpus 🔑92(1)

In habeas corpus to obtain release of one convicted of violating ordinance requiring license to solicit memberships in organizations requiring payment of dues, court could not determine whether evidence in prosecution adequately showed that accused was engaged in soliciting membership in labor organization as a business without a license.

6. Licenses 🔑7(1)

An initiative ordinance requiring license to engage in business of soliciting, for compensation, memberships in organizations requiring payment of dues is valid. Gen.Laws 1937, Act 5233, § 764, subd. 10; Const.art. 11, § 11.

7. Licenses 🔑7(1)

The business of soliciting sales of goods or memberships in organizations, for pay, is commercial and susceptible of valid uniform regulations under the police power.

8. Habeas corpus 🔑85(1)

The right to determine necessity for local legislation regulating businesses of specified classes under the police power rests with the legislative authority, and on habeas corpus court may not interfere with that determination in absence of clear showing to the contrary.

9. Municipal corporations 🔑122(2)

It would be assumed that local situation reasonably justified necessity for ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues.

10. Licenses 🔑11(3)

The business agent of a labor organization who received a fixed salary for his services, which included duty of soliciting members, violated ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues.

11. Municipal corporations 🔑591

An ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues, providing for hearing to determine fitness of applicant and prescribing standard of qualifications, is not invalid as conferring on council unrestricted authority to arbitrarily grant or deny licenses. Gen.Laws 1937, Act 5233, § 764, subd. 10; Const.art. 11, § 11.

12. Evidence 🔑83(2)

It may not be presumed that councilmen will act arbitrarily, oppressively or unfairly in granting or refusing licenses.

13. Licenses 🔑30

It is presumed that licensing board or officers will act fairly and impartially in performance of their lawful duty.

14. Evidence 🔑83(2)

A grant of authority to a municipality carries with it presumption that council will perform its duty lawfully without discrimination.

15. Municipal corporations 🔑594(2)

An ordinance prohibiting solicitation of memberships in organizations by force, violence, menace, threat, intimidation, coercion, or corrupt means is not void for uncertainty, as against contention that it covered mere economic, moral, or social pressure. Gen.Laws 1937, Act 5233, § 764, subd. 10; Const.art. 11, § 11.

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* Subsequent opinion 168 P.2d 706.

16. Constitutional law ⚷90
Licenses ⚷7(1, 2)

An ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues, is not void for discrimination, oppression, or denial of freedom of speech. Gen.Laws 1937, Act 5233, § 764, subd. 10; Const.art. 11, § 11.

17. Licenses ⚷7(1)

In ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues, provisions requiring evidence of good moral character and evidence that applicant is not likely to resort to force, violence, or coercion are reasonable and valid. Gen. Laws 1937, Act 5233, § 764, subd. 10; Const.art. 11, § 11.

18. Municipal corporations ⚷111(4)

In ordinance requiring license to solicit, for compensation, memberships in organizations requiring payment of dues, invalidity of provision requiring evidence that applicant is not likely to resort to force, violence, or coercion would not render entire ordinance invalid. Gen.Laws 1937, Act 5233, § 764, subd. 10; Const. art. 11, § 11.

19. Constitutional law ⚷48
Municipal corporations ⚷122(2)

Where ordinance or statute is adopted with relation to matter which is within legislative power, all presumptions are in favor of its validity.

20. Municipal corporations ⚷121

One convicted of soliciting, for compensation and without a license, memberships in an organization requiring payment of dues in violation of ordinance, could not complain of possibility of arbitrary or discriminatory conduct in passing on applications for licenses, and could not complain of provision of ordinance making it unlawful to solicit memberships by force, violence or coercion.

PEEK, J., dissenting.

◆

Proceeding in the matter of the application on behalf of James Porterfield for a writ of habeas corpus.

Writ discharged.

Clarence E. Todd, of San Francisco, for petitioner.

Glenn D. Newton, of Redding, for respondent.

THOMPSON, Justice.

By means of habeas corpus the defendant seeks to obtain his release from custody after having been convicted of violating an initiative ordinance of the City of Redding prohibiting soliciting, for compensation, without a license, memberships in organizations requiring the payment of dues.

It is contended the ordinance is void for the reason that it violates the right of freedom of speech guaranteed by the Federal and State Constitutions, and because it discriminates against labor organizations. It is also asserted the petitioner did not engage in the business of soliciting memberships, and that the ordinance therefore has no application to his activity in that regard.

A complaint was filed in the City Court of Redding March 10, 1942, charging petitioner with violating sections 2, 4 and 7 of said ordinance, by wilfully and unlawfully engaging in soliciting, for compensation, without procuring a license therefor, in said city on the last mentioned date memberships in Construction and General Laborers Union, Local 961, which organization requires the payment of dues from all members.

Upon trial he was convicted of that offense, and sentenced to pay a fine of twenty-five dollars, or upon failure to do so, that he be imprisoned in the county jail one day for each unpaid two dollars of said fine. No part of the fine was paid. The petitioner applied to the Superior Court of Shasta County for a writ of habeas corpus, which was denied. The petition was then filed in this court.

At the trial the defendant failed to take the witness stand in his own behalf. It satisfactorily appears, without conflict, that he was the business agent of the labor organization mentioned in the complaint, and that it was a part of his duties "to solicit members" therefor; that he was not paid a separate fee or commission for such solicitations, but was paid a stipulated salary for the performance of all of his duties, including the soliciting of memberships in the organization; that he did solicit in the city of Redding, on March 10, 1942, at least one man by the name of Shaw, to join his labor organization, without securing a license as required by the ordinance in question, and that, upon request by an officer of that city, he refused to apply for a license, stating that he did so on advice of his attorney.

The ordinance reads in part:

"Ordinance No. 251

"An Ordinance requiring any person soliciting membership in any organization for compensation to obtain a license therefor, and forbidding the use of corrupt means in such solicitation in the City of Redding.

"The people of the City of Redding do ordain as follows, to-wit:

"Section 1. It shall be unlawful for any person, firm or corporation, whether as principal, clerk, servant, agent, or employee, inside of the city limits of the City of Redding, by force, violence, menaces, threat, intimidation, coercion or corrupt means, either directly or indirectly, to seek, solicit, induce, or attempt to seek, solicit or induce, any person to join or take membership in any organization, or by force, violence, threat, intimidation, coercion or corrupt means, either directly or indirectly, to seek, solicit or induce, or attempt to seek, solicit or induce, any employer or other person to compel or induce any employee or any other person to join or take membership in any organization.

"Section 2. It shall be unlawful for any person, inside of the city limits of the City of Redding, to solicit or obtain membership for compensation in any organization which requires the payment of dues by such members without first having procured a license so to do, as in this ordinance provided.

* * * * *

"Section 4. Any person desiring a license to engage in or carry on the work of soliciting membership as herein provided shall make application in writing to said City Council upon such forms as may be provided by said City Council, a copy of which shall at all times be attached to said license.

* * * * *

"Section 6. Upon said hearing the said City Council shall receive evidence and determine whether said applicant is of good moral character, and is likely to use force, violence, threats, menace, coercion, intimidation or corrupt means in his proposed work of solicitation. If the City Council is satisfied that said applicant is of good moral character and will not resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation, it shall direct the issuance of a license to said applicant for said purpose of solicitation upon payment of the license fee herein provided for.

"Section 7. Each person to whom a license is issued hereunder shall pay to the City of Redding for each period of three months a license fee in the sum of $5.00.

"Section 8. Any license to be issued hereunder shall be issued by the Chief of Police of said City of Redding, upon payment to him in advance of the license fee hereinabove set forth. All money received in payment of said license fee shall be paid into the General Fund of the City of Redding by the Chief of Police."

[1-5] The constitutionality of a city ordinance may be properly challenged and determined by means of habeas corpus. In re Bell, 19 Cal.2d 488, 122 P.2d 22; In re Vitalie, 117 Cal.App. 553, 4 P.2d 171; 13 Cal.Jur. 225, sec. 8. The office of the writ of habeas corpus is confined to the question of the jurisdiction of the court or officer to render the judgment or order by means of which the petitioner is restrained of his liberty. When the jurisdiction of a court depends on adjudicated facts, the determination of the court in that regard is ordinarily conclusive on the hearing of a writ of habeas corpus. The writ is not designed to serve the purpose of an appeal or to retry issues of fact. Ex parte Connor, 16 Cal.2d 701, 705, 108 P.2d 10, 13; 13 Cal.Jur. 223, sec. 7. Pursuant to that well established rule, this court may not determine on this proceeding whether the evidence adequately shows that the petitioner was engaged in soliciting within the city of Redding, memberships in his labor organization, as a business, without a license to do so. As the Supreme Court says in the Connor case, supra, with respect to an alleged failure of the trial court to inform the defendant of his right to be represented by counsel:

"This contention cannot at this late date be made the basis of a successful collateral attack by habeas corpus upon the validity of the judgment. The point could have been urged by petitioner on an appeal from the judgment, but none was taken. * * * It is not a good ground for discharge in this proceeding. In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him. In re Drew, 188 Cal. 717, 207 P. 249; [Ex parte] Connor, supra. Neither may the writ of habeas corpus be employed to serve the purposes of an appeal. In re Leonardino, 9 Cal.App. 690, 100 P. 708. The function of the writ, as described in the case last cited, 'is to determine the legality of one's detention by an inquiry into the question of jurisdiction and the validity of the process upon its face and whether anything has transpired since it was issued to render it invalid. It is not designated to retry issues of fact or to answer the purpose of an appeal.' "

We must therefore assume that if the ordinance is a valid exercise of either the police power of the city of Redding to reasonably regulate a specified business within its limits, in the interest of peace, health or general welfare of its citizens, or to license such business for the purpose of revenue, and that it is not discriminatory in its application, the writ should be denied. We may not be permitted, on this proceeding, to weigh the evidence adduced at the trial to determine whether the court erred in determining that the petitioner was engaged in the *business* of soliciting memberships, as distinguished from a single effort, since it does appear that business was a part of his duties and that he did actually solicit at least one member without a license.

Redding is a city of the sixth class. Section 764, subdivision 10, of the Municipal Corporations Act of California (Stats. 1927, p. 503, 2 Deering's Gen.Laws of 1937, p. 2513, Act 5233) provides that:

"The board of trustees of such city shall have power: * * *

"10. To license, for purposes of *regulation and revenue,* all and every kind of business, including the sale of intoxicating liquors, authorized by law and transacted or carried on in such city, * * * to fix the rates of licenses upon the same, and to provide for the collection of the same by suit or otherwise."

[6] The ordinance appears to be a valid and uniform exercise of the police power of the city to reasonably regulate by means of licensing all persons who engage in the business of soliciting for compensation within the city limits, memberships in all organizations which require the payment of dues. It was enacted in the interest of peace, the general welfare and for the purpose of raising revenue. It was evidently intended to protect the citizens against dishonest and unreliable solicitors, and from the annoyance, detriment and injury resulting from the use of force, violence or coercion in securing members of organizations. The ordinance authorizes the city council to issue such licenses upon a showing of "good moral character" on the part of applicants, and upon a showing that they are not "likely to use force, violence, threats, menace, coercion, intimidation or corrupt means" of procuring members. A license fee of $5.00 per quarter is required to be paid by each solicitor.

The ordinance does not *prohibit* the soliciting of memberships in any organization. It merely requires the procuring of a license, under reasonable specified circumstances, as a prerequisite to engaging in that pursuit. It is uniform in its application to all organizations requiring the payment of dues. The reasonableness of the amount of the license tax is conceded. Nor is the requirement to establish "good moral character" of the applicants challenged. The good moral character of the petitioner is acknowledged. The question as to whether he was eligible to receive a license is not involved in this proceeding. He deliberately solicited at least one membership in his labor organization without a license. It was a part of his business to solicit memberships. He refused to apply for a license on the advice of his attorney. He assumed that the ordinance was void, and that he did not require a license. The only excuse which the petitioner offers for violating the ordinance is that it is unconstitutional and void. Evidently the petitioner deliberately solicited memberships in his organization without a license to test the validity of the ordinance.

[7] The businesses of soliciting sales of goods, or memberships in organizations, for pay, are commercial in their nature, and therefore susceptible of valid uniform regulations under the police power. Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; 16 Cal.Jur. 206, sec. 14; 37 C. J. 214, §§ 69, 70.

The Redding ordinance appears on its face to be a valid police regulation of the business of soliciting for compensation memberships in organizations which require the payment of dues. Art. XI, sec. 11, Const. of Calif.; Town of Green River

v. Fuller Brush Co., 10 Cir., 65 F.2d 112, 88 A.L.R. 177; Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; E. A. Hoffman Candy Co. v. City of Newport Beach, 120 Cal.App. 525, 8 P.2d 235; In re Hartmann, 25 Cal.App.2d 55, 60, 76 P.2d 709. In the Green River case, supra, an ordinance prohibiting peddlers from vending or soliciting sales of merchandise within that city was held to be a valid exercise of police powers. The court said [65 F.2d 114, 88 A.L.R. 177]:

"It has been uniformly held that while legislative authority may not arbitrarily interfere with private affairs by imposing unusual and unnecessary restrictions upon a lawful business, yet a considerable latitude of discretion must be accorded to the law making power, and if the regulation operates uniformly upon all persons similarly situated and it is not shown that it is clearly unreasonable and arbitrary, it cannot be judicially declared to be in contravention of constitutional right."

Many Federal authorities are cited in support of the preceding quotation.

[8] The right to determine the necessity for local legislation regulating businesses of specified classes under the police power rests with the legislative authority. On habeas corpus, a court may not interfere with that determination in the absence of a clear showing to the contrary. The court says in the Green River case, supra, in that regard, quoting from Schmidinger v. Chicago, 226 U.S. 578, 33 S.Ct. 182, 57 L.Ed. 364:

" 'This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, *and not the courts,* are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred.' "

[9] In the present case the ordinance appears to be fair and impartial in its application, and we must assume the local situation reasonably justified the necessity for the regulatory ordinance in question. It was an initiative ordinance adopted at the instance of electors of the City of Redding, which shows some public demand for the regulation to protect the inhabitants against unreliable solicitors.

It is true that a single transaction or the soliciting of but one individual to become a member of an organization does not necessarily constitute a business. In re Smith, 33 Cal.App. 161, 164 P. 618; Merced County v. Helm & Nolan, 102 Cal. 159, 36 P. 399; 16 Cal.Jur. 193, sec. 6. But in the present case it sufficiently appears that the petitioner was regularly employed as agent of the labor union upon a fixed salary, and that a part of his duties was to solicit memberships in the organization. It was therefore a part of his business to solicit members. He was charged and convicted of violating the ordinance in pursuance of that business.

[10] The ordinance makes it unlawful for any person within the city of Redding to solicit members "for compensation" in any organization which requires "the payment of dues." The language of the ordinance covers any person who solicits for pay members in such an organization, whether he is compensated with a stipulated sum for each member secured, or is paid a salary for services, including his duty to solicit members. Either method of payment constitutes compensation for the services, and falls within the inhibition of the ordinance.

The evidence in this case shows that it was a part of the duties of the petitioner to solicit members. He was paid a stipulated salary for his services, which included the duty of soliciting members. It is true that his salary was due *regardless of whether he was successful* in securing new members. But his duties did require him *to solicit* for members. The evidence shows the following testimony in that regard:

"Q. That salary was the same whether he *got* any members or not? A. I believe that's correct.

"Q. But that *part of his duties was to solicit members* from time to time? That was part of his work? A. Yes, sir."

It thus appears the petitioner's salary did not depend on his success in securing members, but it did depend on his efforts to at least seek for members.

[11-14] The ordinance is not invalid because it confers upon the council unrestricted authority to arbitrarily grant or deny licenses. It provides for hearings by the council to determine the fitness of applicants for licenses to solicit for memberships in organizations. The standard of qualifications is prescribed. The appli-

cants are required to furnish evidence of their good moral character, and that they are not likely to resort to force, violence, coercion, etc., in soliciting for memberships. In the absence of evidence to the contrary, it may not be presumed the councilmen will act arbitrarily, oppressively or unfairly in granting or refusing to grant licenses. If in fact the council does abuse its discretion in that regard the applicant has his remedy against the members of the board. In California the presumption that licensing boards or officers will act fairly and impartially in the performance of their lawful duty is in accordance with the Federal rule in that regard. A grant of authority to a municipality carries with it the presumption that the council will perform its duty lawfully without discrimination. People v. Globe Grain & Milling Co., 211 Cal. 121, 126, 294 P. 3; In re Flaherty, 105 Cal. 558, 562, 38 P. 981, 27 L.R.A. 529; People ex rel. Doyle v. Atwell, 232 N.Y. 96, 133 N.E. 364, 25 A.L.R. 107; 16 Cal.Jur. 213, sec. 19; 37 Am.Jur. 782, sec. 161; 19 Cal.Law Rev. p. 448. In the Doyle case, supra, Mr. Justice Pound says [232 N.Y. 96, 133 N.E. 368, 25 A.L.R. 107]:

"This court has casually said in People ex rel. Nechamcus v. Warden, 144 N.Y. 529, 539, 39 N.E. 686, 689, 27 L.R.A. 718: 'Nor is the constitutionality of an act to be determined by the manner in which its provisions may be carried out by those upon whom devolved the duty of acting as examiners [of applicants for plumbers' licenses]. If they act unfairly or oppressively, as alleged by the relator in the petition, that is conduct which may call for a remedy against the persons who compose the board; but it does not furnish ground for assailing the validity of the statute.' "

In the Globe Grain & Milling Co. case, supra, it is said, 211 Cal. at page 126, 294 P. at page 5 thereof:

"The essential requirement of due process is merely that the administrative officer or body be required to determine the existence or nonexistence of the necessary facts before any decision is made. If the statute requires this, it does not vest an uncontrolled discretion, and the officer or body may not act arbitrarily. Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A.L.R. 418; Doble Steam Motors Corp. v. Daugherty, 195 Cal. 158, 232 P. 140; Ex parte McManus, 151 Cal. 331, 90 P. 702."

To the same effect it is stated in the excellent note upon that subject found in 19 California Law Review, at page 449:

"The California case under discussion fortifies previous holdings in this state, and is in accord with the federal rule, that a grant of authority carries the implication that it will be exercised reasonably, fairly, and lawfully. See People ex rel. Lieberman v. Van De Carr, 1905, 199 U.S. 552, 26 S.Ct. 144, [50 L.Ed. 305]; Monongahela Bridge Co. v. United States, 216 U.S. 177, 30 S.Ct. 356 [54 L.Ed. 435]; Hall v. Geiger-Jones Co., 1916, 242 U.S. 539, 37 S.Ct. 217 [61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643]; Ex parte McManus, 1907, 151 Cal. 331, 90 P. 702. The court expressly declares that 'the statute will be construed together with the constitutional provisions against discrimination.' [People v. Globe Grain & Milling Co., 211 Cal. 121], 294 P. at [page] 5.

"* * * But in jurisdictions like California, where such enactments are upheld through reading in constitutional limitations, a complainant may only have relief under the statute by proving discriminatory action against himself. In the instant case, the plaintiff set up no facts proving discrimination, but alleged that since the statute on its face did not preclude unfair action, it was invalid. The court asserts that the remedy for a person injured, in view of the validity of the act, consists in an application for a review of particular orders or rules of the commission, to determine whether the administrative agency is acting in excess of the powers delegated to it. * * *

"* * * The case seems rather to be decided upon the sensible theory that administrative officers granted wide powers are sufficiently limited by reading into their authority constitutional limitations, and that in proper cases an adequate remedy against their misuse of discretion is provided by a review of their orders and rules."

In this case the petitioner refused to apply for a license to solicit memberships. The members of the council were not asked to pass upon his qualifications for a license. Under the preceding authorities, in the absence of evidence of an abuse of discretion, it will not be presumed the ordinance is void merely because the statutory authority to enact ordinances for "regulation and revenue" does not prescribe limitations of discretion on the part of the council.

[15] The petitioner claims on the asserted authority of Ex parte Bell, 19 Cal. 2d 488, 122 P.2d 22, that the ordinance is uncertain because it seeks to prohibit the soliciting of members by the exercise of "force, violence, menace, threat, intimidation, coercion or corrupt means" since it may be lawful to resort to compulsion, coercion, intimidation or threat to secure members, provided such means amount only to "economic, moral or social pressure." That is a strained construction of the language. The fair import of the language employed is to prohibit the securing of members of any organization included in the ordinance *against the will of a person* solicited, induced by means of physical violence, threat, menace, coercion, intimidation or fraud, whether they are economic, moral, social or any other type of compulsion. None of those terms fairly comes within the scope of legitimate persuasion. Lisse v. Local Union No. 31, 2 Cal.2d 312, 317, 41 P.2d 314. They all savor of unfair and unwarranted means of forcing one to join an organization against his will. The application of petitioner's construction would result in depriving one of his inalienable right to determine for himself what association, group or organization he wished to join. The use of force to procure members would seem to fall within the totalitarian methods so scathingly denounced by the petitioner. We think the language is not reasonably susceptible of the distinction urged by petitioner.

In support of his contention that the Redding ordinance violates the constitutional guarantee of freedom of speech, the petitioner relies on the following cases: In re Campbell, 64 Cal.App. 300, 221 P. 952; Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 882, 891, 87 L.Ed. 1292, 146 A.L.R. 81; Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed 278; Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Pittman v. Nix, Fla., 11 So.2d 791, 144 A.L.R. 1341.

[16] None of the foregoing cases is authority for holding that the Redding ordinance is unconstitutional and void for the reason that it is discriminatory or oppressive or because it violates the constitutional guarantee of freedom of speech. Those cases involved statutes or ordinances absolutely prohibiting the distribution of handbills or pamphlets to disseminate religious or other legitimate views, and absolutely forbidding the organization of labor unions. Some of them involved participation in public meetings held under the auspices of the Communist Party, regardless of unlawful utterances or conduct in opposition to organized government, or clear discriminations of either the ordinances or their enforcement against such businesses as laundries. Several of those cases clearly distinguish between statutes or ordinances adopted under the police power to regulate businesses or to secure revenue and those which are clearly intended to actually prohibit lawful businesses or pursuits. Several of those cases specifically recognize the right to regulate by license such enterprises as soliciting for compensation subscriptions to newspapers, magazines or books, since that occupation is deemed to be commercial in its nature. None of the foregoing cases cited by the petitioner involved the licensing of solicitors who engaged in that pursuit for compensation. In that respect the present proceeding is radically different from the cases relied upon by the petitioner. They are therefore not in point.

It would be useless to attempt to analyze in detail each of the numerous cases relied upon by the petitioner. We shall attempt only to point out the chief distinctions in the leading cases. In the Campbell case, a Eureka ordinance which made it unlawful to belong, under any circumstances, to the organization of the Industrial Workers of the World, or to circulate printed propaganda advocating membership therein, regardless of proof of subversive activity or unlawful conduct on its part was held to be discriminatory and void. The court properly said regarding that ordinance, that it was an "invidious discrimination as against a particular organization" [64 Cal. App. 300, 221 P. 953] without proof of its asserted unlawful tendencies.

In the recent Murdock case, supra, it was held on certiorari, an ordinance of the city of Jeannette, Pennsylvania, which required a license for the distribution of goods or pamphlets regardless of payment therefor was in conflict with the guarantee of freedom of speech, and therefore void. Murdock, as a member of "Jehovah's Witnesses" was convicted of circulating pamphlets advocating the religious beliefs of that sect. The court held that the voluntary payment of small sums of money for the books and pamphlets constituted mere contributions and did not bring the transaction within the class of commercial business; that the requirement to pay a license tax was a mere subterfuge to disguise the attempt to unlawfully abridge the guarantee of freedom of religion. Recognizing the right to regulate the business of selling books, magazines or pamphlets for profit, even when that is done by agents for the benefit of religious organizations, quoting with approval from the case of Jones v. Opelika, 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691, 1702, 141 A.L.R. 514, the court said [319 U.S. 105, 63 S.Ct. 874, 87 L.Ed. 1292, 146 A.L.R. 81]:

"When a religious sect uses 'ordinary commercial methods of sales of articles to raise propaganda funds', it is proper for the state to charge 'reasonable fees for the privilege of canvassing.'"

Four Justices of the Supreme Court dissented to the Murdock opinion. There is, however, nothing in that decision in conflict with what we have said regarding the validity of the ordinance in the present case.

In Schneider v. State of New Jersey, Town of Irvington, supra, which was combined with three other cases, the United States Supreme Court, in a proceeding in certiorari, held that city ordinances of Los Angeles, Milwaukee, Worcester and Irvington, New Jersey, which prohibited the distribution of hand bills on the streets or in the parks of the respective cities, without first procuring permits from the Chiefs of Police, or the city authorities, were in conflict with the Fourteenth Amendment of the Federal Constitution and void as abridgements of the freedom of speech. The court said with respect to one case [308 U.S. 147, 60 S.Ct. 152, 84 L.Ed. 155]:

"It [the ordinance] bans unlicensed communication of any views or the advocacy of any cause * * *, and permits canvassing only subject to the power of a police officer to determine, as a censor, *what literature may be distributed* * * * and who may distribute it."

In distinguishing those cases from valid ordinances affecting commercial enterprises, adopted for the purpose of regulation and revenue, the court further said:

"The ordinance is not limited to those who canvass *for private profit;* nor is it merely the common type of ordinance requiring some form of registration or license of hawkers or vendors."

In the Thornhill case an Alabama statute which absolutely prohibited any individual from entering on the premises *or going near to* another person's business property to induce others to refrain from trading with that enterprise, or to picket the works to the detriment of the business was held to be unconstitutional. The court said [310 U.S. 88, 60 S.Ct. 745, 84 L.Ed. 1093]:

"The group in power * * * may not impose penal sanctions on peaceful and truthful discussion of matters of public interest."

That statute failed to recognize the right of peaceful picketing and private communications to persuade others, without force, violence or coercion, to recognize or accept the doctrine of the right of laboring men to organize for collective bargaining and mutual benefit and to lawfully promulgate their views in that regard. That statute had no application to the regulating of commercial enterprises. It is not in point.

The Hague case, upon which the petitioner in this case strongly relies, held that an ordinance of Jersey City which prohibited the holding of public parades or assembly of persons on the streets, in the parks or in public buildings of that city, without a permit therefor from the Director of Public Safety was unconstitutional and void. On certiorari the United States Supreme Court said with relation to the rights of freedom of speech and of peaceable assemblies that [307 U.S. 496, 59 S.Ct. 962, 83 L.Ed. 1423]:

"The bill alleges, and the findings sustain the allegation, that the respondents had no other purpose than to inform citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation. * * *

"It is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects."

That ordinance gave the Director of Public Safety arbitrary power to grant or refuse, without evidence, permission to hold public meetings or parades. The court said the Director was empowered to withhold his permission on the mere assumption, without evidence thereof, that the meetings might result in "riots, disturbances or disorderly assemblage." That ordinance did not purport to regulate commercial business. It fixed no standard of fitness. It merely authorized the Director, "after investigation", to arbitrarily refuse permission to hold public parades or public meetings, when "he believes it to be proper." The ordinance declared that it was enacted to prevent "riots and disturbances." That case is not determinative of the invalidity of the Redding ordinance which is involved in this proceeding.

In the cases of Herndon, supra, and De Jonge, supra, judgments of convictions were reversed, which were secured under statutes of the states of Georgia and Oregon, respectively, making it unlawful for any person to participate in or attend any meeting of the Communist Party, regardless of the purpose of the meetings. In each case it was found that the meetings which were attended by the defendants were conducted in peaceful and orderly manner and that there was no evidence of the purpose or intent to thereby incite insurrection, riots, disturbances or opposition to organized government. It was said that in the absence of evidence to the contrary it must be assumed public meetings are held for lawful purpose, and that the statutes in question prescribed no standards of guilt. Those cases did not involve the regulation or licensing of businesses under the police power or otherwise. They are not in point.

In the Pittman case, an ordinance of the Town of Perry, in Florida, was held to be unconstitutional and void. That ordinance made it unlawful "to organize or attempt to organize within the Town any labor union or other labor organization" [11 So. 2d 792], or for any person to solicit memberships in labor organizations. Clearly that ordinance was discriminatory and void. It did not attempt to regulate businesses or authorize the licensing thereof.

In the Near case, a statute of Minnesota which outlawed and by means of injunction authorized the abatement as a public nuisance of any newspaper, magazine or periodical which published "malicious, scandalous [or] defamatory" statements regarding public officers was held to be void. Laws 1925, c. 285. Without proof that the editor of the "Saturday Press" intended to repeat the scurrilous publications, and regardless of the truth of the charges, the publication of the newspaper was suppressed. That injunction was held to be an invasion of the right of the freedom of the press.

In the Yick Wo case [118 U.S. 356, 6 S.Ct. 1065, 30 L.Ed. 220] an ordinance of the City of San Francisco, which prohibited the maintaining of a laundry without the consent of the board of supervisors, "except the same be located in a building *constructed either of brick or stone*" was held to be discriminatory and void. The court said:

"No reason whatever, except the will of the supervisors, is assigned why they (the petitioners) should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood; and while this consent of the supervisors is withheld from them, and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business *under similar conditions*. The fact of this discrimination is admitted. No reason for it is shown."

From the record in that case it is quite evident that, in the guise of regulation of a business for pretended protection against fire hazard, clear discriminations against discredited Chinese laundrymen were continuously practiced. No such showing is made in the present proceeding.

The other cases relied upon by the petitioner may be likewise distinguished from the facts of the present proceeding. No similar case is cited, and we have been unable to find one which holds than an ordinance adopted under police power, which requires a license based on a showing, after hearing, of reasonable qualifications, to engage in a commercial business of soliciting for compensation, either the sale of goods or magazines or the securing of memberships in organizations requiring the payment of dues is unconstitutional and void. There appears to be no valid distinction between the conducting of the business of canvassing for subscriptions for magazines and books, or merchandise, and soliciting for memberships in organizations, provided those pursuits are engaged in for personal profit. The present ordinance appears to be a reasonable and uniform method of attempting to regulate by license a business affecting all organizations of a specified class. There is nothing in the ordinance which appears to be discriminatory, or to indicate that it is aimed toward labor unions alone. It may not reasonably be said from either the language of the ordinance or from the evidence of its enforcement, that it was adopted as a subterfuge to conceal a secret purpose to discriminate against labor unions. The ordinance will not bear that construction.

[17, 18] The applicant for a license is required to furnish evidence of good moral character. Certainly that is reasonable and valid. Numerous cases so hold. Fernel v. Board of Medical Examiners, 91 Cal.App. 712, 267 P. 561; Riley v. Chambers, 181 Cal. 589, 594, 185 P. 855, 8 A.L.R. 418; 37 C. J. 239, § 93. The applicant is also required to furnish evidence that he is not likely to resort to force, violence or coercion in soliciting memberships. We observe slight distinction between those qualifications. Both refer to the character of a man. Good moral character is indicative of honesty and reliability. The tendency of one to resort to force, violence or coercion in soliciting sales of goods or memberships in organizations, indicates that he may be lawless, tyrannical and dangerous. Those traits may be refuted by evidence of general reputation as a peaceable, trustworthy man. If it be assumed that the latter qualification with relation to the use of force, violence or coercion be deemed to be unreasonable and uncertain because it involves speculation as to what one might do in the future, which conclusion we think is not warranted, then the provision of the ordinance with respect to the showing regarding the use of force, violence or coercion, may be eliminated. The balance of the ordinance, including sections 2, 4 and 7, under which the petitioner was convicted, may still stand as valid. The ordinance contains a saving clause.

[19] Every presumption is in favor of the validity of the ordinance. It is a well settled general rule that where an ordinance or a statute is adopted with relation to a matter which is within the legislative power to enact, all presumptions are in favor of its validity, constitutionality and reasonableness. People v. Globe Grain & Milling Co., supra; Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; 16 C.J.S., Constitutional Law, p. 234, § 98. In the authority last cited it is said:

"It is a cardinal rule of construction that when reasonably possible, a statute must be so construed as to uphold its validity, and not so construed as to endanger its validity, either in whole or in part. Indeed, a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score. In other words, in testing the constitutionality of a statute, the language must receive such construction as will conform it to any constitutional limitation or requirement, if it is susceptible of such interpretation; and the statute and constitutional provisions must be read together and so harmonized as to give effect to both when this can be consistently done. If a statute is susceptible of two constructions, one of which will render it constitutional and the other of which will render it unconstitutional in whole or in part, or raise grave and doubtful constitutional questions, the court will adopt that construction which, without doing violence to fair meaning of language, will render it valid, in its entirety, or free it from doubt as to its constitutionality, even though the other construction is equally reasonable, or seems the more obvious, natural, and preferable, interpretation."

A multitude of authorities support the foregoing text. That presumption applies to both statutes and ordinances. Pursuant to that rule there is no difficulty in determining from the initiative ordinance in this case that it was adopted for revenue and to regulate the business of soliciting memberships in all organizations of a designated class and to protect the inhabitants of the City of Redding against dishonest, fraudulent and oppressive means of solicitation.

[20] But, as hereinbefore pointed out, petitioner may not complain of the possibility of arbitrary or discriminatory conduct on the part of the council in passing upon applications for licenses or that it might deny such applications on the ground that the applicant was likely to resort to force, violence, etc., in his proposed work of solicitation, and thereby deny to him some right guaranteed by the constitution,

since petitioner made no application for a license and gave the council no opportunity to determine his qualifications. Also, he is not charged with violating section 1 of the ordinance which makes it unlawful to solicit memberships by force, violence, etc. The charge against him is that he violated section 2 thereof in that he solicited membership for compensation in an organization which requires the payment of dues by such members, without having first procured a license so to do. If that section of the ordinance is valid, which we hold that it is, petitioner's conviction must be upheld.

The writ is discharged.

ADAMS, P. J., concurs.

PEEK, Justice (dissenting).

I dissent.

At the outset I cannot agree with the majority opinion that the activities of petitioner were such as to constitute him a solicitor of memberships "for compensation" under the provisions of said act.

The only evidence in this regard is that of the tax collector of the city of Redding, who testified that petitioner stated to him that his salary would be the same whether he obtained any members or not; that part of his duties were to solicit members but that nothing was said about petitioner being paid for such solicitation. Counsel for respondent testified that petitioner informed him he received a salary for all the services he performed; that a part of his duties was to solicit memberships for his organization; that he made no mention of being paid a fee or special compensation for such solicitation, and that his salary included all of his activities. The trial court in summation of such testimony stated it understood that the salary paid to petitioner would go on whether he obtained members or not. Section VI of the by-laws of the organization relating to the duties of the business manager thereof, and quoted by petitioner in his brief, makes no mention of the solicitation of members as a part of his duties or of compensation to be paid him for such solicitation.

If the construction placed upon the words "solicit or obtain membership for compensation" by virtue of the judgment of the trial court were to be followed, then any individual within the limits of the city of Redding who received any compensation from any organization which collected dues, and who might solicit a single membership in such organization, would be guilty of a crime under the ordinance in question. It is difficult to understand how such could have been the intent of the ordinance. The wording, in my opinion, does not lend itself to such interpretation.

The interpretation placed upon the ordinance by the city prior to the charge against petitioner, which, as testified to by the tax collector, was that during the four years subsequent to the adoption of the ordinance only one license fee was collected. and that was from an individual who admittedly received his entire livelihood from a percentage of the monies collected for memberships sold in a particular organization. From such testimony it would appear that it was the original intent of the city to prevent racketeering in the solicitation of memberships by one who existed solely by his wits in the sale of fraudulent memberships, that prompted the ordinance.

By reason of the conflicting interpretations given to the ordinance, particularly the word "compensation" and to which it is obviously susceptible, an objection upon the ground of uncertainty might well be made. However, petitioner's contention in this regard appears to be directed to the uncertainty existing between section 1, which prohibits any solicitation in any organization by certain means, and the prohibition in section 2 prohibiting solicitation "for compensation" in any organization which collects dues. These sections would not seem to be irreconcilable. "An ordinance of a regulatory nature must be clear, certain and definite, so that the average man may with due care after reading the same understand whether he will incur a penalty for his actions or not. Otherwise it is void for uncertainty." 19 R.C.L. p. 810. But it cannot be nullified upon the ground of uncertainty if susceptible of any reasonable construction.

The petitioner, in addition to contending that the ordinance in question is uncertain, as previously mentioned, also contends that it is incapable of enforcement without abridging constitutional rights and is in violation of the Bill of Rights.

Respondent's brief argues (1) that it is a matter of "common knowledge to everyone that in the past, there have been fraudulent solicitations, as well as solicitations by intimidation, threats, force and violence," (2) that "the public interest is involved in solicitation of members in organizations, particularly labor unions, where fraud, force, violence, menace, threats, etc., are used," and (3) that "the real test of an ordinance of the nature of the one involved is whether or not the subject matter is a valid exercise of the police power. In other words, the question to be answered is whether soliciting memberships in an organization for compensation may cause injury to the public health, comfort, morals or general welfare."

If counsel for respondent in so commenting is stating the reasons which impelled the city of Redding to enact the ordinance then the first and third contentions made, properly would come within the general rule that local authorities are the sole judges of the necessities of local situations calling for such legislation, and that the courts may not determine the question of necessity so adopted. Undoubtedly, respondent does not seriously urge its second contention, for obviously to do so is to urge the validity of the ordinance upon the ground of class legislation and thereby insure its invalidity.

That an ordinance is a valid exercise of the police power is a general statement which must be qualified by the facts of a given case, bearing in mind the statement of the United States Supreme Court in the case of Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 742, 84 L.Ed. 1093, that a penal statute which "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press * * * lends itself to harsh and discriminatory enforcement by local prosecuting officials * * *," and "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

Therefore the first test of the constitutionality of such ordinance is whether or not it prohibits acts proper within themselves. If such is the ultimate result, then the act must fall, even though other acts contained therein properly may be made illegal. "Language prohibiting conduct that may be prohibited and conduct that may not affords no reasonably ascertainable standard of guilt and is therefore too uncertain and vague to be enforced. Stromberg v. California, supra, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; Herndon v. Lowry, 301 U.S. 242, 261-263, 57 S.Ct. 732, 81 L.Ed. 1066; Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888; De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; Hague v. C. I. O., supra [307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423]; Schneider v. State, supra [308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155]; In re Harder, 9 Cal.App.2d 153, 155, 49 P.2d 304; Territory of Hawaii v. Anduha, 9 Cir., 48 F.2d 171. A conviction based upon such a statute cannot stand even though the acts of misconduct in the particular case could be validly prohibited by properly drafted legislation. Thornhill v. Alabama, supra; Carlson v. California, supra [310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104]." Ex parte Bell, 19 Cal.2d 488, 122 P.2d 22, 27.

Secondly, I disagree with the majority opinion in its construction of the language "that to some extent compulsion, coercion, intimidation, or threat are employed does not detract from its peaceful nature so long as they constitute only economic, moral, or social pressure and not the pressure of violence" as used in the case of Ex parte Bell, supra, to mean that anything which is "against the will of a person solicited" whether by physical violence or by "economic, moral, social or any other type of compulsion" savors of "unfair and unwarranted means" to force one to join an organization against his will, and therefore does not come "within the scope of legitimate persuasion."

It would thereby appear from the wording of the majority opinion that it turns, in a degree at least, upon the assumption that mere solicitation by threat, menace, coercion, or fraud, carries with it a threat of physical violence.

The ordinance in question in the Bell case states in section 3 thereof, that "it is unlawful for any persons to beset or picket the premises of another * * * for the purpose of inducing [an] employee or person seeking employment, by means of compulsion, coercion, intimidation, threats, acts of violence, or fear to quit his or her employment or to refrain from seeking or freely entering into employment." The words used in section 1 of the Redding ordinance are, "it shall be unlawful * * * by force, violence, menace, threat, intimidation, coercion or corrupt means * * * to solicit any person * * * to take membership in any organization." Section 6 also uses comparable language—"* * * force, violence, threat, menace, coercion, intimidation or corrupt means in * * * solicitation." Wherein is the distinction between the words used in the two acts? The Supreme Court, in the Bell case, further held that upon such words must be superimposed the question of kind, and as illustrative thereof said: "A picket may point to the possibility of ousting from the union any employee crossing the picket line and thereby compel or coerce him to quit his employment," and as such compulsion could therefore be moral or economic and not necessarily physically violent, held the section in the Yuba ordinance to be invalid.

In my opinion the wording of the present ordinance falls directly within the rule laid down in the Bell case. The sweeping prohibitions contained in sections 1 and 6 thereof, even though containing acts which the city of Redding might validly prohibit, also contain acts which could not be prohibited, and therefore the section is invalid. It cannot be doubted that in every day life there may be many instances where one is compelled to do or accept certain things against his will. For instance, when a local merchant, operating his individual store, sells to a large chain after the proposition has been made to him that he should sell. He knows full well that if he refuses he must take the inevitable consequences of financially disastrous competition, and if he so heeds either the direct or implied economic threat and sells, can it then be said that he has not done so against his will and by virtue of economic compulsion and threat? Is that not a present adaption of the situation described by Justice Holmes in his dissenting opinion in 1896, in the case of Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077, 1081, 35 L.R.A. 722, 57 Am.St.Rep. 443, when speaking of the competition between two merchants, one long established, one newly arrived, in a town too small to support more than one, said:

> "The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop, and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages, which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal of, or threats to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants. * * * I pause here to remark that the word 'threats' often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do —that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequences. So, as to 'compulsion,' it depends on how you 'compel'. * * * So as to 'annoyance' or 'intimidation.' * * *"

The majority opinion, in holding that an act of compulsion, intimidation or threat, though only moral, economic or social, to induce a person to become a member of an organization may be prohibited under the police power of the city by virtue of the fact that such intimidation would be against the will of the person solicited is, therefore, in my opinion, directly contra to the rule as laid down in the Bell case and all of the more recent decisions, not only of the courts of this state but also the federal courts as well. See McKay v. Retail Automobile Salesmen's Local Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Lisse v. Local Union No. 31, 2 Cal.2d 312, 41 P.2d 314; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324.

The majority opinion does not explicity determine that the business to be regulated by the ordinance in question is so inherently harmful to the general welfare of the community that the administration thereunder may be lodged in the reasonable discretion of the council. Rather it impliedly decides the case upon the ground that the business to be regulated is a lawful exercise of the police power of the city of Redding in the interest of the general welfare, and that a reasonable standard of qualifications has been set. Such interpretation would appear to be a valid inference by virtue of the citation of the case of Fernel v. Board of Medical Examiners, 91 Cal.App. 712, 267 P. 561.

If I be correct in my understanding of the conclusion reached by the majority it can be rationalized only by a determination of but one issue, and that is (1) that as the business of soliciting memberships for compensation, whether directly or indirectly, for a chamber of commerce, a luncheon club, a fraternal organization, a labor union, or any other organization which requires the payment of dues by its members, is a lawful occupation and is not inherently harmful to the morals, health or general welfare of the city, and that the provision relating to the necessity for the showing of good moral character on the part of the applicant that he is one who would not likely resort to force, violence, threats, menace, coercion, intimidation or corrupt means, is a proper standard of rules or regulation for guidance by the council, and also as information to a prospective applicant of the qualifications he must show in order to obtain a license.

In the Fernel case the petitioner claimed that the act in question (Medical Practice Act) did not authorize the medical board to decline to grant a certificate because it was not convinced that the applicant was possessed of good moral character, and, in addition, that the board had no jurisdiction to consider such subject. All that the court held therein was that the requirement contained in section 9 of said act, St.1913, p. 722, to-wit: "every applicant must file with the board * * * satisfactory testimonials of good moral character," was a reasonable condition precedent to the taking of an examination for a license. Further reading of that act discloses that in addition to the above requirement the act also provided for a complete standard of objective qualifications which an applicant had to meet before he could obtain a license to practice medicine in this state. Such case is, therefore, authority only for the one proposition, i.e., a showing of good moral character is a valid prerequisite to the granting of a license to practice medicine in the State of California.

Under the principle enunciated in the Fernel case it cannot be said that proof of good moral character is not a reasonable condition precedent to the granting of a license in so far as the practice of the healing arts are concerned. A similar provision in the present ordinance is, therefore, undoubtedly valid. But to hold that a showing of good moral character is a valid requirement, is not to say, as in effect does the majority opinion, in following the argument of respondent, that the additional words, "if the City Council is satisfied that said applicant * * * will not resort to force, violence, threat, menace, coercion, intimidation or corrupt means," does not add to such requirement of good moral character in that there is only a "slight distinction" between the acts attempted to be prohibited by the ordinance and the requirement of good moral character. From such observation the majority then concludes that a sufficient "standard of qualifications is prescribed."

My third objection is directed at the last quoted statement.

What facts could be held to be sufficient to prove to the *satisfaction* of the council that one of good moral character to-day would not commit one of the acts mentioned in the future, and if the council was not *satisfied* with the evidence so submitted, what additional facts might be produced to *satisfy* the council? In other words, what might be satisfaction to one might be utter dissatisfaction to another. One test might be applied to one applicant and a different one to another.

In the case of Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 41, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750, the court, in holding a provision of Chapter 51, p. 56, Statutes of 1901, void, stated: "As the provision of the act in question does not define what shall constitute 'grossly improbable statements,' but leaves it to be determined according to the opinions of the particular members of the board who happen to constitute it * * * it is obvious, if such a provision can be sustained, that it could operate disastrously not only to individual physicians, but upon physicians of a particular school."

In a later case, Matter of Application of Dart, 172 Cal. 47, 155 P. 63, 65, L.R.A. 1916D, 905, Ann.Cas.1917D, 1127, wherein an act not wholly unlike the present one was at issue, the court held unconstitutional an ordinance of the city of Los Angeles, whereby the city council attempted to set up a permit system of charities, and stated: "Can the municipal authorities of a city arbitrarily say what person or what institution may or may not engage in charitable work dependent wholly or in part upon voluntary contributions from the public? Unhesitatingly we answer that this cannot be done, that it constitutes an attempt to use the police power in an arbitrary, unreasonable, and oppressive manner. It necessarily contains an assertion of the power to prohibit and suppress vocations and occupations * * *. The power to pass reasonable regulations in such a case bears no relationship to the power to prohibit or suppress." Mr. Justice Shaw, in his concurring opinion, added the further comment that "no standard of character or fitness is set by which the commission is to be guided in giving or withholding permits. The only thing required is that the commission shall find that the 'object of said solicitation is worthy and meritorious.' Persons of the highest character, desiring to solicit for a worthy cause, might be refused a permit for no reason except the arbitrary will of the commission. Every person has the right, under our Constitution, and perhaps without its guaranty, to solicit contributions for a worthy charitable purpose, provided he acts in good faith and honestly applies them to that purpose. The ordinances give the commission power to deprive persons of that right without cause or reason. To the extent that they give this arbitrary power they are contrary to the Constitution and void. They come within the principles stated by the Supreme Court of the United States in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, and by this court in Ex parte Sing Lee, 96 Cal. [354], 359, 31 P. 245, 24 L.R.A. 195, 31 Am.St.Rep. 218; County of Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. [344], 349, 57 P. 153, 71 Am.St.Rep. 75; Schaezlein v. Cabaniss, 135 Cal. [466], 469, 67 P. 755, 56 L.R.A. 733, 87 Am.St.Rep. 122, and Hewitt v. State Board of Medical Examiners, 148 Cal. [590], 593, 84 P. 39, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750. * * *.

"The proper method of regulating a lawful business is indicated in Hewitt v. [State] Board [of Medical Examiners], supra, as follows: 'The right of the physician to be secure in his privilege of practicing his profession is thus made to depend, not upon any definition which the law furnishes him as to what shall constitute, "grossly improbable statements," but upon the determination of the board after the statement is made and simply upon its opinion of its improbability. No definite standard is furnished by the board under this provision whereby a physician with any safety can advertise his medical business, nor is there any definite rule declared whereby after such advertisement is had the board of medical examiners shall be controlled in determining its probability or improbability. The physician is not advised what statements he may make which will not be deemed "grossly improbable" by the board. No rule is provided whereby he can tell whether the publication he makes will bring him within the ban of the provision or not. * * * If a physician's license is to be revoked for "grossly improbable statements," if he is to be thereby deprived of his means of livelihood, * * * on the ground that he has made "grossly improbable statements" in advertising his medical business, it is requisite that the statute authorizing such revocation define what shall constitute such statements so that the physician may know in advance the penalty he incurs in making them.' (148 Cal. 595, 84 P. 41, 3 L.R.A., N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750. Other methods of regulation may also be allowable; but a law or ordinance by and under a lawful occupation, in itself, when properly conducted, in no wise injurious to persons, property, or the public interest, may be absolutely prohibited at the dictation of any official body without other cause than its own will or desire, is beyond the legislative power, and to that extent void."

In the light of the Hewitt and Dart cases can it be said that the individual and personal satisfaction of the members of the council of the city of Redding constitutes a more reasonable standard of qualifications to be met by an applicant than the provisions of the ordinances in such cases? Or, in any event, can the personal satisfaction of the council ever be made the criterion of the right to engage in a lawful business?

In my opinion it must be admitted that by the wording of the Redding ordinance it is a manifest attempt to confer upon the council of the city of Redding the power to grant or deny a license to an applicant arbitrarily no matter what may be the *present facts* which may be submitted by the applicant for the purpose of obtaining a license. Under the wording of such ordinance subjective objections could be raised to an applicant for almost any personal reasons conceivable, be it good or bad, thereby resulting in a denial to him of the privilege of having an equal opportunity with others to make an honest livelihood. Under such unbridled authority unjust discrimination may be made because of nationality, religion, political adherence, or any other real or fancied dissatisfaction. Such a delegation of arbitrary authority is contrary to the basic principles upon which American liberties are founded. The right of citizens to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others must be free to all alike and upon the same conditions.

Assuming that an applicant with an unblemished record was denied a license on the basis that the council was not satisfied that he would not resort in the future to the acts prohibited, what, then, might be included in a petition to the courts to show that the council was not in fact satisfied he would not use various means prohibited in the solicitation of memberships? As the question of satisfaction is one which could exist in the minds of the members of the council, how then can it be construed to be an objective standard of qualifications? Is that not the very situation which the supreme court of the United States condemned and found to be invalid in the case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 1069, 30 L.Ed. 220, when, in ruling upon certain ordinances passed by the Board of Supervisors of the City and County of San Francisco granting to itself the power to prohibit the operation of a laundry in a wooden building, the court stated:

> "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons; so that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the [required] consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their consent, without reason and without responsibility. The power given to them is not confined to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

See, also, Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352.

The case of Riley v. Chambers, 181 Cal. 589, 185 P. 855, 857, 8 A.L.R. 418, is relied upon by respondent and quoted with approval in the majority opinion. However, the Riley case would seem to be directly contra to the purposes for which it is cited. It holds (1) that the right to engage in a lawful occupation cannot be taken away under the guise of regulation but that such business (real estate broker) may be regulated in the interest of the public even though such regulation involves a degree of limitation upon the exercise of the right; (2) that the powers of the Real Estate Commissioner as set forth in the act are not arbitrary in that to deny a license *"there must exist facts* which reasonably justify his conclusion that the applicant is not of good character and reputation." (Italics added.) The court therein further held that as the single and primary purpose of the act was to require that real estate brokers be "honest, truthful and of good [moral character]," the prerequisite of written applications accompanied by a certificate of good character was a reasonable requirement, and that if the commissioner should decide to refuse a license, such refusal must be based on existing facts which reasonably justify such conclusion.

In the present case the ordinance under consideration contains no requirement as to existing facts. To the contrary the prohibition against one "likely to" commit the acts mentioned compels the council to speculate upon what may or may not happen in the future. In other words, to leave the realm of present fact and by assuming to look into the future, make a present finding, and upon such ethereal facts to grant or deny a license. How can it be said that belief or mere suspicion as regards an act which may or may not take place in the future, is a valid enumeration of conditions to which all persons similarly situated may knowingly conform and thereby qualify for a license? How can it be said that the inherent right of an American citizen to engage in a lawful occupation can be subjected to the whim and caprice of a subjective belief or suspicion in the minds of a city council, or any one else? Obviously such a provision is impossible of execution.

No case has been cited nor has one been discovered holding that where suspicion, surmise, fear or belief concerning what an applicant for a license may or may not do in the future would warrant a refusal thereof. To the contrary, the only cases found in which the courts have passed directly upon such questions have been uniformly in accord with the decision in the case of State ex rel. Haddad v. Charleston, 92 W.Va. 57, 114 S.E. 378, 27 A.L.R. 323, wherein the court held that a council may not refuse a license upon the bare fact or surmise that an applicant, if a license were granted to him, would violate any of the conditions imposed by the ordinance. Also, see, People v. Hilliard, 28 App.Div. 140, 50 N.Y.S. 909; Hipes v. State, 18 Ind.App. 426, 48 N.E. 12.

In the case of Gates v. Haw, 150 Ind. 370, 50 N.E. 299, 300, the court, recognizing the impossibility of such provisions, stated that as "the things forbidden in the section relate to acts and things that may transpire after the grant of the license, it would be unreasonable to suppose that a trial of such questions was intended to precede the granting of the license."

A cursory examination of the Business and Professions Code, under which the Riley and Fernel cases arose, will convince the examiner that every act set forth therein regulating and licensing a business or profession has as an integral part thereof certain objective requirements and standards as of the *present* which the applicant must meet before a license will be issued. Such legislation acts come squarely within the rule that:

"An ordinance forbidding the conducting of certain kinds of business without permission of council * * * which does not prescribe any rules or conditions with which the applicant must comply, or by which the council is to be governed in determining whether the permit will be granted or refused, does not establish a uniform regulation, but on the contrary, vests the council with an arbitrary discretion, which it may exercise in favor of one citizen and against another, although the circumstances may be practically the same." McQuillan on Municipal Corporations, Vol. 3, p. 667.

If, then, the business to be regulated by the ordinance in question is a lawful occupation, the case of In re Application of Blanc, 81 Cal.App. 105, 252 P. 1053, 1056, would appear to be controlling. The court there stated:

"In any case the authority to withhold a permit to engage in lawful business, to be sustained, must be regulated by provisions of the law which are reasonable and which apply to matters of conduct upon the part of the applicant in some way affecting his health, morals or safety of the community. *The law must fix standards with such certainty that the citizen may be apprised of their requirements, and it is not enough that the commissioners may establish their own conditions. If they have the power to act regardless of any legislative guidance and control, the authority conferred is arbitrary and unlawful.*" (Italics added.)

It is impossible for me to conceive how and in what manner the morals, health or general welfare of this court, or those of the community, would be affected by solicitation to join the Sacramento Chamber of Commerce, the Blank Luncheon Club, the California Conference of Judges, or a Union of the California State Employees. Nor can I conceive of any one seriously so contending. And if this be true, how, then, can the plain, unambiguous language of the Blanc case, that the law must establish definite standards, be avoided?

It was also held in the later case of City of South Pasadena v. San Gabriel, 134 Cal.App. 403, 25 P.2d 516, 517, wherein the court had before it an ordinance requiring a permit to drill for water, oil, etc., that:

"Where a business is lawful, and permits for its inauguration are required, an ordinance providing the requirement must contain rules and regulations to be followed by the officer or officers who consider applications for permits." (Italics added.)

That California is not alone in this regard is evidenced by the statement of the general rule found in 12 A.L.R. 1436:

"The generally accepted rule is to the effect that a statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business, profession, appliance, etc., in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals, etc., according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform,—is unconstitutional and void."

The majority opinion, in conclusion, states that "petitioner may not complain of the possibility of arbitrary or discriminatory conduct on the part of the council in passing upon applications for licenses or that it might deny such applications on the ground that the applicant was likely to resort to force, violence, etc.," since petitioner made no application to the council for a license and thereby gave it no opportunity to determine his qualifications. "Proof of an abuse of power * * * has never been deemed a requisite for attack on the constitutionality of a statute * * * the rule is not based upon any assumption that application for the license would be refused. * * * One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it * * *." Thornhill v. Alabama, supra; Uhden, Inc., v. Greenough, 181 Wash. 412, 43 P.2d 983, 98 A.L.R. 1181.

It is true, as the majority opinion states, he was not charged with a violation of section 1, which makes solicitation by force and violence a crime, and it is also true that he was charged with failing to secure a license in accordance with section 2. It is to be noted, however, that the last mentioned section provides "it shall be unlawful * * * to solicit membership for compensation * * * without first having procured a license * * * *as in this ordinance provided.*" (Italics added.) Obviously, then, one must turn to the provisions in the ordinance relating to the procedure to be followed by an applicant desirous of obtaining a license. Such provisions are that an application shall be made in writing to the council (section 4); that such application shall be filed with the clerk at least one week prior to the meeting of the council at which it is to be heard (section 5), and at such hearing the council shall determine to its satisfaction whether or not the applicant is not likely to use force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation (Section 6).

By virtue of such reference in section 2 to the procedure, as set forth elsewhere in the ordinance, all sections relating thereto must be read in conjunction with each other.

The majority opinion states that even though it be assumed that the provision relating to the satisfaction of the council as to the possibility of an applicant using force, violence, threat, menace, coercion, intimidation or corrupt means, is unreasonable and uncertain because it involves speculation as to what one might do in the future, by virtue of the saving clause contained in the ordinance, the provision with respect to a showing regarding the use of such acts may be eliminated, and the balance of the ordinance, including sections 2, 4, and 7 under which petitioner was convicted, may stand as valid. However, as previously noted, by virtue of the reference in section 2 and to other sections within the ordinance, the present case is taken out of the rule laid down in the Bell case that if valid and invalid sections of an ordinance be severable, the valid portions may stand if complete within themselves. In so far as the present case is concerned it would be of little consequence whether one or more innocuous sections of the ordinance were valid if the provision relating to the procedure necessary to acquire an application is held to be invalid. Assuming that only that portion of section 2, which prescribes that it shall be necessary to first obtain a license to solicit, be valid, the question of how to obtain a license still remains, and if section 6 be invalid, then neither regulation nor rule, whether valid or invalid, can be found in the ordinance, and the ultimate result is the same.

Even assuming that the conclusion of the majority that speculation to the subjective satisfaction of the conscience of the council is a reasonable standard of qualifications for the guidance of such body, cannot it be said that the wide difference of opinion between the construction placed upon the words, force, violence, threat, menace, coercion, intimidation or corrupt means by the majority and the construction applied to the same words by the Supreme Court in the Bell case is a very practical illustration of the necessity for the rule that if an average man, after reading a regulatory ordinance with due care, cannot understand whether he will incur a penalty or not, then such ordinance is void for uncertainty. 19 R.C.L. 810. Surely a layman is not to be held to a higher degree of understanding of the legal implication of his acts under such an ordinance than the degree of misunderstanding with which the Supreme Court and the majority of this court view the same language. If there can be no unanimity of interpretation of such regulatory language by the courts, surely it cannot be said that the average individual not schooled in the law can read the same with understanding and readily conclude whether he will incur a penalty or not.

In my opinion, the ordinance viewed from every perspective is void upon its face, and therefore it was not necessary for petitioner to seek a license under it to attack its constitutionality. Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949.

The underlying viciousness of such an ordinance is in the uncontrolled and arbitrary suppression which may be exercised through personal whim and caprice, thereby effectively suppressing legitimate business activity. It is an evil inherent in the licensing system. The power of the licensing body is pernicious not merely because of a sporadic abuse of the power but more so because of the pervasive threat inherent in the very existence of the power. The existence of an ordinance which readily lends itself to such harsh and discriminatory enforcement results in a continuous restraint of everything which reasonably might be regarded within its purview. Thornhill v. Alabama, supra. This does not mean that our constitutional guarantee of liberty amounts to an unrestrained disregard of the rights of others. Such guarantee only implies an absence of arbitrary restraint and does not deny to government the power to provide such restrictions upon one's acts as are reasonable and imposed in the interests of the community.

The business of soliciting memberships in organizations being a lawful occupation, the power of a municipality to regulate such a business is limited to the exercise thereof, and such regulation must be by fixed rules and regulations and cannot be left to a subjective determination of the question to the personal satisfaction of a city council. Otherwise it thus could be made the instrument of arbitrary suppression of free enterprise. Denial of an application under the Redding ordinance would amount to a conviction upon a charge neither made nor proven, and would be an absolute denial of due process. Such uncontrolled official suppression cannot be made the substitute for the duty to maintain order in connection with the exercise of the right. Hague v. Committee, etc., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423.

That another unfortunate effect of the ordinance is to confer upon the City Council of Redding the power to determine the extent to which the ordinance will be operative is well illustrated by the record in this case. The tax collector testified that more than forty notices were sent out and in each instance it was either a labor organization or an individual connected with such an organization to whom the notice was addressed. The only limitation upon the exercise of such arbitrary power exists solely in the consciences of the present members of the council. The succeeding members of the council might have an entirely different view, i.e. instruct the tax collector to send notices only to veteran organizations, fraternal bodies or luncheon clubs. It is not enough to say, as does the majority opinion, that it must be presumed that the council will act properly. It is not a question of whether the power conferred will be properly exercised, but whether an ordinance which attempts to grant such sweeping arbitrary power is valid. If it is not, then it is no answer to say that it will not be abused. The mildest form of despotism has no place in our constitutional government. In a nation existing under a government of laws the conduct of its citizens cannot be subjected to the arbitrary will of either an official or an official body.

Rehearing denied; PEEK, J., dissenting.

63 Cal.App.2d 651

PEEBLER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 14389.

District Court of Appeal, Second District, Division 1, California.

March 31, 1944.

1. Appeal and error ⚿117

Order of superior court terminating on appellants' own motion their proceedings for a bill of exceptions and allowing appellants ten days in which to give notice to clerk to prepare a transcript on appeal taken pursuant to alternative method provided by statute was not appealable. Code Civ.Proc. § 953a.

2. Prohibition ⚿3(1)

Motion to dismiss the appeal afforded appellees, who had unsuccessfully moved to terminate proceedings in trial court to perfect a record on appeal, an "adequate remedy" in the ordinary course of proceedings to test jurisdiction of trial court to allow additional time in which to give notice to clerk to prepare a transcript on appeal taken pursuant to alternative method provided by statute, and hence prohibition would not lie to restrain further proceedings in conection with preparation of transcript. Code Civ.Proc. § 953a.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy".

3. Appeal and error ⚿800

The filing of a certified transcript in District Court of Appeal before notice of motion to dismiss appeal would not necessarily preclude dismissal of appeal for failure to give clerk timely notice to prepare a transcript on appeal taken pursuant to alternative method provided by statute, where appellees unsuccessfully moved to terminate proceedings in trial court. Code Civ.Proc. § 953a.

4. Prohibition ⚿3(1)

Whether a plain, speedy and adequate remedy at law exists so that prohibition will not lie depends upon the circumstances, and, to some extent at least, rests in the discretion of the court.

5. Appeal and error ⚿117

Jurisdiction of trial court to allow additional time in which to give clerk notice to prepare transcript on appeal taken pursuant to alternative method provided by statute may be reviewed preliminary to hearing of main appeal on the merits by way of motion to dismiss based on affidavits, if proceedings resulting in order extending time are not incorporated in transcript on the main appeal. Code Civ.Proc. § 953a.

◆

Proceeding by Byron Peebler and another for a peremptory writ of prohibition to restrain the Superior Court of the State of California, in and for the County of Los Angeles, its officers and agents, and all persons acting by and through its orders, from taking any further steps or proceedings in connection with the preparation of a transcript pursuant to provisions of the Code of Civil Procedure, § 953a, for use in an appeal from a judgment recovered by petitioners in respondent court.

Writ of prohibition denied.

Roland Maxwell, of Pasadena, for petitioners.

J. M. Danziger, of Los Angeles, for respondents.

DORAN, Justice.

The plaintiffs in an action in the Superior Court of the County of Los Angeles, in which action the said plaintiff recovered judgment against the defendants, have applied to this court for a writ of prohibition to restrain the said superior court from taking any further steps or proceedings in connection with the preparation of a transcript pursuant to the provisions of section 953a of the Code of Civil Procedure for use by defendants in their appeal from said judgment. According to the petition herein the defendants filed their notice of appeal from the judgment on January 15, 1943; and, over a period of nearly eleven months, defendants appear to have attempted unsuccessfully to perfect a record by way of a bill of exceptions. Plaintiffs' motions to strike the proposed bill of exceptions and to terminate proceedings, made during the course of this period, were denied by the trial court. On December 7, 1943, defendants moved the trial court for an order dismissing and terminating the pending proceedings for a bill of exceptions and for an order allowing said defendants a period of ten days thereafter within which to give notice to the clerk to prepare a record on appeal under section 953a of the Code of Civil Procedure. This motion was granted, the court making the following order: "It is hereby ordered that the proceedings pending for bill of exceptions be now terminated and appellants are allowed a period of ten days from date hereof within which to give notice to clerk to prepare record on appeal under C.C.P. 953a."

[1-3] Petitioners contend that prohibition will lie in this instance because no remedy is available by way of appeal, the order in question not being appealable. It is true that the order above mentioned is not appealable, being in effect merely an order allowing appellants to proceed with the preparation of a record on appeal. However, it appears that petitioners will be afforded an adequate remedy in the ordinary course of proceedings on defendants' appeal from the judgment. The question as to the jurisdiction of the trial court to grant the relief given defendants in the preparation of their record on appeal can be passed on, with a sufficient record, upon defendants' appeal from the judgment. Hume v. Lindholm, 85 Cal.App. 86, 258 P. 1006; Kaltschmidt v. Weber, 136 Cal. 675, 69 P. 497; Kramm v. Stockton Electric R. R. Co., 22 Cal.App. 761, 136 P. 534. The following cases serve to illustrate the fact that the question of defendants' alleged default in the matter of preparing a transcript may be given full consideration on appeal from the judgment. Colburn Biological Institute v. DeBold, 6 Cal.2d 631, 59 P.2d 108; Lynch v. Coe, 203 Cal. 422, 264 P. 747; Stenzel v. Kronick, 201 Cal. 26, 255 P. 199; In re Barney, 191 Cal. 18, 214 P. 853; Des Granges v. Des Granges, 175 Cal. 67, 165 P. 13; Bognuda v. Pearson, 71 Cal.App. 105, 234 P. 857; McDowell v. Title Guarantee, Etc., Co., 48 Cal.App. 400, 192 P. 103. It should be pointed out that the statement in Charles v. City of Crescent City, 12 Cal. 2d 241, at pages 243, 244, 83 P.2d 34, to the effect that a failure to file on time the notice to the clerk, as provided by section 953a of the Code of Civil Procedure, was cured by the filing of a certified transcript prior to notice of motion to dismiss the appeal, does not appear applicable to the alleged facts of the present case. Petitioners for the writ herein allege that they moved for termination of proceedings in the trial court. In this connection see: Kinkle v. Fruit Growers Supply Co., 53 Cal.App.2d 706, at page 709, 128 P.2d 420. Under the circumstances here alleged it does not appear that the mere filing of a certified transcript in this court prior to any move by petitioners, will of necessity preclude petitioners from an adequate remedy upon the appeal from the judgment.

[4] It is true that in Jones v. Superior Court, 78 Cal.App. 163, 248 P. 292, 293, a peremptory writ of prohibition was granted to prevent the superior court from settling and certifying a reporter's transcript. But in that case the court, after holding that the order granting appellant relief was not an appealable order, merely stated, "Prohibition is the only adequate remedy available for the injured party." The possibility of review and consideration of the question upon the appeal proper is not there discussed. Moreover, the question of whether a plain, speedy and adequate remedy at law exists depends upon the circumstances of the particular case; and the determination of that question, to some extent at least, rests in the discretion of the court. Frye v. Superior Court, 17 Cal App.2d 198, 201, 61 P.2d 778; Fisher v Superior Court, 23 Cal.App.2d 528, 535, 73 P.2d 892.

[5] In Hohnemann v. Pacific Gas & Elec. Co., 29 Cal.App.2d 551, 85 P.2d 151, an appeal from an order of the superior court, denying a motion to terminate proceedings for the preparation of a transcript on appeal under the alternative method, was dismissed. The following quotation is taken from the latter case, at page 553 of 29 Cal.App.2d, at page 152 of 85 P.2d: "Defendant argues that to deny the right of appeal from such an order is to deny an aggrieved party any remedy whatever to review the ruling of a trial court refusing to terminate the proceedings for the preparation of a transcript, for the reason that the proceedings upon which such an order is based take place subsequent to the entry of judgment and to the ruling on motion for new trial, if such motion be made, and consequently form no part of the record on the main appeal. It has been the practice in some trial courts, however, to allow such subsequent proceedings to be incorporated in the transcript on the main appeal, to the end that a full and complete consideration on appeal may be given to all material questions presented to and determined by the trial court; and in those cases wherein such subsequent proceedings have not been so made part of the transcript on the main

appeal, the question of the validity of the trial court's order of denial has been brought up for review, preliminary to the hearing of the main appeal on the merits, by way of motion to dismiss, based on affidavits; and there would seem to be no reason why such course may not be followed in the present case, using as the record in the presentation of such motion the bill of exceptions upon which the present appeal was taken." The foregoing quotation is particularly apt, both in pointing out the existence of a remedy available to petitioners and in indicating the means of obtaining such remedy.

It appearing that the petitioners have a complete and adequate remedy in the ordinary course of law, the petition for a peremptory writ of prohibition is hereby denied.

YORK, P. J., and WHITE, J., concur.

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63 Cal.App.2d 401

TAYLOR v. WESTERN STATES LAND & MORTGAGE CO. et al.

STATE v. TAYLOR et al.

Civ. 14138.

District Court of Appeal, Second District, Division 3, California.

March 22, 1944.

1. Appeal and error 🔑790(3)

An order directing a bank to appear and show cause why money on deposit could not be paid to plaintiff was rendered functus officio by orders vacating default judgment against depositor of the account and by order permitting the state, which also claimed the account, to intervene.

2. Stipulations 🔑18(1)

Plaintiff, who stipulated that a bank should deposit certain accounts in the name of the clerk to abide outcome of action and thereupon be discharged from all liability to plaintiff and to the state, which was also claiming the accounts, could not complain of dissolution of order directing bank to show cause why it should not pay the money to plaintiff.

3. Appeal and error 🔑78(2)

An order permitting the state to intervene, which was an intermediary order not determining anybody's rights with finality, was not appealable. Code Civ.Proc. § 963.

4. Appeal and error 🔑876

Where validity of order vacating default judgment was to be tested by propriety of order permitting state to intervene in the action in which default was entered, the order permitting intervention was subject to review on the appeal from the order setting the judgment aside. Code Civ.Proc. § 963.

5. Escheat 🔑6

The "escheat" of funds is not brought about by the mere passage of 20 years without a claim but takes place only when it is so decreed, which cannot take place until an opportunity is given all claimants to be heard. Code Civ.Proc. § 1273.

See Words and Phrases, Permanent Edition, for all other definitions of "Escheat".

6. Escheat 🔑6

Where bank account which the state claimed under escheat was involved in a quiet title action and state had been permitted to intervene in the quiet title action, question whether the account escheated to the state could be determined therein without necessity of state bringing separate proceedings. Code Civ.Proc. §§ 1269a, 1273.

7. Escheat 🔑6

The state was a necessary if not an indispensable party to plaintiff's quiet title action to obtain bank account which the state claimed under escheat. Code Civ. Proc. §§ 1269a, 1273.

8. Escheat 🔑6

An order making the state a party to an action to quiet title to a bank account was not an adjudication that the account was to be paid to the state under escheat and not to the plaintiff.

9. Judgment 🔑174

Vacating default judgment in order to allow the bringing in of a necessary party did not justify setting aside the default itself but only the judgment.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Eva Taylor against Western States Land & Mortgage Company and others to quiet title to real estate and certain bank accounts in the First Trust & Savings Bank of Pasadena and standing in the name of Pasadena Land & Water Company. From orders granting motion of the State of California to intervene and granting its motion to vacate default judgment entered against water company and from order denying plaintiff's petition for release of bank account, plaintiff appeals.

Order vacating default and default judgment modified so that it affected the judgment only, and as so modified affirmed, and appeals from other orders dismissed.

William M. Taylor, of Long Beach, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent State of California.

BISHOP, Justice pro tem.

By a series of procedural steps this action to quiet title to thirteen parcels of real estate and twelve scattered bank accounts has developed, as to one bank account, into an action of interpleader in which the plaintiff and the State of California appear as rival claimants. Of the twenty-five items covered by the amended complaint the one in which we are interested is described as "A bank account in the First Trust and Savings Bank of Pasadena, California, including money deposited and interest and the proceeds therefrom, standing in the name of Pasadena Land & Wtr. Co." The Pasadena Land & Water Company was named as a defendant, served, its default entered June 5, 1942, and a partial decree entered on July 10, 1942, quieting the plaintiff's title to the bank account as against the water company. The bank in which the account existed (actually there were two accounts) was not made a party to the action. Nevertheless an order was issued, July 30, 1942, which, by its terms, ordered the bank to appear and show cause why it should not pay the money in the water company's accounts to the plaintiff. The bank resisted the move to require it to pay the amount of the accounts to the plaintiff, advancing, among other reasons, the fact that the State of California claimed that the account should escheat to it. The State then came upon the scene, serving notice that it was going to make three motions: first, that the judgment and default which the plaintiff had had entered against the water company be vacated; second, that the order to show cause against the bank be dissolved; third, that it (the State) be allowed to intervene in the action. These motions were made at the same court session at which the order to show cause was heard, the plaintiff, the bank and the State each being represented by counsel. These orders were made: (1) The motion to vacate was granted; (2) the motion to intervene was granted; (3) plaintiff's petition for release of bank account was denied. It was stipulated that the bank, having filed a disclaimer (which does not appear in the record before us) should deposit with the clerk of the court the balances in the two accounts of the water company, $932.21, and that upon such deposit the bank should be discharged from all liability to the plaintiff and to the State, and that upon such deposit being made, the amount thereof shall abide the outcome of this action. "Said stipulation is approved and it is so ordered."

[1-4] Plaintiff's appeal is from the order vacating the default and judgment, from an order dissolving the order to show cause, and from the order permitting intervention. We know of no order being made which dissolved the order to show cause. In any event the effect of the orders which were made rendered that order functus officio, and in view of the stipulation she entered into the plaintiff is in no position to complain if it was dissolved. The order permitting the State to intervene we regard as a nonappealable order. It is not listed among the orders from which appeals are authorized, Code Civ.Proc. sec. 963, and it is quite plainly an intermediary order, not determining anybody's rights with finality. See Camp v. Oakland Mortg. & Finance Co., 1928, 205 Cal. 380, 270 P. 685. However, the validity of the order vacating the default judgment is to be tested, as we shall see, by the propriety of the order permitting the State to intervene, with the result that the order is subject to review on the appeal from the order setting the judgment aside.

[5, 6] It appears from the record relied upon in support of the State's motion to be permitted to intervene, that the bank account in question had lain quiescent for

over twenty years. No deposit had added to its total; no withdrawals had depleted its principal or interest; no claim had been made for any part of it. Nor, according to the proposed petition in intervention, had either the water company (elsewhere shown to have been dissolved) or any claimant filed a notice with the bank showing a present address. Given these facts, section 1273, Code of Civil Procedure, applies and declares that the money in the account escheats to the State. In spite of the language used in section 1273 it has been held that the escheat is not brought about by the mere passage of twenty years without a claim, but takes place only when it is so decreed, and that that cannot take place until an opportunity is given all claimants to be heard. Mathews v. Savings Union Bank & Trust Co., 1919, 43 Cal.App. 45, 184 P. 418; State v. Savings Union Bank & Trust Co., 1921, 186 Cal. 294, 199 P. 26; Forster v. Riley, 1935, 11 Cal.App.2d 89, 53 P.2d 192. The State might have brought an independent action to obtain its decree, as authorized in section 1273, but inasmuch as the account which had escheated, within the meaning of section 1273, was property involved in plaintiff's quiet title action, the State properly sought intervention in that action. Section 1269a, Code Civ.Proc. Intervention having been granted, the court in the quiet title action may proceed to determine whether or not the account escheats or whether plaintiff has a superior claim to it, without the necessity of bringing the action authorized by section 1273. Mathews v. Savings Union Bank & Trust Co., supra, 43 Cal.App. 45, 50, 51, 184 P. 418.

[7, 8] What we have said respecting the State's right to intervene establishes it as a necessary if not an indispensable party to plaintiff's action to obtain the bank account which the State claims. Bank of California v. Superior Court, 1940, 16 Cal. 2d 516, 106 P.2d 879. This being so, it was quite proper to set aside the default judgment upon the State's motion in order that the State might be made a party to the action. Nuckolls v. Bank of California, 1937, 10 Cal.2d 266, 273, 74 P.2d 264, 268, 114 A.L.R. 708; Hammond Lumber Co. v. Gilkey, 1932, 120 Cal.App. 252, 258, 7 P.2d 724, 725. The order making the State a party is not an adjudication that the fund in dispute is to be paid to the State and not to the plaintiff. Obviously that question is yet to be determined.

[9] In the case last cited the default judgment was vacated but the default itself was not molested. The rationale of the cases which support the vacating of a default judgment in order to allow the bringing in of a necessary party does not justify setting aside the default itself. It was unnecessary, and erroneous, to order the default of the water company set aside in the present action.

The order vacating the default and the default judgment is modified so that it affects the judgment only; as so modified the order is affirmed. The appeals from the other two orders are dismissed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

PASHLEY v. PACIFIC ELECTRIC CO. et al.*

Civ. 14291.

District Court of Appeal, Second District, Division 2, California.

March 23, 1944.

Hearing Granted May 19, 1944.

1. Limitation of actions 🔑104(1)

Generally, fraudulent concealment by defendant of the facts upon which a cause of action is based tolls the statute of limitations until discovery of the facts by plaintiff. Code Civ.Proc. § 340, subds. 2, 3.

2. Action 🔑1

Damages do not constitute an essential element of the "cause of action," but are merely a part of the "remedy" allowed for the injury resulting from a wrong.

See Words and Phrases, Permanent Edition, for all other definitions of "Cause of Action" and "Remedy".

3. Limitation of actions 🔑95(1)

Although the entire damages resulting from a negligent act of another may not be known until the right to recover is barred, yet the time within which an action may be brought is not thereby prolonged. Code Civ.Proc. § 340, subds. 2, 3.

* Subsequent opinion 153 P.2d 325.

4. Limitation of actions ⟹104(3)

A complaint alleging that plaintiff sustained an eye injury while a passenger on defendant's street car and was treated by defendant's physicians who fraudulently concealed the seriousness of the injury, resulting in loss of sight about 12 years later, did not allege facts which would toll the statute of limitations, since extent of the injury was the only thing concealed and not the "cause of action." Code Civ.Proc. § 340, subds. 2, 3.

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Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by John W. Pashley against Pacific Electric Company and another to recover damages allegedly resulting from taking declarations of defendant's physician as to the seriousness of an eye injury sustained by plaintiff while a passenger on defendant's street car. Defendant's demurrer to the complaint on ground that the cause of action was barred by limitations was sustained, and from the judgment entered thereon, plaintiff appeals.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant, Pacific Electric Company, predicated upon the sustaining of its demurrer to plaintiff's complaint without leave to amend, on the ground that the cause of action alleged in the complaint (damages resulting from negligence) was barred by the statute of limitations, section 340, subdivision 3 of the Code of Civil Procedure, plaintiff appeals.

It is alleged in the complaint[*] filed June 14, 1943, that on September 3, 1930, plain-

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[*] The allegations in the complaint pertinent to the tolling of the statute of limitations are these:

"VII

"That plaintiff has not hitherto instituted the within action against defendants for the following reasons, to-wit: that upon the complaint of plaintiff and immediately subsequent to said accident, defendant corporation directed plaintiff to go for examination, treatment and advice to physicians employed by it, particularly one Dr. Scholz, and Doctors Kress and Goldstein, whom defendant corporation held out and represented to be experts in the treatment of eye injuries and diseases; that both Dr. Scholz and Dr. Kress, aforesaid, acting for and in behalf of said defendant corporation, treated the right eye of plaintiff, that splinters of glass were removed therefrom by them, and said doctors and each of them advised plaintiff that they were acting for defendant corporation, the expense of plaintiff's treatment to be paid by defendant corporation; and said physicians further stated that plaintiff must not go to any other physician or they would not be held responsible, that his said eye wounds would heal quickly and that he would have no more trouble whatsoever therefrom, that the immediate trouble then with plaintiff was shock, that plaintiff should return in two years for a final check-up; that plaintiff did return for said final check-up and said physicians as said representatives of said defendant corporation then and there stated to plaintiff that aside from the need of glasses, his said eye was in perfect condition and the cure thereof was complete;

"That said statements, declarations and representations were false and untrue in the following, to wit: that the said glass had severed the cellular system and delicate tissues of the eyeball of said eye, and they then and there, and at all times knew that such an injury would eventually cause a cataract and the destruction of plaintiff's eyesight.

"VIII

"That the said agents, representatives and servant physicians of defendant corporation stated, declared and represented to plaintiff as in paragraph VII hereof set forth, falsely and fraudulently, and for the purpose and with the intent of preventing plaintiff from bringing an action against defendants for damages within the period set forth in the statutes made and provided therefor, and plaintiff in reliance on the said statements, declarations and representations, and believing he was in no further danger by reason of said injury and was permanently cured, did delay bringing said action or any action against defendants, and so continued to believe until in October of 1942, when he perceived for the first time that the vision of said right eye was blurred; that said affliction then steadily increased until finally on February 5, 1943, he sought the advice of another and indetiff, while a passenger on one of defendant's streetcars, was injured in a collision, due to defendant's negligence, between the streetcar upon which he was riding and a truck; that as a result of the accident plaintiff was struck in the eye by glass splinters; that defendant sent plaintiff to its eye specialists; that said specialists took glass splinters from plaintiff's eye and told him he was all right and that he would never have further trouble with his eye, but he might come for a recheck in two years, which he did, when the physicians reiterated their previous statement; that in fact, the injury to plaintiff was in a nature destructive to his eye, which said physicians knew; that the first intimation plaintiff had of the seriousness of his eye's injury was in October, 1942; and that in 1943, he discovered he was totally blind in the injured eye.

Plaintiff relies for reversal of the judgment on this proposition:

That defendant's fraudulent concealment of the extent of plaintiff's injury tolled the statute of limitations until plaintiff discovered the seriousness of his injury.

This proposition is untenable.

[1] It is the general rule that a fraudulent concealment by defendant of the facts upon which a cause of action is based tolls the statute of limitations until discovery of the facts by plaintiff, and that upon discovery of the true facts the applicable section of the statute of limitations commences to run. (Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 210, 30 P.2d 39.) However, in the instant case, this rule upon which plaintiff relies is inapplicable for the reason that defendant did not fraudulently conceal from plaintiff any fact or facts upon which the "cause of action" was based.

[2] Since the rule is clearly established in California that damages do not constitute an essential element of the "cause of action," but are merely a part of the remedy allowed for the injury resulting from a wrong, the statute of limitations is not tolled. (Frost v. Witter, 132 Cal. 421, 426, 64 P. 705, 84 Am.St.Rep. 53; Lattin v. Gillette, 95 Cal. 317, 319, 30 P. 545, 29 Am. St.Rep. 115; Raynor v. Mintzer, 72 Cal. 585, 590, 18 P. 82; see also Wright v. Brush, 10 Cir., 115 F.2d 265, 267; Nester v. Western Union Telegraph Co., D.C.S.D. Cal., 25 F.Supp. 478; Dennison v. Payne, 2 Cir., 293 F. 333, 344.)

[3] It is likewise established in California that although the entire damages resulting from a negligent act of another may not be known until a right to recover is barred, yet the time within which an action may be brought is not thereby prolonged. (Lattin v. Gillette, supra, 95 Cal. 319, 30 P. 545, 29 Am.St.Rep. 115.)

[4] Applying these rules to the facts in the instant case, it is apparent that plaintiff knew at all times subsequent to his injury the facts upon which his "cause of action" was predicated. The only thing concealed from him was the extent of his injury. As the facts pertaining to his "cause of action" were not concealed from him the statute of limitations was not tolled and the general rule, that in a tort action the statute of limitations commences to run from the time of the act causing the injury, is pertinent.

This being a tort action, section 340, subdivision 2 of the Code of Civil Procedure governs. This section provides that a tort action must be commenced within one year after the accrual of the "cause of action" therefore, because the injury occurred September 3, 1930, and the present action was not instituted until June 14, 1943, plaintiff's cause of action was barred by the statute of limitations and the trial court properly sustained the demurrer to the complaint without leave to amend.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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pendent physician and then and for the first time discovered that, as a proximate result of said injury to said eye on September 3rd, 1930, a cataract had finally completely enveloped said eye and that he was totally and permanently blind therein."

63 Cal.App.2d 618

WESCOATT v. MEEKER.

Civ. 7005.

District Court of Appeal, Third District, California.

March 30, 1944.

1. Appeal and error 🔑1011(1)

The District Court of Appeal is without power to interfere with findings which are supported by ample evidence merely because there is also evidence which would have supported a contrary finding.

2. Work and labor 🔑4(2)

Where services are rendered by one person from which another derives benefit, a presumption arises from proof of services rendered that person benefited was bound to pay what they were reasonably worth, although there was no express contract to pay therefor.

3. Limitation of actions 🔑46(7), 49(2)

The statute of limitations does not apply to a claim against decedent for personal services rendered over a period of time until decedent's death under rule that, where there is an express or implied promise to pay on termination of services, statute does not start to run until termination of such services. Code Civ.Proc. § 339, subd. 1.

4. Frauds, statute of 🔑44(3)

The Code section requiring that an agreement which by its terms is not to be performed within a year from the making thereof must be evidenced by a writing subscribed by party to be charged does not apply to contract, either express or implied, for rendition of services for an indefinite period of time and payment to be made at termination of relationship. Civ.Code, § 1624, subd. 1.

5. Appeal and error 🔑989

When a verdict is attacked as being unsupported by evidence, power of appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

6. Work and labor 🔑4(2)

When work is done by one for benefit of another, with his knowledge or approbation, law will imply a promise to pay for it, unless it appears that there was an understanding that no compensation should be given; but where there is such an understanding law will not imply a promise, and such understanding may be implied from circumstances.

7. Executors and administrators 🔑221(5)

Conflicting evidence sustained finding that services rendered by plaintiff for decedent during decedent's lifetime were not rendered in contemplation of future compensation but were already compensated for by money advanced by decedent to finance claimant's mining operations and supported judgment against claimant.

8. Evidence 🔑271(16)

Declarations of a person, since deceased, not against, but in support of, his own interests, and made outside presence of party sought to be bound by them, are not admissible in favor of those who claim rights which declarations would maintain.

9. Witnesses 🔑268(3)

Where witness on direct examination testified to a statement made by decedent against decedent's interest and outside presence of plaintiff, admission upon cross-examination of remainder of decedent's conversation was proper notwithstanding that it contained statements against plaintiff's interest. Code Civ.Proc. § 1854.

10. Witnesses 🔑268(3)

Where witness on direct examination relates a part of a conversation, adverse party, on cross-examination, is entitled to ask for remainder of conversation and to go fully into what was said. Code Civ. Proc. § 1854.

11. Witnesses 🔑268(3)

A litigant, who chooses to prove oral declarations against interest of a deceased person made to a witness called by litigant, cannot prevent adverse party from bringing out all that was said by decedent in conversation in which statements were made notwithstanding that statements are placed in record that might otherwise be excluded as self-serving. Code Civ.Proc. § 1854.

12. Appeal and error 🔑237(2)

Where testimony was permitted to go into record subject to motion to strike out and record failed to disclose that such a motion was either made or ruled upon, reviewing court was required to consider that testimony was before trial court and considered by it.

13. Appeal and error ⚿1056(1)

In action to establish agreement between claimant and decedent that claimant should be compensated for his work on decedent's farm, exclusion of testimony adduced by claimant that decedent was not on friendly terms with her relatives and that they refused to assist decedent was not prejudicial error.

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Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by W. H. Wescoatt against W. J. Meeker, as administrator of the estate of Effie M. Meeker, also known as Effie Meeker, deceased, to recover upon a claim filed in decedent's estate, which claim was rejected by defendant administrator. Judgment for defendant, and plaintiff appeals.

Affirmed.

DeMeo & DeMeo, of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa (A. Dal Thomson, of San Francisco, of counsel), for respondent.

SCHOTTKY, Justice pro tem.

Plaintiff and appellant filed an action against defendant and respondent administrator after the rejection of his verified claim which read in part as follows:

"Claimant rendered services and performed labor for and at the request of Effie M. Meeker from December, 1911, to the time of her death, which services and labor consisted of general farm and dairy work, the repairing and maintenance of improvements, the cutting and sale of wood and the making and sale of split timber, the supervision and management of farm, dairy, and business properties, and said services and labor were performed with the understanding and agreement between said Effie M. Meeker and claimant that said Effie M. Meeker would compensate claimant to the amount of the reasonable value thereof upon the termination of said labor and services at or before her death, and that the reasonable value of said labor and services in addition to board and lodging furnished claimant by decedent is the sum of $20,640.00."

Respondent administrator in his answer denied the allegations of said claim and also set up the defense that each of the four causes of action based upon the claim was barred by subdivision 1 of section 339 of the Code of Civil Procedure.

After a trial before the court without a jury the court found that the decedent Effie M. Meeker was not indebted to appellant, that appellant's action was barred by subdivision 1 of section 339 of the Code of Civil Procedure and "that the plaintiff rendered services and performed labor for said decedent Effie M. Meeker, also known as Effie Meeker, continuously, from December, 1911, to about two years before the death of said decedent and intermittently thereafter to the date of her death, as aforesaid, except for periods of two (2) or three (3) weeks each year, up to the year 1938, and for periods of two (2) to four (4) months annually during the years 1938, 1939 and 1940, which said services and labor consisted of general farm and dairy work, the repairing and maintenance of improvements, the cutting and sale of wood, and the making and sale of split timber, the supervision and management of farm, dairy, and business properties, and miscellaneous other services and labor, but that it is not true that said services and labor, or any part thereof, were performed by plaintiff during any of said times with the understanding or agreement between said decedent and plaintiff that said decedent would compensate plaintiff the reasonable value thereof, or otherwise, upon the termination of said services at or before her death; that said services were not terminated before the death of said decedent, save and except that all services in connection with dairy work and the supervision of said decedent's dairy property were terminated in the year 1938 or 1939 and more than two years prior to the death of said decedent on July 31, 1940; that it is not true that the reasonable value of said labor and services, in addition to board and lodging furnished plaintiff by decedent, is the sum of $20,640, or any sum whatever, and in this connection the Court further finds that the value of all labor and services performed by plaintiff for decedent during the period of two years next before her death, as aforesaid, did not exceed in value the board and lodging furnished to plaintiff by decedent during said period of two years."

Judgment in favor of respondent was entered in accordance with the findings, and this appeal is from said judgment.

[1] Appellant makes a forceful attack upon the findings and the judgment and

contends that they are without support in the evidence. We believe that what was said in Lloyd v. Kleefisch, 48 Cal.App.2d 408, at page 410, 120 P.2d 97, 99, is quite applicable to the instant case:

"After reading the record we are of the opinion that, so far as the sufficiency of the evidence is concerned, this is a typical fact case. Had the jury brought in a verdict in favor of appellant there is ample evidence and inferences therefrom that would have supported such a verdict. But there is also ample evidence with inferences therefrom to support the contrary verdict. Under such circumstances, this court has no power to interfere with the judgment."

Disregarding all conflicts in the evidence and indulging in all reasonable inferences to support the judgment, the record shows the following facts, which are set forth in the opinion of the trial court:

"The evidence discloses that decedent Effie Meeker was, to put it mildly, an eccentric individual who elected to live on a ranch in western Sonoma County separate and apart from other members of her family. About the year 1911 or 1912 plaintiff took up his abode upon this ranch and remained thereon except as hereinafter noted until Effie Meeker's death. From that time on plaintiff performed the usual duties on the place which the character of the property demanded; milked the cows, built fences, split and hauled posts, delivered the cream to the creamery and such other labor as was required and necessary. During the period from 1914, or early in 1915 to 1938 the herd of cows was built up from a herd of converted beef cows to a good milk herd. During the same period Effie Meeker accumulated upon the ranch a band of some forty to fifty dogs, to which she fed the skimmed milk. Eventually the herd of cows became seriously infected with T. B. and abortion and most of it was sold after which the herd was never again built up. It likewise appears that from 1921 to 1930 and despite the quality of the herd upon the ranch and the probable good income therefrom—based upon general dairying conditions in this section during that period —Effie Meeker was becoming financially involved. In May of 1930 her account for dairy feed with the McNear Co. had reached the sum of $2877.14 and an action to recover this sum was commenced against Effie Meeker and plaintiff herein as 'Copartners doing business under the name and style of Meeker and Wescoatt.' Subsequently, this action was dismissed and settled by Effie Meeker executing to McNear Co. a note secured by chattel mortgage. Effie Meeker refused to permit plaintiff to execute the mortgage or any other paper with her for the reason as stated by her, 'He was not her partner.' The McNear Co., however, took a chattel mortgage independently from Wescoatt 'to cover any possible interest he might have in the herd.' In 1934 the note and chattel mortgages were renewed by Effie Meeker and also by plaintiff separately as before, but thereafter Effie Meeker further secured the constantly growing debt by executing a mortgage upon her real estate as well as a chattel mortgage, and plaintiff thereupon was not requested to execute a chattel mortgage in renewal of the chattel mortgage previously executed by him. At the time of her death Effie Meeker's indebtedness to the McNear Co. had reached the principal sum of about $6,500.

"It appears from the evidence that at one period subsequent to when plaintiff went upon the Effie Meeker ranch, Effie Meeker expressed upon more than one occasion to third parties an intent to 'take care of Wescoatt' by her will; that she and plaintiff may have agreed that the survivor should be the recipient of the other's bounty by a proper provision in the will of each to that effect. Upon the death of Effie Meeker plaintiff and Mrs. Addie Feige, a neighbor, looked through decedent's effects for the purpose of discovering a possible will, but none was found other than an olographic will of plaintiff, dated December 30, 1924, wherein Effie Meeker was designated as plaintiff's sole beneficiary. It further appears, however, that although Effie Meeker may have once entertained the thought of naming plaintiff as her sole heir, or as a beneficiary, she abandoned that idea quite some time before her death for upon several occasions in recent years she expressed her antipathy to wills; that she didn't believe in them; that 'they just break them.' During the last eight to ten years Effiie Meeker was in a straightened financial condition due in part at least to the diversion of a considerable portion of her income to a mining venture in which plaintiff and, perhaps, Effie Meeker herself were interested. Be that as it may, the evidence discloses that in the last eight to ten years of her life the relations of plaintiff and Effie Meeker became definitely strained over financial matters. During this period plaintiff would leave the ranch for the mine for periods estimated at from thirty days to two or three months and would then return to the ranch for short periods and then depart for the mine again.

* * * * * *

"The evidence shows that plaintiff rendered services upon the Meeker property from 1911 or '12 up to 1940. These services were apparently continuous, at least up to the last few years of Effie Meeker's life, and until plaintiff commenced the pursuit of the mining venture mentioned by several witnesses. It clearly appears, however, that the actual relations between plaintiff and Effie Meeker during the later years were such as to wholly overcome the presumption that he was to be compensated therefor upon the death of Effie Meeker. On the contrary, the evidence convinces that during this period Effie Meeker was looking to plaintiff to repay to her advances she claimed to have made to him so that she would be relieved of her apparently pressing financial worry. And according to one witness plaintiff had said he would try and promised to make such repayment 'if he got his mine to pay.' It further appears from the evidence that during at least the past eight years of Effie Meeker's life she and plaintiff were constantly quarreling over financial matters. The testimony concerning these quarrels over money and debts indicates that Effie Meeker was the more active party in them; that she was not only expecting, but demanding that plaintiff do something about the pressing obligations, which demand on her part is wholly unreconcilable with plaintiff's present contention that she was his debtor. It seems clear that from the very nature of the repeated demands of Effie Meeker upon him plaintiff was necessarily put on notice for quite some time before her death that Effie Meeker not only disclaimed any financial obligation toward plaintiff, but on the contrary claimed the right to be recompensed for the advances she had made to him."

[2] Generally speaking, the law applicable to the facts of the instant case is found in Lloyd v. Kleefisch, supra, 48 Cal.App.2d at page 412, 120 P.2d at page 99, which case states:

"In a case closely parallel to the instant one on its facts, the court in Seib v. Mitchell, 10 Cal.App.2d 91, at page 94, 52 P.2d 281, * * * stated: 'An express contract need not necessarily be proved but "it is sufficient if from the facts and circumstances it reasonably can be inferred that compensation was in the view and contemplation of the parties." Mayborne v. Citizens' Trust & Sav. Bank, 46 Cal.App. 178, 188 P. 1034, supra. When services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what they are reasonably worth." Moulin v. Columbet, 22 Cal. 508, 509.' "

See, also, Lundberg v. Katz, 44 Cal.App. 2d 38, 41, 45, 111 P.2d 917; Wax v. Adair, 16 Cal.App.2d 393, 60 P.2d 904; Turell v. Anderson, 16 Cal.App.2d 445, 60 P.2d 906.

[3] The statute of limitations does not apply to a claim such as is here involved for "where there is an express or implied promise to pay on the termination of the services the statute of limitations does not start to run until the termination of the services—in the instant case upon the death of Haskell." Lloyd v. Kleefisch, supra, 48 Cal.App.2d at page 413, 120 P.2d at page 100.

[4] Nor do the provisions of subdivision 1 of section 1624 of the Civil Code, which require an agreement that by its terms is not to be performed within a year from the making thereof to be evidenced by a writing subscribed by the party to be charged, apply "to contracts, either express or implied, for the rendition of services for an indefinite period of time and payment to be made at the termination of the relationship." Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, 188 P. 1034, 1039; Lauritsen v. Goldsmith, 99 Cal.App. 671, 675, 279 P. 168; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562.

There is little or no dispute between appellant and respondent as to the foregoing principles of law, but appellant contends that under the evidence the court was not justified in rendering judgment for the respondent. Appellant argues that the evidence showed that he had rendered continuous services for decedent to the date of her death and that there was a promise implied in law that payment should take place upon the termination of the services. He cites Lloyd v. Kleefisch, supra, and various cases therein cited. All of these cases are cases in which the trial court found in favor of the plaintiff and in which the judgments were affirmed. But in each case it was a question as to whether or not the evidence sustained the judgment.

In Mayborne v. Citizens' Trust & Savings Bank, supra, 46 Cal.App., at page 181, 188 P. at page 1036, the court quoted from Crane v. Derrick, 157 Cal. 667, 109 P. 31, as follows:

"It has been said many times that the question is one that must be determined on the circumstances of the particular case, the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered or the support was furnished."

It also said:

"We are required, of course, to go no further than to say that such conclusion of the trial court is not unreasonable, although, we may believe that a finding the other way would be amply supported."

[5] If appellant had prevailed in the trial court, as did the plaintiffs in the cases cited by him, we would, in accordance with the rule laid down in those cases, be compelled to hold that there was ample evidence in the record to support such a judgment. But in considering the sufficiency of the evidence in this case we must keep in mind the language of our Supreme Court in Juchert v. California Water Service Co., 16 Cal.2d 500, at page 503, 106 P.2d 886, at page 888:

"As is always true on such appeals, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible. It is elementary that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483."

[6] It must be borne in mind that in cases of this character the surrounding facts and circumstances are usually such that different constructions may reasonably be placed upon them and one trier of facts may reasonably draw one inference and another trier of facts may reasonably draw a contrary inference. This is clearly recognized in numerous cases. In the early and frequently cited and frequently approved case of Moulin v. Columbet, 22 Cal. 508, the court said at page 510:

"When work is done by one for the benefit of another, with his knowledge or approbation, the law will imply a promise to pay for it, unless it appear that there was an understanding that no compensation should be given; but where there is such an understanding the law will not imply a promise, and such understanding may be implied from circumstances."

And in Mayborne v. Citizens' T. & S. Bank, supra, the court said 46 Cal.App. at pages 181, 182, 183, 188 P. at page 1036:

"Appellant does not dispute the general rule, as stated in Moulin v. Columbet, 22 Cal. [508], 509, that, when services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a 'presumption of law which arises from the proof of services rendered that the person enjoying the benefit of the same is bound to pay what they are reasonably worth.'

"It is, though, justly contended that this is a mere presumption and 'liable to be rebutted by proof of a special agreement to pay therefor a particular amount or in a particular manner, or by proof that the services were intended to be gratuitous, or even by particular circumstances, from which the law would raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby.' * * * We need not review these various decisions, as we find a sufficient guide for our purpose in the declarations of the Supreme Court in Crane v. Derrick, 157 Cal. 667, 109 P. 31, as follows: 'It has been said many times that the question is one that must be determined on the circumstances of the particular case, the question in each case being whether it can reasonably be inferred that pecuniary compensation was in the view of the parties at the time the services were rendered or the support was furnished. * * * We are required, of course, to go no further than to say that such conclusion of the trial court is not unreasonable, although, we may believe that a finding the other way would be amply supported."

Bearing in mind the legal principles hereinbefore set forth, can we say that the conclusion of the trial court that there was no understanding, express or implied, between appellant and decedent that appellant's services were to be paid for at the termination thereof, finds no support in the record? We do not think so. A reading of the record convinces us that it is a fair inference from the evidence that appellant lived and made his headquarters on decedent's farm and did the necessary work upon the farm, and that in return therefor decedent financed appellant in his mining ventures to the extent of many thousands of dollars over a period of many years. There is nowhere in the record any direct statement by decedent to appellant that appellant was to be compensated for his services nor is there any evidence that appellant ever made any demand upon decedent for compensation; nor is there any evidence of any statement or agreement as to the amount of compensation that appellant was to receive. There was testimony that appellant and decedent had quarreled over money matters in the last few years of her life and that decedent had stated that "all the money went into the mines and that she didn't get a dollar", and that appellant had stated that "if he could get something out of the mines he would straighten out all of the bills."

In Mayborne v. Citizens' T. & S. Bank, supra, 46 Cal.App. at page 182, 188 P. at page 1036, the court said:

"Our own decisions support the doctrine that to authorize compensation in such cases the circumstances must be such as to warrant the inference that it was the expectation of both parties that compensation should be made."

In Seib v. Mitchell, 10 Cal.App.2d 91, at page 94, 52 P.2d 281, at page 282, it is stated:

"An express contract need not necessarily be proved, but 'it is sufficient if from the facts and circumstances it reasonably can be inferred that compensation was in the view and contemplation of the parties.'"

[7] While it may be conceded that the evidence adduced by appellant at the trial might well have persuaded the trial judge to decide in favor of appellant, and that a finding in favor of appellant would have found ample support in the record, yet we are convinced that there is likewise ample support in the record for the trial court's conclusion against appellant. The trial court is the sole judge of the weight and effect of testimony and of the inferences that may reasonably be drawn therefrom. The trial judge who observes the witnesses and hears them testify is in a position to gain impressions from such testimony of such witnesses which are not apparent in a record. And when, as in the instant case, two inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

Appellant makes the further contention that the trial court erred in admitting into evidence "self-serving and hearsay statements of decedent which statements [appellant contends] constitute the entire foundation upon which the Court's decision in favor of defendant is based."

During the examination of Annie J. Rodgers, a witness for appellant, the following questions were asked and answers given:

"Q. Did she mention something about them to you? A. Notes?

"Q. Yes, did she say anything about taking care of Mr. Wescoatt as long as he lived? A. No, she said he had done things for her and if she got her bills paid while she lived she would like to do something for him, but she said he got her so much in debt,—that's all I can tell you."

Upon cross-examination the following occurred:

"Q. Just a moment. You say, Mrs. Rodgers, you do recall that Effie Meeker told you at one time if she got her bills paid she would like to do something for Mr. Wescoatt? A. I told Mr. DeMeo that; she said she expected him to pay her bills that he caused her.

"The Court: And that he got her so much in debt? A. Yes, that she expected him to pay the bills and that he said he would.

"Mr. DeMeo: Pardon me, are you repeating what Miss Meeker said? A. Yes.

"Mr. DeMeo: That's self-serving—that he would pay the bills. * * *

"The Court: And she expected him to pay the bills? A. Yes, and that he promised to pay the bills.

"The Court: She said that? A. Yes, if he could make his mines good.

"Mr. DeMeo: I ask that be stricken as self-serving statement on her part; it is no more admissible than any other person's self-serving statement, and on the further ground it is not my examination. * * *

"The Court: Overruled. It is, in effect, what the witness testified to on direct examination; that's what she said on direct examination.

"Mr. DeMeo: Well, I asked the question with reference to notes and now we are going into an entirely different branch."

Appellant contends that the trial court not only erred in refusing to strike out the testimony of the witness Annie J. Rodgers to the effect that decedent had stated to her that she expected appellant to pay the bills he had caused her and that he had said that he would, but that the trial court made this incompetent testimony the basis of its decision. We believe that what we have heretofore set forth shows that there is sufficient evidence in the record, independent of this particular testimony, to support the conclusion of the trial court, but nevertheless it must be conceded that if the court improperly permitted to remain in the record the testimony sought to be stricken, it is a serious error.

[8] Appellant cites Barcroft v. Livacich, 35 Cal.App.2d 710, at page 718, 96 P.2d 951, at page 956, in which the well-settled rule is stated as follows:

"Declarations of a person, since deceased, not against, but in support of his own interests, and made outside the presence of the party sought to be bound by them, are not admissible in favor of those who claim rights which the declarations would maintain. Steinberger v. Young, 175 Cal. 81, 165 P. 432."

[9] While it is true that, ordinarily, a statement of decedent made outside of the presence of appellant and against his interest, would be inadmissible, we are of the opinion that in view of the testimony of the witness on direct examination, when being interrogated by counsel for appellant, the ruling of the court in this instance was proper. The testimony which counsel sought to strike out upon cross-examination appears to be part of the same conversation to which the witness had testified upon direct examination by appellant's counsel.

Section 1854 of the Code of Civil Procedure reads as follows:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; * * * and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence."

In Hinton v. Welch, 179 Cal. 463, at page 465, 177 P. 282, the court said:

"The plaintiff, while upon the witness stand in her own behalf, but while undergoing cross-examination, was asked this question, 'You received, did you not, Mrs. Hinton, all of the money which you were entitled to from the estate of your father?' The plaintiff answered this question at some length, in the course of which she volunteered the statement that she had written a letter to her brother requesting a statement as to her half interest in the ranch, to which she had received a reply. The defendant produced her said letter and offered it in evidence, and thereupon offered in evidence the decedent's letter in reply. To the admission of this latter letter the plaintiff objected upon the ground that it was inadmissible as a self-serving declaration. We are inclined to the opinion that this objection was not well taken, for while we think it is true that a party may not, under the provisions of section 1854 of the Code of Civil Procedure, offer a letter of an opposing party for the mere purpose of laying the foundation for the admission of an answer to it containing self-serving declarations on the part of the writer of such reply, yet when, as in this case, the plaintiff has volunteered to state in part the subject-matter of a correspondence between the parties, the other party is entitled to have and to present in evidence the whole correspondence to which her testimony thus volunteered relates, upon the same principle, also covered by section 1854 of the Code of Civil Procedure, that when part of a conversation is given in evidence by one party, the whole conversation may be given by the other party, even though it may embrace the latter's self-serving declarations."

In Reeves v. Vallow, 16 Cal.2d 95, at page 99, 104 P.2d 1017, at page 1019, the court said:

"The defendant sought to introduce in evidence the copy of the will originally annexed to the complaint, for the benefit of the inference which it might afford that the $20,000 legacy therein to Mrs. Reeves was intended as a gift rather than as compensation for her services. The copy contained the following statement: 'I have been residing with Clara Reeves and all sums due her are paid except for the current month.' This appeared with a declaration in the will of the decedent's assets and liabilities. The court sustained an objection to its introduction on the ground that the declaration of the decedent therein was self-serving.

"The complaint as originally filed, with the allegations referring to the copy of the will annexed thereto as an exhibit, was verified by the plaintiff. By striking out the allegations of the complaint referring to the will and the copy annexed thereto, and by introducing evidence of the execution of the will and its later destruction and testimony of a portion of its contents, the plaintiff sought to present to the jury only the inferences therefrom which were favorable to her. But inasmuch as the plaintiff's witnesses had testified to a portion of the contents of the will, the defendant was entitled to introduce the entire copy of the will for the purpose of rebutting the inferences sought to be attributed to it by the plaintiff. The plaintiff was not entitled to rely on a portion of the will as proof of the decedent's intent in her favor, if a different intent was discoverable when the entire will was considered. That the statements relied on by the defendant might have been self-serving declarations of the decedent was immaterial."

In Sly v. Abbott, 89 Cal.App. 209, at page 218, 264 P. 507, at page 511, it was said:

"* * * the evidence was admissible upon the issue of whether plaintiff was ready, willing, and able to perform his obligations, and was also admissible upon the theory, as expressed by the trial court, that, plaintiff himself having first offered evidence of this conference, the defendants were at liberty to offer evidence in contradiction of that offered, and, in fact, to show the entire conversation which occurred at one time and one place. Code Civ.Proc., § 1854."

[10, 11] We are, therefore, of the opinion that the trial court did not err in refusing to strike out the testimony hereinbefore set forth. Appellant sought to elicit from the witness what Effie Meeker had told her as to what she (decedent) had intended to do for appellant. In answer to a question by appellant's counsel on direct examination the witness related what was no doubt part of a conversation. The respondent was undoubtedly entitled to ask for the remainder of the conversation and to go fully into what was said. The fact that some of these statements may have been favorable to respondent and self-serving did not, under the authorities hereinbefore cited, render them inadmissible or immaterial. If a party chooses to prove oral declarations against interest of a deceased person made to a witness called by him, he cannot prevent the opposing party from bringing out all that was said by decedent in the conversations in which the statements were made, even though this may result in getting into the record statements that might otherwise be excluded as self-serving.

[12, 13] Appellant's final contention is that the trial court "erred in failing to admit and consider evidence as to the justice and equity of plaintiff's claim." The record shows that appellant offered testimony to the effect that decedent was not on friendly terms with her relatives and that her relatives had refused to assist her. This testimony was objected to by respondent as being immaterial. The court permitted it to go into the record subject to respondent's motion to strike out. So far as the record shows, such a motion was neither made nor ruled upon, so we must consider that the testimony was before the court and considered by it. However, even if the court had excluded or failed to consider the evidence in question, it is difficult to see how such ruling could be considered prejudicial error because the relations of decedent with her relatives could have little bearing upon the question of whether or not there was an agreement, express or implied, between appellant and decedent that appellant should be compensated for his work on the farm of decedent.

In view of the foregoing our conclusion is that the record supports the judgment of the trial court, that no prejudicial error has been committed and that the judgment should be and hereby is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

63 Cal.App.2d 418

PEOPLE v. ONE 1941 CADILLAC CLUB COUPE et al.

Civ. 14133.

District Court of Appeal, Second District, Division 1, California.

March 23, 1944.

As Modified on Denial of Rehearing April 21, 1944.

Hearing Denied May 19, 1944.

1. Forfeiture 🔑5

The statute relating to forfeiture of vehicle used to transport narcotics being highly penal, any attempt to enforce forfeiture imposes duty on court to scan record with meticulous care to end that no injustice results. St.1939, pp. 767–769, and St.1940, 1st Ex.Sess., p. 23 et seq., §§ 11610–11629.

2. Forfeiture 🔑5

All doubts must be resolved in favor of innocent claimant of vehicle sought to be forfeited for conveyance of narcotics, and every intendment and presumption is against one seeking forfeiture. St.1939, pp. 767–769, and St.1940, 1st Ex.Sess., p. 23 et seq., §§ 11610–11629.

3. Forfeiture 🔑4, 5

To "transport" within statute providing for forfeiture of vehicle used to convey narcotics means to carry or convey from one place to another, and to authorize forfeiture it must clearly appear that the vehicle was being used for such a purpose. St.1939, pp. 767–769, and St.1940, 1st Ex.Sess., p. 23 et seq., §§ 11610–11629.

See Words and Phrases, Permanent Edition, for all other definitions of "Transport".

4. Forfeiture 🔑5

Incidental discovery of a single marihuana cigarette in a vehicle is not sufficient to establish fact that vehicle was being used to transport narcotics so as to justify forfeiture thereof by the state. St. 1939, pp. 767–769, and St.1940, 1st Ex.Sess., p. 23 et seq., §§ 11610–11629.

5. Forfeiture 🔑5

If attempted forfeiture of vehicle is based on statutory provision relating to vehicle in which a narcotic is unlawfully kept, deposited or concealed, it must clearly appear that the legal or equitable owner claiming vehicle was particeps criminis. St.1940, 1st Ex.Sess., p. 23, § 11610.

6. Appeal and error 🔑989

When attack is made upon judgment on ground that it was unsupported by evidence, power of reviewing court is limited to determination of whether there is substantial evidence, contradicted or uncontradicted, which will sustain judgment rendered.

7. Forfeiture 🔑5

As bearing on finance company's proof that conditional sales contract was bona fide and that its interest was created after reasonable investigation of purchaser of automobile sought to be forfeited for transporting narcotics, landlord's reply to finance company's investigator to effect that landlord knew nothing against purchaser amounted to evidence of good reputation. St.1939, pp. 767–769, and St.1940, 1st Ex.Sess., p. 23 et seq., §§ 11610–11629.

8. Forfeiture 🔑5

The statute relating to forfeiture of vehicle used for transporting narcotics only requires of claimant seeking to prove that his interest was created after reasonable investigation as to purchaser that information result from an investigation which would satisfy reasonably prudent person of purchaser's good character. St. 1939, p. 768, § 11620.

9. Appeal and error 🔑1010(1)

In proceeding to forfeit automobile for transportation of narcotics, District Court of Appeal could not disturb trial court's findings where record disclosed substantial evidentiary support therefor, simply because more than one inference might reasonably be drawn from evidence. St. 1939, p. 768 § 11620.

10. Forfeiture 🔑5

In proceeding by state for forfeiture of automobile allegedly used to transport narcotics, trial court's finding that rights, title, and interest of finance company, holding title under conditional sales contract, was created after reasonable investigation of moral responsibility, character, and reputation of purchaser, was supported by the evidence. St.1939, p. 768, § 11620.

YORK, P. J., dissenting.

* * *

Appeal from Superior Court, Los Angeles County; B. J. Scheinman, Judge.

Proceedings by the People of the State of California against One 1941 Cadillac Club Coupe to forfeit the defendant automobile in which Gilbert B. Gonzales was notified as the registered owner and Pacific Finance Corporation of California was notified as the legal owner. From a judgment which forfeited to the state the interest of the registered owner and ordered the automobile sold and from the proceeds of sale directed that certain sum be paid to a legal owner, the People appeal.

Affirmed.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for appellant.

Williamson, Hoge & Judson, Gene G. Curry, and Edward M. Patterson, all of Los Angeles, for corporate respondent.

WHITE, Justice.

Plaintiff commenced proceedings to forfeit the defendant automobile on the ground that it was used to unlawfully transport narcotics (sections 11610–11629, Health & Safety Code, St.1939, pp. 767–769, St.1940, 1st Ex.Sess., p. 23 et seq., formerly known as the State Narcotic Act). Pursuant to the code provisions, the following were notified of the proceeding: Gilbert B. Gonzales, the registered owner, and Pacific Finance Corporation of California, the legal owner. Gilbert B. Gonzales, the registered owner, filed an answer in which he denied that the vehicle was used unlawfully to conceal, convey, carry or transport narcotics. By its answer the legal owner, Pacific Finance Corporation of Californa, set up its interest under a conditional sales contract upon which there was a balance due in the sum of $780, and further alleging that its interest under said conditional sales contract was created after reasonable investigation by such corporation of the moral responsibility, character and reputation of the registered owner.

With reference to the seizure of said vehicle, the record discloses that on August 23, 1942, while the automobile was, with the consent of the registered owner, under the sole control and in the temporary possession of one Andrew Pekara, certain narcotic enforcement officers made a search of the vehicle and in a depression in the seat thereof, not visible to one entering the driver's compartment, found a single marihuana cigarette. Hence, the attempted forfeiture not only of the registered owner's interest but of the legal owner's as well.

The case was tried under the provisions of the aforesaid Health & Safety Code. The portion of the statute involved is found in section 11620 of such code and reads as follows:

"The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

At the trial the State stipulated (1) that the conditional sales contract under which the Pacific Finance Corporation of California claimed an interest in said automobile was bona fide; (2) that said corporation's right, title and interest under said contract was created without any knowledge that the vehicle was being, or to be, used for the purpose charged. The issue here presented is therefore narrowed down to the question of whether the right, title or interest of said finance company was created after a reasonable investigation by it of the moral responsibility, character and reputation of the purchaser. The trial court found that "said vehicle was used unlawfully to transport narcotics, to-wit, marihuana, and was seized by the Division of Narcotic Enforcement of the State of California on or about August 23, 1942, at the time of the arrest of Andrew Pekara, who had the specific consent of the registered owner (Gilbert B. Gonzales) to drive said vehicle;" also, "that the conditional sales contract, right, title and interest of the Pacific Finance Corporation of California arose in good faith and for a valuable consideration, and was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser, and without any knowledge that said vehicle was being or was to be used for any unlawful purpose; * * * that the amount due to Pacific Finance Corporation of California upon its conditional sales contract is the sum of $780.00 * * * (which) is less than the value of said vehicle."

This appeal is by the State from the judgment rendered which forfeited to the State of California the interest of the registered owner, Gilbert B. Gonzales, in and to said vehicle; ordered the automobile sold at public auction and from the proceeds of the sale directed that the sum of $780 with interest at 10% from December 8, 1942, be paid to respondent corporation.

As grounds for reversal appellant urges "that the finding of the court that the right, title and interest of the Pacific Finance Corporation 'was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser' is not supported by the evidence."

The claim that the evidence is insufficient to sustain the finding that a reasonable investigation of the moral character of the owner was made, is totally without merit.

[1, 2] The requirements of the foregoing provision are highly penal and impose a burden of a most extraordinary nature on a lawful and useful business transaction, the like of which is unknown elsewhere in the law. Any attempt, therefore, to enforce a forfeiture under such circumstances, imposes a corresponding duty on the courts to scan the record with meticulous care, to the end that no injustice may result from such action. 25 C.J. p. 1172; 37 C.J.S., Forfeitures, § 5. And in that connection, all doubts must necessarily be resolved in favor of the innocent claimant. No rule is more firmly grounded in our law than the one which declares that neither courts of law nor of equity look with favor upon statutes which impose penalties or exact forfeitures. Therefore, every intendment and presumption is against one who seeks to enforce the penalty or forfeiture created by such a statute. Savings & Loan Society v. McKoon, 120 Cal. 177, 179, 52 P. 305. Section 11610 of the Health and Safety Code, St.1940, 1st Ex.Sess., p. 23, relating to forfeitures of vehicles for violations of the State Narcotic Law provides as follows: "A vehicle used to unlawfully transport any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited to the State."

[3-6] To transport means to carry or convey from one place to another. And it must clearly appear that the vehicle was being used for such a purpose. The incidental discovery of a single marihuana cigarette in a vehicle is not sufficient to establish the fact that the vehicle was being used *to transport* narcotics. The forfeiture provisions of the Health & Safety Code are designed to aid in the suppression of the traffic in narcotics. There is no evidence in the record tending to prove, or that even suggests, that the automobile in question was being used for such a purpose. If the attempted forfeiture is based on the balance of the aforesaid provision, viz.: "or in which any narcotic is unlawfully kept, deposited or concealed, or in which any narcotic is unlawfully possessed by an occupant thereof", then it must clearly appear that either the legal or equitable owner of the vehicle, as the case may be, who is seeking to protect his interest therein, was an aider and abettor in such unlawful conduct, or in other words, particeps criminis. Furthermore, the statement that when an attack is made upon a judgment on the ground that it is unsupported by the evidence, the power of reviewing courts is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will sustain the judgment rendered, is supported by legion of authority. The record herein shows that on or about June 8, 1942, an automobile dealer named Lee Evans sold the vehicle here in question to respondent Gilbert B. Gonzales on a conditional sales contract. On June 9, 1942, in the usual and ordinary course of business, respondent Pacific Finance Corporation purchased the contract from Evans. It was stipulated that the vehicle had an approximate value of $1200 at the time of its seizure and that there was then owing to the finance company on such contract a balance of $780. When respondent Gonzales purchased the automobile he filled in and signed the usual purchaser's statement which bears date of June 10, 1942. In such statement he declared that he was married, had one dependent, gave his address and the name of his landlord. As a trade reference he gave the name of an automobile dealer from whom he had previously purchased a motor vehicle. He furnished the names of three individuals as personal references. He stated that he was employed by the California Shipbuilding Corporation for whom he had worked over a period of four months as a sheet metal worker; that his income was $200 per month and that prior to his shipyard employment he had worked as a bartender for John Blandino whose name was also given as a personal reference.

[7] The credit investigator for respondent finance corporation whose duty it was to make an investigation in connection with conditional sales contracts testified that she contacted the California Shipbuilding Corporation by telephone but was advised that "they verified by mail" and required the badge number of the employee when inquiry was made. This information was not available to her. She testified that she telephoned to the purchaser's landlord and "asked him how long Mr. Gonzales had lived there, and he said for a year, and I asked him how he paid his rent; it was paid promptly, and asked him if he knew anything against him and he said

everything was all right, nothing against him." The witness also made inquiry of the landlord as to where Mr. Gonzales was employed and was informed that he worked at the California Shipbuilding Corporation. At the trial it was definitely established by the testimony of two employees of the shipbuilding corporation that Gonzales was employed by said company at the time here in question. Thus we have a situation wherein the requirements of the law as to both the financial status and the moral responsibility of the purchaser were met. The investigation embraced not only financial consideration in connection with the purchaser, but also included inquiry as to how such purchaser was regarded by his landlord and whether his moral conduct in the community in which he resided was good or bad. It needs no citation of authority for the statement that the landlord's reply to the effect that he knew nothing against Mr. Gonzales amounted to evidence of good reputation.

Appellant places strong reliance on the case of People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 416, 110 P.2d 1013, 1016. In that case the court, in holding that the question of the scope and reasonableness of the required investigation is primarily one of fact but should meet certain legal requirements, stated: "It would seem that a bona fide investigation should, among other essentials, reveal the home address of the prospect, his employer, either past or present, the source of his income, his family or social connections, and as in the case here of a stranger, some inquiry as to his prior location and his standing in that community." The inquiry in the case at bar meets the test just stated and upon which appellant so strongly relies.

[8] We are impressed that in the consideration of cases arising out of the statute here under consideration the interpretation to be given the investigation required therein to be made must turn on the circumstances of the individual case, and that the decisions passing upon the facts deemed sufficient or insufficient to sustain a judgment can be of little assistance other than to announce the definition of what constitutes a "reasonable investigation of the moral responsibility, character and reputation" of the purchaser. For instance, it has been held that an investigation sufficiently complies with the law when but a single reference was interviewed. People v. One 1939 Buick Coupe, 56 Cal.App.2d 163, 132 P.2d 308; People v. One 1940 Chrysler Convertible Coupe, 48 Cal.App.2d 546, 120 P.2d 117; People v. One Plymouth Sedan, 21 Cal.App.2d 715, 69 P.2d 1011.

Neither a maximum nor a minimum of investigation, required to be made by a lender, is set forth in the statute. Nor is the extent to which the investigation as to the moral responsibility, character and reputation of a purchaser shall go, prescribed by the law. Under the facts disclosed in the instant proceeding, we are persuaded that it must be held that the statements made to the finance corporation by the purchaser's landlord as to his financial responsibility, his reputation in the community, and as to his employment, corroborating as they did the statements made by the purchaser in his purchaser's statement, were such as to satisfy a reasonably prudent person of the purchaser's good moral character. That is all the law requires. It should also be borne in mind that the vehicle was not seized because of any illegal or unlawful conduct on the part of the purchaser in connection therewith, and the record is barren of any evidence connecting Mr. Gonzales, the purchaser, with the alleged illicit transportation of narcotics other than the fact that he innocently permitted Pekara to borrow the automobile.

[9, 10] The question of whether the investigation made by respondent finance corporation as to the moral responsibility of the purchaser was a reasonable one, being essentially one of fact, simply because more than one inference might reasonably be drawn from the evidence, does not authorize us to disturb the finding thereon made by the duly constituted trier of facts "if the record discloses any substantial evidentiary support therefor. People v. One 1939 Buick Coupe, 56 Cal.App.2d 163, 167, 132 P.2d 308. In the case with which we are here concerned the evidence relative to the inquiry made satisfies the requirement of the act that a reasonable investigation be made and fully supports the trial court's finding upon the subject.

The cases of People v. One 1937 Packard 6 Touring Sedan, 50 Cal.App.2d 761, 123 P.2d 900; People v. One Packard 6 Touring Sedan, 26 Cal.App.2d 150, 79 P.2d 130; People v. One 1939 Buick 8 Coupe, 43 Cal. App.2d 411, 110 P.2d 1013; People v. One Harley-Davidson Motorcycle, 5 Cal.2d 188, 53 P.2d 970; People v. One 1938 Buick Sedan, 39 Cal.App.2d 42, 102 P.2d 447, relied upon by appellant, are distinguishable from the case at bar in the factual situations presented, while the investigation made by respondent finance corporation herein discloses the obtaining of as much or more information concerning the purchaser of the vehicle, and the making of an investigation equally as reasonable as was held sufficient in the following cases: People v. One Plymouth Sedan, 21 Cal. App.2d 715, 69 P.2d 1011; People v. One Ford V8 Coach, 21 Cal.App.2d 445, 69 P.2d 473; People v. One 1939 Plymouth 6 Coupe, 41 Cal.App.2d 559, 107 P.2d 266; People v. One 1933 Buick Sedan, 43 Cal. App.2d 482, 111 P.2d 378; People v. One 1940 Chrysler Convertible Coupe, 48 Cal. App.2d 546, 120 P.2d 117; People v. One 1939 Buick Coupe, 56 Cal.App.2d 163, 132 P.2d 308.

For the reasons herein stated, the judgment is affirmed.

DORAN, J., concurs.

YORK, Presiding Justice (dissenting).

I dissent. The so-called investigation, in my opinion, did not constitute any investigation whatsoever. At least, the evidence as shown by the record did not in any wise tend to prove the moral responsibility, character or reputation of the purchaser.

Rehearing denied; YORK, P. J., dissenting.

63 Cal.App.2d 398

FITZSIMMONS v. RAICHE.

Civ. 14131.

District Court of Appeal, Second District, Division 3, California.

March 22, 1944.

1. Deeds 🔑54

Where brother executed deed of his home to his sister, but never delivered to sister deed which he personally filed with registrar of titles, and sister signed and delivered deed covering same home to brother, and such deed was not recorded and entire transaction was only made to protect brother from his creditors, title to home did not pass to sister after brother's death, though it was intended that title should pass to sister if brother should die before sister.

2. Records 🔑9(13¼)

The fact that brother placed realty under Torrens title did not pass title to realty to sister, where brother executed deed to sister but did not deliver it to sister and remained in possession of realty.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Laura Fitzsimmons against E. W. Raiche, as administrator of the estate of Albert W. Raiche, also known as A. W. Raiche, deceased, to quiet title to land, wherein defendant filed a cross-complaint. From a judgment for defendant, plaintiff appeals.

Affirmed.

Catlin & Catlin and William E. Woodroof, all of Los Angeles, for appellant.

Alvan M. Palmer and Harvey A. Harkness, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The plaintiff in this quiet title action finds herself in a dilemma. The title to the real property in question, if we look only to the deeds which were made and delivered, was in her brother at the time of his death. That is also where it was if the intent with which the deeds were made and delivered is given effect. In either event the judgment in favor of the administrator of her brother's estate, from which the plaintiff has appealed, should be affirmed.

There is some room in the evidence for a conflict in the inferences which might have been drawn concerning the intent with which plaintiff's brother acted, but the trial court had ample grounds for the conclusion, which it doubtless reached, that these were the penultimate facts. Plaintiff's brother owned his home. He became somewhat fearful that his creditors might look with longing eyes at it, so he proposed to his sister, and they carried out, the following program. He made a deed of his home to her, personally filing it with the registrar of titles, without the deed ever being in her possession, and she signed and forwarded to him a deed covering the property which, unrecorded, he placed in his safe deposit box where it was found upon his death. Neither the plaintiff nor her brother believed that he did not at all times have full control over the property after these deeds had passed, nor did they intend that it should be otherwise.

They did intend that if he died before she did, and before he had disposed of the property, that it should become hers. A program such as that adopted by plaintiff and her brother operates to pass title as a practical matter if the facts are not discovered, so that the title as disclosed by the face of the record remains unquestioned. The true facts came to light in the present case, however, partly through the commendable honesty of the plaintiff, appearing as a witness, and it is clear that at his death her brother, and not the plaintiff, was the owner of the property to which the plaintiff claimed title, no delivery of any deed having been made to her, and no other circumstance existing which operated to transfer the title to her.

[1, 2] The elementary principles of law which uphold the trial court's conclusion that, at the time of his death, plaintiff's brother and not the plaintiff held title to the property (Miller v. Jansen, 1943, 21 Cal.2d 473, 132 P.2d 801; Blackledge v. McIntosh, 1927, 85 Cal.App. 475, 259 P. 770; Hall v. Ferguson, 1935, 8 Cal.App.2d 444, 47 P.2d 1073; Rothney v. Rothney, 1940, 41 Cal.App.2d 566, 107 P.2d 294), are not rendered inapplicable by the fact that the property had been placed under Torrens Title. Warden v. Wyandotte Savings Bank, 1941, 47 Cal.App.2d 352, 356, 117 P.2d 910, and cases cited.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

PEOPLE v. McCOY.*

Cr. 3759.

District Court of Appeal, Second District, Division 1, California.

March 17, 1944.

Hearing Granted April 13, 1944.

Rehearing Denied March 27, 1944.

1. Indictment and Information 🔑186

The statute authorizing conviction of an offense necessarily included in offense charged is intended to expedite administration of justice in the interest of economy and is concerned only with procedure and not with the rights of accused. Pen.Code, § 1159.

2. Indictment and Information 🔑185

The statute authorizing conviction of an offense necessarily included in offense charged gives jury power in certain cases to find accused guilty of a minor offense when evidence as a matter of law is insufficient to support conviction of a major offense, but does not authorize jury to choose at will from a series of included relatively minor offenses. Pen.Code, § 1159.

3. Criminal law 🔑734

Whether the evidence presents a proper case for jury's exercise of power under statute to convict accused of a lesser offense necessarily included in offense charged is a question of law. Pen.Code, § 1159.

4. Criminal law 🔑770(1), 1172(1)

Where evidence is such that jury may be authorized to exercise its power under statute to convict accused of lesser offense necessarily included in offense charged, jury should be instructed accordingly, but failure to give such instruction is not a matter about which accused may complain. Pen.Code, § 1159.

5. Criminal law 🔑1172(1)

Prejudicial error may not be predicated on failure to give instruction allowing conviction of a lesser offense necessarily included in offense charged. Pen.Code, § 1159.

6. Criminal law 🔑1172(1)

One convicted of assault with a deadly weapon could not complain of failure to instruct as to simple assault pursuant to statute authorizing conviction of lesser offense necessarily included in offense charged. Pen.Code, § 1159.

7. Criminal law 🔑27

Assault is a "misdemeanor", but when assault is accompanied by use of a deadly weapon or instrument or by any means of force likely to produce great bodily injury, such assault by reason of a different punishment is a "felony". Pen.Code, §§ 240, 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony" and "Misdemeanor".

8. Assault and battery 🔑95

Whether weapon used in an assault is "deadly weapon" within statute providing punishment for assault with a deadly weapon primarily is a mixed question of law and fact which in certain cases, under proper instructions, is a question for jury. Pen.Code, § 245.

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* Subsequent opinion 153 P.2d 315.

9. Assault and battery 🔑56

In determining whether weapon used in an assault is a deadly weapon within statute providing punishment for assault with a deadly weapon, the character of weapon, manner of its use, and location and extent of any injury should be taken into account. Pen.Code, § 245.

10. Assault and battery 🔑51

There must be some semblance, although slight, of a physical attempt in order to constitute an "assault". Pen.Code, § 240.

See Words and Phrases, Permanent Edition, for all other definitions of "Assault".

11. Assault and battery 🔑51

Words used by one exhibiting a weapon or instrument, though they may reveal intent and therefore be important in determining whether act is lawful or unlawful, are not part of a physical attempt such as is necessary to constitute an "assault". Pen.Code, §§ 240, 245.

12. Assault and battery 🔑56

Firearms as distinguished from other weapons or instruments, generally, and as a matter of law, are regarded as intrinsically deadly. Pen.Code, § 245.

13. Assault and battery 🔑48, 56

"Assault" involves the intent to strike and ability and an attempt to do so, and to constitute "assault with a deadly weapon" there must have been an attempt to strike with or use the deadly weapon. Pen.Code, §§ 240, 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Assault With a Deadly Weapon".

14. Assault and battery 🔑92

Evidence showing affirmatively that accused made no attempt to strike victim with knife which he exhibited and threatened to use if she was not quiet was insufficient to sustain conviction of assault with a deadly weapon. Pen.Code, § 245.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Samuel McCoy was convicted of assault with a deadly weapon, and from the judgment and an order denying his motion for a new trial, he appeals.

Judgment and order reversed and cause remanded for a new trial.

Albert G. Bergman, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged by information with assault to commit rape in count I and in count II with assault with a deadly weapon. The jury returned a verdict of guilty as to count II and not guilty as to count I. Defendant appeals from the judgment and from the order denying a motion for a new trial.

The alleged offense occurred about 11:45 P.M. The victim, on direct examination, described the assault as follows:

"* * * when I started out I was walking down the street alone, and then I noticed suddenly someone came toward me walking on the same sidewalk as I was, only I was walking south and this man was walking north. * * * I just kept on walking anyway, but when this man came abreast of me, instead of going on his way he came towards me, and he didn't say anything, but he just held a knife towards me, and I backed away, but he still came towards me and knocked me down on the sidewalk.

"Q. What did he knock you down with? A. Just the weight of his body by walking into me, and when I was down on the sidewalk he was over, he was standing over me with the knife held suspended above my face; I started to scream and he put his hand over my mouth and he said: 'Don't make any noise or I will use this knife.'

"Q. He said what? A. I don't remember the exact words, but it was something like 'Be quiet or I will use this knife.'

"Q. Go ahead. A. And then I worked my way free enough and I screamed again and I called for help and I didn't hear anyone coming, so I worked myself free again, and at this time he was more or less standing a bit to the right of me while I was lying down, and while he was standing, I drew my foot up and I kicked him, I kicked him in the groin, and he just straightened up for a minute and then he ran away, * * *".

And on cross-examination as follows:

"Q. All right. Now, Miss Hoffman, when this man came towards you you testified that he bumped into you, is that correct? A. He came over toward me and he rather walked into me so that he pushed me down on the sidewalk.

"Q. Well, now, when the—call it the collision, if you will, when the contact took place between you and this man, did he use his hands to push you down, did he use his body or any part of his body in so doing? A. He used his body.

"Q. You remember that definitely? A. No, as he first came toward me I backed away and he continued to come toward me, and the next thing I knew I was down on the ground and he was over me, and it seems that he must have used his body to push me down—all I know, I didn't fall down all by myself. * * *

"Q. By Mr. Bergman: Now, Miss Hoffman, the fact of the matter is this, is it not: that this man, whoever he was, never, at any time, touched any part of your body, isn't that true? A. No, it is not true, because I am positive he touched my mouth, and I also had some scratches on my hands.

"Q. All right. Now, we will take your statement that he touched your mouth. Did he touch any other part of your body? A. Not so that his hand lingered or stayed there, but at some time or another in the struggle we were in contact with each other.

"Q. Isn't it a fact, Miss Hoffman, that this man remained standing at all times during the period of time that you were on the sidewalk? A. Yes, but he was bent over me.

"Q. And he never at any time placed any portion of his body near your body, at any time that you were on the sidewalk, isn't that true? A. That is true.

"Q. And while he was standing there—that is, we will take this transaction and try to reconstruct it accurately—this man bumped into you and knocked you down, and according to your statement he stood there and held this knife, isn't that true? A. That is true.

"Q. And while you were on the ground you kicked him and he ran away? A. That is true.

"Q. And on your direct examination you said it was a matter of some seconds, isn't that true? A. It was either seconds or a few minutes. All I know is time went very fast."

Defendant assigns as error the refusal of the trial court to give certain requested instructions and disputes the sufficiency of the evidence to support the verdict.

With regard to the subject of instructions, it is appellant's contention that the court's refusal to instruct the jury pursuant to the provisions of section 1159 of the Penal Code was error. It is argued by appellant that, "It is also axiomatic that the jury is the sole judge of all questions of fact; that the jury in arriving at a verdict in this case had the unquestioned right to either convict or acquit the defendant of the crime of assault with a deadly weapon, or if the jury was convinced beyond a reasonable doubt that the defendant had made an assault upon the complaining witness, but were not convinced beyond a reasonable doubt that a deadly weapon had been used by the defendant in the perpetration of the crime, they nevertheless had the right to convict the defendant of the crime of simple assault. * * * The trial judge in refusing to give the foregoing instruction to the jury, in effect, legally and in actuality, *took away from the jury, and as such judge, decided a question of fact,* i. e., that if any crime was committed at all, it was the crime of assault with a deadly weapon, or nothing at all." (Emphasis included.)

[1, 2] Section 1159 of the Penal Code is as follows: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." It is at once evident that this provision of the law is concerned fundamentally *with the power of the jury* in criminal cases where the major offense charged includes elements that separately are defined as offenses elsewhere in the law. It is concerned only with procedure and not with the rights of the defendant. Obviously, its purpose is to expedite and facilitate the administration of justice in the interest of economy. It confers power on the jury and indirectly imposes a duty on the court as a result of which the jury in certain cases may find a defendant guilty of a minor offense when the evidence, as a matter of law, is insufficient to support a verdict of guilty of the major offense. In no sense is this provision designed to afford the jury the power to pick and choose at will from a series of included relatively minor offenses.

[3, 4] The question as to whether the evidence presents a proper case for the exercise of such power by the jury is one of

law. Manifestly, in doubtful cases the jury is, or should be instructed accordingly, but the failure of the court to perform its duty in this regard, whether as a result of error of judgment or for any other reason, is not a matter about which the defendant may be heard to complain. Nor does the language of section 1159 of the Penal Code purport to afford the defendant in a criminal action a method and means of escape from the just consequences of a criminal act by affording an opportunity for the conviction of a minor offense when the evidence, as a matter of law, clearly supports a judgment of conviction of the offense charged.

Nor may a defendant in a criminal action be heard to advocate the *rights* of the jury in such circumstances, nor indeed, in any circumstances. The law vests juries with certain powers and imposes certain duties, but a jury, *as such,* has no rights. To refer to such powers and duties as *rights* is a confusion of terms; and it is by such means that errors frequently have their beginning, and by later reference are perpetuated. For example, in People v. De La Roi, 23 Cal. 2d 692, 146 P.2d 225, 229, appears the following:

"*It Was Error to Instruct the Jury Contrary to the Provisions of Section 1138 of the Penal Code, but It Appears that No Prejudice Therefrom Was Suffered by Defendant.* Defendant's fourth contention—the only one which has semblance of merit—is based on the last paragraph of the charge of the court. In closing his instructions to the jury the trial judge stated, 'I wish to say that from this time on, you will receive no visitors from any source whatever; *neither will you send out any communications nor will any be sent to your room. You have now all that is to be said in this case, by the respective parties and by the Court.* The case now remains with you.' (Italics supplied.) Section 1138 of the Penal Code provides that 'After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called.'

"Obviously it was improper to admonish the jury, 'neither will you send out any communications. * * * You have now all that is to be said in this case, by the respective parties and by the Court.' The jury had the right to send out a communication to the court at any time it saw fit and it had the right to have testimony read or further instructions given. But the fact that it had these rights does not show that it had any occasion, in this case, to use them; nor, even if we assume that it may have wished to exercise such rights and felt precluded therefrom, does prejudice to the defendant appear possible." (Italics included.)

In the instruction referred to and considered in the above mentioned case, there is nothing that conflicts with section 1138 of the Penal Code. Said section imposes a certain *duty* on the jury when the circumstances, therein referred to, arise. And only two incidents are mentioned. Neither directly nor by inference did the language of section 1138 give the jury the "*right* to send out a communication to the court at any time it saw fit". Indeed the provisions of section 1138 of the Penal Code clearly are designed to prevent such practices. In the circumstances mentioned, the jury "must require the officer to conduct them into court." There can be no confusion between such an unqualified mandate and what is recognized under the law as a *right.* And the obvious purpose to prevent secret communications to the court is but a part of the general scheme of procedure that guarantees a fair trial in open court.

With regard to the effect of and the appropriate application of section 1159, the decisions are not in harmony. In People v. McNutt, 93 Cal. 658, 29 P. 243, defendant was charged with assault with a deadly weapon with intent to commit murder and adjudged guilty of assault with a deadly weapon. Failure of the court to instruct the jury that, "under the information they could convict him of a simple assault", was assigned as error. The court held that, "The facts disclosed by the record would seem to justify a refusal by the court to give an instruction as to simple assault, even if it had been requested by the defendant. People v. Madden, 76 Cal. 521, 18 P. 402; People v. Scott, [91] Cal. [563], 27 P. [930], 931. These decisions of the court are not in conflict with section 1159 of the Penal Code; for that section contemplates the conviction of a defendant for the lesser offense, when the evidence is insufficient to justify a conviction for the greater offense charged." 93 Cal. at page 659, 29 P. at page 243. And in People v. Albori, 97 Cal.App. 537, 275 P. 1017, the court declared, "There are numerous authorities to the effect that, where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the offense charged, and not of any included offense, that it is proper to refuse to instruct the jury that they may convict of an included crime", (97 Cal.App. at page 540, 275 P. at page 1019), citing authorities.

But a tendency to the contrary appears in the following cases. In People v. Demasters, 105 Cal. 669, 39 P. 35, the court held that an instruction authorized by section 1159 of the Penal Code should have been given, although the judgment was reversed on other grounds. In People v. Mock Ming Fat, 82 Cal.App. 618, 256 P. 270, in an action where defendant was found guilty of assault with intent to commit murder, the court, with regard to section 1159 of the Penal Code, declared that, "Under such circumstances the jury had no opportunity to bring in a verdict of assault with a deadly weapon, as it might have done had the case been submitted under proper instructions. People v. Maciel, 71 Cal.App. 213, 234 P. 877." 82 Cal.App. at page 621, 256 P. at page 271. In People v. Foss, 85 Cal.App. 269, 259 P. 123, defendant was convicted of robbery. The court held that the failure to instruct on simple assault was prejudicial error, asserting that, "In view of the lack of evidence justifying the verdict of robbery, we must hold that this error was prejudicial and resulted in a miscarriage of justice." 85 Cal.App. at page 272, 259 P. at page 124. And in People v. Cicerelli, 123 Cal. App. 48, 10 P.2d 792, defendant was convicted of the crime of assault to commit rape. With regard to the provision of section 1159 of the Penal Code, appears the following (123 Cal.App. at page 49, 10 P. 2d at page 792):

"However, the evidence was such that the jury might well have found the appellant guilty of simple assault, and he requested the trial court to instruct the jury to that effect. The proposed instruction was refused, and this is assigned as error. The law applicable to the point is found in section 1159 [of the] Penal Code; People v. Demasters, 105 Cal. 669, 673, 39 P. 35; People v. Mock Ming Fat, 82 Cal.App. 618, 620, 256 P. 270; People v. Foss, 85 Cal.App. 269, 272, 259 P. 123.

"The state's answer that the proposed instruction was not proper because appellant could have been convicted of the assault charged and no other is not supported by the evidence. This disclosed that the parties were engaged in a brawl induced by the use of too much liquor. The jury could have found appellant guilty of simple assault because of the admitted striking of the girl, and, if it had accepted appellant's testimony that he had no intention of having sexual intercourse, a verdict of simple assault would have been the proper verdict to return."

Finally, as another example of the decisions on the subject, in People v. Washburn, 54 Cal.App. 124, 201 P. 335, defendant was found guilty of assault when, as the court pointed out, the evidence clearly demonstrated the offense of assault with a deadly weapon. Appellant complained in this case because the instruction on simple assault was given when, it was contended, the evidence established assault with a deadly weapon or nothing. However, the judgment was affirmed for the reasons and on the authorities therein given.

[5, 6] Logical reasoning would appear to support an interpretation of section 1159 of the Penal Code to the effect that an alleged prejudicial error may not be predicated on the failure of the court to give an instruction allowing the conviction of a minor offense necessarily included in the offense charged. Either a verdict, as a matter of law, is supported by the evidence, or it is not. If it is, then no prejudice exists. If it is not, then the prejudice results from the insufficiency of the evidence and not from the failure of the court to follow the procedure authorized by section 1159 of the Penal Code. For, in any event, the prejudice resulting from the insufficiency of the evidence to support the verdict would not be removed by an instruction as to the provisions of section 1159. Such an instruction could not serve to supply the deficiency in the evidence. For the purpose of determining the question as to the sufficiency of the evidence to support the verdict, it is immaterial whether the court has instructed the jury in accordance with the provisions of section 1159 of the Penal Code. Appellant's con-

tention in this connection therefore cannot be upheld.

[7-9] Appellant's contention, however, that the evidence is insufficient to support the verdict, as a matter of law, exemplifies the proper remedy in the circumstances. Assault is defined as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. Penal Code, section 240. By reason of the punishment, it is a misdemeanor. But when such assault is accompanied by the use of a deadly weapon or instrument or by any means of force likely to produce great bodily injury, such assault, by reason of a different punishment, is a felony. Section 245, Penal Code. A deadly weapon is not defined in the law for the purpose of these provisions. But the decisions are uniform on the subject and in substance agree that whether a weapon used in an assault amounts to a deadly weapon within the meaning of section 245, supra, primarily is a mixed question of law and fact; that, in certain cases, under proper instructions it is a question for the jury; that for the purpose of determining such question not only the character of the weapon should be taken into account but equally important, among other facts, is the manner of its use, the location of the injury and the extent of the injury, if any. The following decisions uphold the foregoing rule in one or more of its phases: People v. Leyba, 74 Cal. 407, 16 P. 200; People v. Dodel, 77 Cal. 293, 19 P. 484; People v. Fuqua, 58 Cal. 245; People v. Valliere, 123 Cal. 576, 56 P. 433; People v. Stevens, 15 Cal.App. 294, 114 P. 800; People v. Cook, 15 Cal.2d 507, 102 P.2d 752; People v. Lee, 23 Cal.App.2d 168, 72 P.2d 572; and People v. Russell, 59 Cal.App.2d 660, 139 P.2d 661.

[10-12] To constitute an assault, manifestly, there must be some semblance, although slight, of a physical attempt. That evidence of words used by one exhibiting a weapon or instrument is important, there can be no question. Such words may be the test as to whether the act is lawful or unlawful. But conversation, although it may reveal intent, can be no part of a physical attempt. It should be noted, however, with regard to what constitutes an attempt, that firearms, as distinguished from other weapons or instruments, generally, and, as a matter of law, are regarded as intrinsically deadly. Hence, what may be decisive as to whether any other weapon or instrument is a deadly weapon, could be unimportant where a firearm is involved.

[13] With regard to the evidence relied on to sustain the verdict in the within action, People v. Dodel, supra, is particularly applicable. The defendant was charged with assault with a deadly weapon. Quoting from the opinion (77 Cal. at page 294, 19 P. at page 484): "* * * the testimony fails to show directly that defendant made any attempt to strike with or use his knife.

"Counsel for defendant presented 12 instructions, and asked that they be given to the jury, but the court refused them all. Two of these instructions read as follows:

" 'To constitute an assault, the defendant must have the intent to strike, the ability to do so, and must have made the attempt to strike.'

" 'And where, as in this case, the assault is charged to have been committed with a deadly weapon, there must have been an attempt to strike with or to use the deadly weapon.'

"These instructions stated obviously correct rules of law, and the charge of the court, given at its own instance, did not embrace them in substance or effect. In our opinion, they should have been given, and the court clearly erred in refusing to give them."

[14] In the within action, from a consideration of the evidence quoted above describing the assault, it affirmatively appears that no attempt was made to strike the victim with the alleged deadly weapon. At most, it was exhibited in connection with a qualified threat. Taking into account, therefore, the character of the instrument, the manner of its use and the location and extent of the injury suffered, if any, which, as heretofore noted, is the approved test for determining the question, it is apparent that the evidence relied on to support the verdict herein clearly is insufficient as a matter of law. The offense of assault with a deadly weapon was not proved.

For the foregoing reasons the judgment, and the order denying the motion for a new trial, are, and each of them is, reversed, and the cause is remanded for a new trial.

YORK, P. J., and WHITE, J., concur.

Rehearing denied; YORK, P. J., dissenting.

63 Cal.App.2d 414

GLESBY v. BALFOUR, GUTHRIE & CO., Limited.

Civ. 12560.

District Court of Appeal, First District,
Division 1, California.
March 23, 1943.

1. Arbitration and award ⚷31

Proceedings in arbitration are of a summary character and not subject to dilatory tactics.

2. Arbitration and award ⚷73

An appeal lies from order denying motion to vacate an award which is in effect an appeal from an order confirming an award. Code Civ.Proc. § 1293.

3. Arbitration and award ⚷63

Under a contract requiring shipment during a specified month of "copra meal" subject to safe arrival at a specified port of a named steamship, where such ship carrying only "raw copra" arrived at another port during the specified month, arbitration award in favor of seller was not erroneous on its face notwithstanding no deliveries were made to buyer due to manufacturer's failure to deliver the "copra meal" which was one of conditions exempting seller from failure to perform. Code Civ.Proc. § 1288(d).

4. Arbitration and award ⚷82(1)

Appellate court cannot correct an error merely of judgment in a proceeding where parties have agreed that designated third persons shall decide a controversy and that their decision shall be binding upon them. Code Civ.Proc. § 1293.

Appeal from Superior Court, San Francisco County; Theresa Meikle, Judge.

Petition by David Glesby, doing business as Glesby Grain & Milling Company, against Balfour, Guthrie & Company, Limited, to vacate an award made by a board of arbitration set up in accordance with the terms of a written contract between the parties. From an order denying the petition, petitioner appeals.

Affirmed.

Milton Sapiro, of San Francisco, and Samuel DeGroot and Aaron Sapiro, both of Los Angeles, for appellant.

Farnham P. Griffiths, Charles E. Finney, and McCutchen, Thomas, Matthew, Griffiths & Greene, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal by petitioner from an order denying his motion to vacate an award by a board of arbitration set up in accordance with the terms of a written contract between the parties hereto.

The contract required the shipment by Balfour, Guthrie & Co., Limited, during the month of March, 1942, of 350 tons of copra meal to David Glesby, doing business as Glesby Grain & Milling Co. at a price of $34.50 a ton. Among other things the contract provided that "this sale is made subject to the safe arrival at Los Angeles Harbor of the S. S. 'Edna'"; that the seller be relieved of all responsibility for "failure of manufacturers or suppliers [the Tecate mill in Lower California whose business it was to convert the raw copra received through Pacific ports into copra meal] to deliver." The seller was also exempted from any responsibility for failure of delivery due to war, consequences of war, etc. On March 9, 1942, respondent by letter informed petitioner that the S. S. Edna had arrived in San Francisco with a cargo of raw copra but that respondent had been advised by the Tecate mill that none of such material would be used to manufacture copra meal to apply against the contract between the parties herein. In this letter respondent called petitioner's attention to the fact that the sale was made subject to the safe arrival of the S. S. Edna in Los Angeles Harbor (this was a special typewritten provision of their contract) and that:

"Suppliers advise us the 'Edna' was in San Francisco for over a month after the outbreak of the war and that the raw Copra on this delivery applies against contracts previously made by them for earlier delivery than stipulated in our contract with you. We have been advised that this vessel was scheduled by our sellers for two trips. The first trip has now been completed. As of this date no rejection of the second trip has been made by the seller and we understand the vessel is now on its return trip for further supplies of raw Copra.

"We are advised further by our suppliers that they are in a position to offer proof of their contention that the recent discharge of material from this vessel applied to contracts other than ours and that the vessel was scheduled for a second trip, the material from this trip to apply against your contract."

Petitioner claimed that in order to fulfill its own commitments it was compelled to purchase at an increased price, by reason of which it suffered a loss of $5,250; that it accordingly made a claim against respondent, which denied liability and refused to pay. In accordance with the terms of the contract between the parties, the controversy was submitted for arbitration to a committee appointed by the chairman of the Foreign Commerce Association of the San Francisco Chamber of Commerce and the following award made: "Evidence was submitted showing that no deliveries were made by the Tecate mill to Balfour, Guthrie & Co., Limited under this contract and as the contract under dispute under clause 16 specifically exempts Seller for responsibility for 'failure of manufacturers or suppliers to deliver', the arbitrators have no option but to find in favor of Balfour, Guthrie & Co., Limited, and cancellation is hereby sustained."

Petitioner, appellant herein, contends that the award is erroneous in stating that no deliveries were made to respondent under the contract, for which reason the agreement exempts the latter from responsibility to deliver; that the letters filed by respondent as exhibits show that there was a delivery of (raw) copra to it at San Francisco by the "Edna"; that, under their contract, "if, owing to circumstances beyond Seller's control, carrier fails to carry goods to or to discharge them at expected place of delivery and discharges them at some other port or place, Buyer shall take delivery there" (this quoted portion is a part of the contract's printed provisions); and that, regardless of the dates of delivery of contracts on hand between respondent and other customers, where no particular vessel was specified, petitioner is entitled to first consideration in connection with the cargo of the vessel "Edna." Petitioner further contends that error, therefore, appears on the face of the award, which, under section 1288(d), Code Civ. Proc., should be vacated.

Respondent on appeal contends that the order denying the motion to vacate the award is not an appealable order; that the court should not review the evidence presented to the arbitrators because they have made a mutual, final and definite award upon the subject matter submitted to them, and that, irrespective of the foregoing contention, the award is fully supported by the evidence.

[1] Respondent cites Jardine, Matheson & Co., Ltd., v. Pacific O. Co., 100 Cal.App. 572, 280 P. 697, with which we agree, but that case is not controlling here. In the Jardine, Matheson case the right of appeal was restricted so as not to include an appeal from an order directing the parties to proceed. Proceedings in arbitration are of a summary character and not subject to dilatory tactics. It was held in the Jardine case that the rights of the parties are protected and may be reviewed on appeal from the judgment.

[2] This appeal is from an order denying a motion to vacate an award which is in effect an appeal from an order confirming an award. Code Civ.Proc. sec. 1293; Pleaters', etc., Ass'n v. Superior Court, 114 Cal.App. 35, 299 P. 555.

[3] It is not contended that the arbitrators refused to hear pertinent evidence, or that they were guilty of misbehavior as set forth in subd. (c), sec. 1288, Code Civ.Proc., but that the award should be vacated by virtue of the following, subd. (d) of the same section: "Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made." No error appears on the face of the award.

Petitioner initiated the arbitration proceedings and agreed "absolutely to abide by the award and findings of the arbitrators." The contract required shipment during March of 1942 of "copra meal" subject to safe arrival at Los Angeles Harbor of the S. S. Edna. The Edna, carrying only "raw copra", arrived at San Francisco during March of 1942. No deliveries were made by the Tecate mill to respondent under the terms of the contract herein, which exempted the seller "for responsibility for failure of manufacturers or suppliers to deliver."

[4] The appeal as a matter of fact is based solely upon the ground that the arbitrators drew an erroneous conclusion. This court may not correct an error merely of judgment, if any there be, in a proceeding where the parties have agreed that designated third persons shall decide a con-

troversy, and that their decision shall be binding upon them. In re Connor, 128 Cal. 279, 60 P. 862; California Sugar, etc., Agency v. Penoyer, 167 Cal. 274, 139 P. 671; Kerr v. Nelson, 7 Cal.2d 85, 59 P.2d 821; In re Frick, 130 Cal.App. 290, 19 P.2d 836; Pleaters & Stitchers Ass'n v. Davis, 140 Cal.App. 403, 35 P.2d 401; United Farmers Ass'n of Cal. v. Klein, 41 Cal.App. 2d 766, 107 P.2d 631.

The order appealed from is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

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63 Cal.App.2d 567

ROGERS v. MULKEY et al.

MULKEY et al. v. ROGERS et al.

Civ. 7002.

District Court of Appeal, Third District, California.

March 29, 1944.

Rehearing Denied April 28, 1944.

1. Appeal and error ⚷931(1)

The evidence must be construed most strongly against the party losing in the trial court, and every reasonable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the judgment.

2. Appeal and error ⚷931(1), 989

Evidence of the party prevailing in trial court must ordinarily be accepted as true, and evidence which is contradictory to it must be disregarded.

3. Appeal and error ⚷1011(1)

The weight of conflicting testimony of witnesses was for trial court.

4. Mortgages ⚷38(1)

In suit by bankruptcy trustee of grantor to have deed declared to be mortgage with right of redemption, evidence sustained determination that transaction was not intended as a mortgage, but that intention was to deed property absolutely to grantee with option to grantor to repurchase it.

5. Mortgages ⚷37(2), 38(2)

A deed purporting on its face to convey title absolutely may be shown by parol evidence to be a mortgage, but the character of the instrument cannot be thus changed except on clear and convincing evidence.

6. Appeal and error ⚷1008(1)

Whether evidence offered to establish that deed purporting to convey title absolutely was intended to be a mortgage is clear and convincing is a question for the trial court's determination.

7. Appeal and error ⚷1011(1)

Trial court's determination of question whether deed purporting to convey title absolutely is a mortgage in favor of either party on conflicting or contradictory evidence is not open to review on appeal.

8. Appeal and error ⚷1010(1)

An appellate court will not disturb trial court's finding to effect that deed was not intended to be a mortgage where there is substantial evidence warranting a clear and satisfactory conviction to that effect.

9. Fraudulent conveyances ⚷298(1)

Evidence sustained determination that deed of property was not intended to hinder, delay, and defraud grantor's creditors.

10. Judgment ⚷461(5)

Where grantee gave grantor option to repurchase property and, after grantor had failed to exercise option, grantee instituted action to quiet title, evidence sustained determination that judgment quieting title in grantee had not been procured by fraud and concealment.

11. Judgment ⚷435, 443(1)

After time for appeal has expired and after expiration of statutory six months for motion to set aside judgment, a judgment can only be set aside in an independent action in equity if there has been extrinsic fraud or mistake. Code Civ.Proc. § 473.

12. Judgment ⚷435, 443(1)

Fraud or mistake is "extrinsic" when it deprives the unsuccessful party of an opportunity to present his case in court.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

13. Judgment ⚷456(1)

If an unsuccessful party to an action has been kept in ignorance thereof, or has been prevented from fully participating therein, judgment is open to attack at any time.

14. Judgment ⚷456(1)

Where party has been given proper notice of action and has not been prevented from full participation therein, fraud perpetrated under such circumstances is "intrinsic" and unsuccessful party cannot attack judgment after expiration of time for appeal or other direct attack.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

◆

Appeal from Superior Court, Butte County; W. T. Belieu, Judge.

Action by Lilian Rogers, trustee in bankruptcy, against Lloyd H. Mulkey and another to have a deed declared to be a mortgage with right of redemption, to have the deed declared void, and to set aside a judgment quieting defendants' title to property, wherein the defendants filed a cross-complaint against Lilian Rogers, trustee in bankruptcy, and the Mercantile Acceptance Corporation of California. From an adverse judgment Lilian Rogers, trustee in bankruptcy, and Mercantile Acceptance Corporation of California appeal.

Affirmed.

J. Albert Hutchinson, of San Francisco, and Albert M. King, of Oroville, for appellant.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for respondent.

SCHOTTKY, Justice.

Appellant Rogers, as trustee in bankruptcy of the estate of one Gus R. Smith who was adjudicated a bankrupt on April 24, 1941, commenced an action against respondents in which appellant sought to have a grant deed to certain real property in Butte County, executed by the bankrupt Smith to respondents, dated December 5, 1938, and recorded December 10, 1938, declared to be a mortgage with right of redemption. Appellant also sought in the same action to have said deed declared void as being in fraud of creditors and also sought to set aside a judgment entered on July 17, 1939, quieting respondents' title to said property against said bankrupt.

Respondents in their answer denied that the deed in question was intended as a mortgage or as other than an unconditional conveyance, denied that it was for the purpose of defrauding creditors, and denied that they had concealed any facts from the court in the action to quiet title. They also filed a cross-complaint in which they sought to quiet their title against appellant trustee in bankruptcy and also against appellant Mercantile Acceptance Corporation which had attached the property prior to the bankruptcy proceedings.

Following a trial before the court without a jury, the court found in favor of respondents on all issues, and judgment was entered that appellant trustee take nothing by reason of her complaint and that respondents are the owners of the property in question and that appellants have no interest therein. This appeal is from said judgment.

Appellants attack the judgment as being unsupported by and contrary to the evidence. Their principal contentions are that the deed and defeasance must be considered a mortgage, and further that the transaction was intended to hinder, delay and defraud creditors and was therefore void. Appellants also contend that the quiet title action was a fraud upon the court in that action because the loan was concealed, and that the trial court should have declared the quiet title judgment invalid.

[1, 2] Bearing in mind the familiar rule that the evidence must be construed most strongly against the losing party and that every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the judgment of the court, and that the prevailing party's evidence must ordinarily be accepted as true, and that evidence which is contradictory to it must be disregarded, we shall proceed to give a brief summary of the salient facts as shown by the record.

In August, 1938, the bankrupt Smith was the owner of the land in question, subject to a $6000 deed of trust in favor of the Bank of America. Smith had been friendly with respondents for a number of years but had had no business dealings with them. Smith was running for sheriff of Butte County and, needing some money for his campaign, sought a loan from respondent Lloyd H. Mulkey, who loaned him $1000 upon a second deed of trust upon said property, said deed of trust being dated August 22, 1938. Smith was unsuccessful in his campaign and was in need of more funds and sought them from Mulkey. Smith wanted to obtain $833 more and wanted to increase the loan under the second deed of trust, but Mulkey, according to his testimony, refused to do so and insisted that he would not advance Smith any more money unless he got absolute title to the ranch, and that he would then give Smith ninety days' time within which to purchase it under an option agreement. Respondent Mulkey testified:

"I can explain it very easily. I loaned Mr. Smith, I believe, five hundred, I can't recall the exact amounts, sir, it was four years ago. I loaned him so much money and he came back for another loan. I told him at that time that it was utterly impossible I couldn't do it. I can prove that at that time I had gotten money myself which I was paying seven per cent interest on. And he needed it very badly he said and so he told me he would give me the ranch and take an option on it. So I took the ranch and gave him an option for ninety days and told him before Mr. Herbert Whitten, 'I don't want anything to happen at the end of the ninety days, I don't want any hard feelings about this deal.' He said, 'There won't be, Mr. Mulkey.' And I gave him an extension at the end of that time."

Smith and Mulkey then went to the law office of Smith's attorney, Herbert Whitten, in Chico, December 5, 1938, and Whitten prepared a deed of the property from Smith to respondents and an option agreement in which respondents gave Smith the option to buy said property from respondents at any time up to and including March 6, 1939, upon payment of the sum of $1833.26, being the sum of $1000 which Mulkey had previously advanced and the sum of $833.26 which he paid in Whitten's office at the time the above instruments were executed. The deed was recorded on December 10, 1938. At the same time respondents authorized a reconveyance of the second deed of trust. Smith testified that he paid Mulkey the interest on the $1833.26, but this was denied by Mulkey and no receipts or checks showing such payment were produced by Smith to show any payment of interest after the date of the deed. Shortly before March 6, 1939, Smith requested an extension of the option for ninety days and this extension was prepared by Smith's attorney and executed by respondents on March 6, 1939, and read as follows: "The option period granted to Gus R. Smith in the within instrument is hereby extended for ninety (90) days beyond March 6, 1939." Smith did not exercise the option within the extended period and on June 9, 1939, respondents commenced an action against Smith to quiet their title to the property. Smith was served with complaint and summons but did not appear and his default was entered. Smith himself testified that Mulkey told him three days before the quiet title action was filed that he was going to take action because Smith had failed to exercise the option; and also testified that no one told him not to defend the suit, and that he did not appear in the action because "he had no money to fight the thing with." At the hearing of the action to quiet title Lloyd Mulkey testified and the deed and option were introduced in evidence, and a judgment and decree quieting title was entered. Respondents thereupon entered into possession of the real property in question and thereafter collected the rent from the tenant, the rent having been paid to Smith up to the time of the judgment quieting title. No appeal was taken from the decree quieting title, and no motion was made to set it aside under section 473 of the Code of Civil Procedure. On April 23, 1941, Smith filed a voluntary petition in bankruptcy and was adjudicated a bankrupt, and appellant Rogers, who was appointed trustee of said bankrupt estate, commenced this action against respondents on October 30, 1941.

[3, 4] Practically the entire record consisted of documentary evidence and of the testimony of the bankrupt Smith and respondent Lloyd H. Mulkey, and there was considerable conflict between their testimony; but it was for the trial court, who heard the testimony and observed the witnesses, to weigh the conflicting testimony of these witnesses. The trial court reached the conclusion that the transaction was not intended as a mortgage but that the intention was to deed the property absolutely to respondents with an option to Smith to repurchase it. The following language in the opinion of the trial court is fully supported by the record:

"The mere recital of the salient historical facts shown in the record herein by the documentary and oral testimony would appear to refute the contention of the plaintiff that Mr. Smith or Mr. Mulkey had any idea or intention that the deed and option was either agreed to or was to be considered a security transaction, or that the deed considered with the option could be held to be in effect a mortgage. Mr. Smith was a matured man of considerable business experience; he had his own attorney to whom he could have applied for advice when on June 6th, 1939, Mr. Mulkey asserted ownership to him of this property; when Mr. Mulkey had him served with summons and complaint in the quiet title action; when Mr. Mulkey took possession of the property and exercised acts ot ownership over the property and claimed to own the property freed from any interest of Mr. Smith; or when Mr. Mulkey renewed the trust deed on the property. On the contrary, so far as the record herein indicates, he was inactive and quiescent in regard to the claims of defendant of ownership of the property until he testified in this case, and even then it is not recalled he testified that the transaction was one of a security nature rather than a definite transfer to the grantee with an option back to purchase the property for a specific sum of money. His entire attitude and inaction has been entirely consistent with the theory that he had theretofore unconditionally deeded the property to Mulkey and took back an option to purchase. The only inference to be drawn from his inactivity and failure to seek to regain the property which is now claimed for him for the benefit of his creditors, was solely based upon his then honest conviction that he knew he had irrevocably parted with title to the property and had no further rights therein."

Appellants contend most earnestly that under the evidence it is clearly shown that the deed and defeasance here involved were intended to be a mortgage. If we could agree that the only construction that could be placed upon the evidence is the one that is placed upon it by appellants, we might agree with this contention. But, unfortunately for appellants, the record gives strong support to the construction placed upon the transaction by the trial court.

[5] It is, of course, true, as declared by our Supreme Court in Woods v. Jensen, 130 Cal. 200, at page 203, 62 P. 473:

"That a deed purporting on its face to convey the title absolutely may be shown by parol evidence to be something else—namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot be thus changed except upon clear and convincing evidence."

[6-8] It has been declared repeatedly by our decisions that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey land absolutely in fee simple was intended to be a mortgage. See Mahoney v. Bostwick, 96 Cal. 53, 30 P. 1020, 31 Am.St. Rep. 175; Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93; Couts v. Winston, 153 Cal. 686, 96 P. 357; Todd v. Todd, 164 Cal. 255, 128 P. 413; Kohn v. Parent, 174 Cal. 570, 163 P. 1008; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1; Carlson v. Robinson, 7 Cal.2d 235, 60 P.2d 426. But whether or not the evidence offered to change what appears to be the character of the instrument is clear and convincing is a question for the trial court to decide. Mahoney v. Bostwick, supra; Lockhart v. J. H. McDougall Co., supra; 17 Cal.Jur. 757, sec. 59. In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review upon appeal. Sherman v. Sandell, 106 Cal. 373, 39 P. 797; Locke v. Moulton, 132 Cal. 145, 64 P. 87; Beckman v. Waters, 161 Cal. 581, 119 P. 922; 17 Cal.Jur. 758, sec. 60. As was said in this regard in Wadleigh v. Phelps, supra, 149 Cal. at page 637, 87 P. at page 98, "the appellate court * * * will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court."

[9] Appellants' second contention that the deed of the property from Smith to respondents was intended to hinder, delay and defraud creditors, likewise cannot be sustained. Respondent Lloyd H. Mulkey denied that he knew anything about any creditors of Smith other than that Smith owed some money to his landlord, and there is no testimony by Smith or anyone else from which it could reasonably be inferred that there was any intention by either Smith or Mulkey to defraud any creditors.

The trial court found contrary to this contention of appellants and such finding is amply supported by the record.

[10] Appellants, no doubt realizing that the judgment quieting title, unless declared invalid or set aside, would be a complete defense against the instant action, alleged in paragraph V of the complaint that "on or about the 9th day of June, 1939, the defendant, Lloyd H. Mulkey, commenced a pretended action in the above entitled court, entitled 'Lloyd H. Mulkey, Plaintiff, vs. Gus R. Smith, et al, Defendants,' and numbered therein '17536', alleging in his certain complaint filed therein that the bankrupt had or claimed some interest in and to said property; that he had none, and praying for a decree declaring that the bankrupt had no interest in or to said real property; that said complaint did not allege in substance or effect the existence of said defeasance, said loan, or said extensions of time for the payment of the same; that defendant Lloyd H. Mulkey failed to exhibit to and concealed from said Court the existence and purpose of said defeasance or the existence of said loan; that the bankrupt was served with complaint and summons in said action, but did not appear and did not file an answer therein; that thereafter and on or about the 17th day of July, 1939, said Court made and entered its purported judgment in said action, purporting to quiet defendant Lloyd H. Mulkey's title to said real property." And as part of the relief sought in the prayer of her complaint in the instant action appellant Rogers asked that the said judgment quieting title be set aside. Said appellant sought by these allegations to make her action, in part at least, an independent action in equity to set aside the said judgment quieting title. Even if it should be held that the allegations were sufficient for that purpose, a point which it is unnecessary for us to decide here, the court found that such allegations of fraud and concealment were untrue, and we must hold that said findings find strong support in the record. The record shows that the deed and option, or defeasance, were introduced as exhibits in the quieting title action, and as we have hereinbefore pointed out, the court found upon sufficient evidence that the transaction was not a loan but was an absolute conveyance subject only to Smith's option to purchase, which option was not exercised.

[11-14] Furthermore, after the time for an appeal has expired, and after the six months period set forth in section 473 has expired, a judgment of a court can only be set aside in an independent action in equity if there has been extrinsic fraud or mistake. The following language from Westphal v. Westphal, 20 Cal.2d 393, at page 397, 126 P.2d 105, at page 106, is a further answer to appellants' contention that the judgment in the quieting action should be set aside:

"The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. United States v. Throckmorton, 98 U.S. 61, 25 L. Ed. 93; In re Griffith's Estate, 84 Cal. 107, 23 P. 528, 24 P. 381; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, [140 A.L.R. 1328]. Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98. See 23 Cal. Law Rev. 80; 9 Cal. Law Rev. 156. If an unsuccessful party to an action has been kept in ignorance thereof (Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976) or has been prevented from fully participating therein (Caldwell v. Taylor, supra), there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594; Langdon v. Blackburn, 109 Cal. 19, 41 P. 814. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. Langdon v. Blackburn, 109 Cal. 19, 41 P. 814; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; see Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 P. 24, 48 Am.St.Rep. 110."

No other points urged in the briefs merit discussion.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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DELNO et al. v. MARKET STREET RY. CO. et al.

Civ. 12602.

District Court of Appeal, First District,
Division 2, California.
March 27, 1944.

1. Appeal and error ⇨1024(3)

Trial court's finding on conflicting evidence on motion to change place of trial that certain defendant resided in county where suit was commenced was conclusive.

2. Venue ⇨22(3)

Complaint by minority bondholders involving rights of minority bondholders against rights of majority bondholders who agreed to extension of maturity of bonds and rights of bondholders against trustor and trustee was an attempt to allege a bill in equity to prevent multiplicity of suits, and at hearing of such controversy each of such persons was a necessary and proper party for venue purposes.

3. Venue ⇨22(3)

In action by minority bondholders involving rights of minority bondholders against rights of majority bondholders and rights of the bondholders against the trustor and trustee, defendant residing in county of suit, who was an alleged bondholder, was a proper and necessary party for venue purposes.

4. Pleading ⇨8(2), 125

In action involving rights of bondholders, allegation that certain defendants were representative of and could defend for all dissenting bondholders and denial of such allegation involved merely conclusions of law.

5. Corporations ⇨473

In action by minority bondholders involving rights of the bondholders, against corporation in which other parties were made parties defendant, plaintiff waived constitutional provision relating to venue of actions against corporations. Code Civ. Proc. § 395; Const. art. 12, § 16.

6. Corporations ⇨473

Where there were several defendants in action by minority bondholders seeking recovery on bonds against corporations and other bondholders who consented to extension of time of maturity of bonds, one of whom resided in county where action was commenced and who was a proper and necessary party, trial court did not err in refusing to grant motion for a change of venue to county where corporate defendants had their principal places of business, whether such defendant joined in the motion or consented thereto. Code Civ.Proc. § 395.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Chester Delno and others against Market Street Railway Company and others on bonds. Defendants filed a motion to change the place of trial and from an order denying their motion, they appeal.

Affirmed.

Cyril Appel, Stephen R. Duhring, and Chickering & Gregory, all of San Francisco, for appellant Market St. Ry. Co.

Samuel S. Stevens and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellant Wells Fargo Bank & Union Trust Co.

Morgan J. Doyle, of San Francisco, and Joseph J. Bullock, of Redwood City (A. Dal Thomson, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

After the plaintiffs had commenced the above entitled action by filing a complaint which we set forth in substance below, the defendants appeared and filed a motion to change the place of trial. Their motion was denied and they have taken an appeal from the order denying their motion. The complaint was substantially as follows:

"1. That at all times mentioned herein, defendant Market Street Railway Company was and still is a corporation organized and existing under and by virtue of the laws of the State of California, having and maintaining offices in, and engaging in business in, the County of San Mateo, State of California; that at all times mentioned herein, defendant Wells Fargo Bank & Union Trust Co. was, and still is, a corporation organized and existing under and by virtue of the laws of the State of California; that at all times mentioned herein, defendant The Anglo California National Bank of San Francisco was, and still is, a national banking association, maintaining its principal office at the City and County of San Francisco, State of California; that at all times mentioned herein defendant American Trust Company was, and still is a corporation organized and existing under and by virtue of the laws of the State of California, having and maintaining offices in, and engaging in business in the County of San Mateo, State of California.

"II. That as of the 1st day of April, 1924, defendant Market Street Railway Company, a California corporation (hereinafter sometimes referred to as 'Railway Company') made, executed and delivered a certain Indenture of First Mortgage, wherein and whereby said Railway Company granted, mortgaged and pledged to defendant Wells Fargo Bank & Union Trust Co., a California corporation (herein sometimes called 'Bank'), certain real and personal property situated in the State of California, and more particularly described in said Indenture of First Mortgage, which said Indenture of First Mortgage was duly recorded in the office of the County Recorder of San Mateo County on March 31, 1924 in Liber 1112 of Official Records at page 4 thereof, and in the office of the County Recorder of the City and County of San Francisco, on March 31, 1924, in Volume 7866 of Official Records at page 12 thereof, and in the office of the County Recorder of Humboldt County on April 3, 1924, in Book 87 of Mortgages at page 289 thereof, and in the office of the County Recorder of the City and County of San Francisco in Liber 2848 of Official Records at page 267 thereof.

"That said Indenture of First Mortgage (hereinafter sometimes called 'mortgage') was so made, executed, delivered and recorded for the purpose of securing an issue of First Mortgage Seven Per Cent Sinking Fund Gold Bonds, each and all of which said bonds were dated April 1, 1924, and by the express terms thereof matured and became due on April 1, 1940.

"That said issue of bonds, issued under and secured by said Indenture consisted of bonds in the aggregate principal amount of thirteen million dollars ($13,000,000.00) That between the dates of April 1, 1924 and April 1, 1940, certain of said bonds in the aggregate principal amount of eight million three hundred eighty-two thousand dollars ($8,382,000.00), were paid and retired, and on April 1, 1940, bonds of said issue of the aggregate principal amount of four million six hundred and eighteen thousand dollars ($4,618,000.00) were outstanding and unpaid.

"III. That plaintiffs are the owners of thirty (30) of said bonds so outstanding and unpaid as aforesaid, each of said bonds being in the principal amount of one thousand dollars ($1,000.00); that a photostatic copy of one of plaintiffs' said bonds is attached hereto, marked Exhibit 'A', and the same is hereby incorporated herein and is hereby referred to for further particulars. That each and all of said thirty bonds so owned by plaintiffs, as aforesaid, is identical in language and terms with the bond shown as Exhibit 'A' attached hereto.

"IV. That in and by said Indenture of First Mortgage, defendant railway company agreed that it would duly and punctually pay the principal and interest of every bond issued thereunder at the dates and at the places mentioned in said bonds. That among the provisions contained in said indenture of First Mortgage is the following:

"'Section 11. When and as the Bonds secured hereby and the coupons thereto attached are paid said Bonds and coupons shall be cancelled. The Company shall not extend nor consent to an extension of the time of payment of said Bonds or of any interest coupons and if such extension be made, whether with or without the consent of the Company, such Bond or interest coupon or claim for interest represented thereby shall be subject to prior payment in full of the principal of the Bonds and coupons whose payment shall not have been so extended.'

"V. That on the 1st day of April, 1940, each and all of said issued and outstanding bonds aggregating approximately four million six hundred and eighteen thousand dollars ($4,618,000.00), as aforesaid, including the said bonds of plaintiffs, became due and payable. That on or about said 1st day of April, 1940, the owners and holders of certain of said issued and outstanding bonds agreed in writing with said railway company, among other things, as follows:

"1. That the maturity date of the said bonds so owned and held by them be extended to April 1st, 1945;

"2. That the interest rate on said bonds so owned and held by them be reduced from seven per cent as provided therein to five per cent per annum, payable quarterly on the 1st days of January, April, July and October of each year, commencing July 1st, 1940;

"3. That certain sinking fund provisions contained in said Indenture of First Mortgage need not be complied with.

"VI. That plaintiffs are not informed as to the identity of all persons who entered into the aforesaid agreement with the said railway company, but that among the owners and holders of said issued and outstanding bonds who entered into the aforesaid agreement are the defendants Wells Fargo Bank & Union Trust Co., The Anglo California National Bank of San Francisco, American Trust Company, and Samuel Kahn. That the defendant railway company and the defendant Wells Fargo Bank & Union Trust Co., are informed and have actual knowledge as to the identity of all of the persons who entered into the aforesaid agreement and of the principal amount of the bonds owned and held by them. That plaintiffs, as the owners and holders of said thirty bonds so secured by said Indenture of First Mortgage, as aforesaid, did not agree and have not agreed or consented in writing or otherwise to any extension of the maturity date of the bonds so held by plaintiffs, or to any other change, alteration, amendment, modification or extension of all or any of the provisions of said mortgage or of said bonds.

"VII. That on April 1, 1940, said defendant railway company made, executed and delivered to said defendant Wells Fargo Bank & Union Trust Co., as trustee, for the benefit of the said bondholders who agreed to the extension of the maturity of their bonds, as aforesaid a certain document entitled 'Supplemental Indenture' wherein and whereby said defendant railway company made certain promises and covenants with respect to the time and manner of payment of said extended bonds. That said 'Supplemental Indenture' was recorded in the office of the County Recorder of San Mateo County on April 12, 1940, in Book No. 885 of Official Records at page 444; and was recorded in the office of the County Recorder of Humboldt County on April 12, 1940 in Book 107 of Mortgages at page 90; and was recorded in the office of the County Recorder of the City and County of San Francisco on April 12, 1940, in Book 3599 of Official Records, at page 1 thereof.

"VIII. That plaintiffs are informed and believe, and upon such information and belief allege that the outstanding bonds belonging to persons who did not enter into the aforesaid extension agreement with said railway company amount to more than four hundred thousand dollars ($400,000.00), and said bonds are owned and held by more than one hundred persons, firms and corporations, most of whom reside outside the State of California, and of those residing within the State of California, most of them reside in counties other than the County of San Mateo; that therefore it is and would be impracticable to bring all of said non-assenting bondholders before the court, that the question involved herein is one of common or general interest to all of the said non-assenting bondholders and plaintiffs therefore sue for the benefit and on behalf of themselves and of all of the said non-assenting bondholders.

"IX. That the defendants Wells Fargo Bank & Union Trust Co., American Trust Company, The Anglo California National Bank of San Francisco and Samuel Kahn are owners and holders of certain of said issued and outstanding bonds, and did enter into the aforesaid agreement with the said railway company; that the outstanding bonds owned by persons who likewise entered into the aforesaid agreement, as in paragraph V hereof related, with the said railway company are owned by approximately three hundred persons, firms and corporations, most of whom reside outside of the State of California, and of those residing within the State of California, most reside in counties other than San Mateo County; that therefore it is and would be impracticable to bring all of said assenting bondholders before the court; that all of the assenting bondholders are united in interest and the question involved herein is one of common or general interest to all of said assenting bondholders, and that the said defendants, Wells Fargo Bank & Union Trust Co., American Trust Company, The Anglo California National Bank of San Francisco and Samuel Kahn are representative of and can defend for the benefit of all of said assenting bondholders.

"X. That plaintiffs have demanded of said defendant railway company and defendant Wells Fargo Bank & Union Trust Co., as trustee under said Indenture of First Mortgage, that they pay the principal and interest due on the said non-extended bonds; that said defendants and each of them have refused and still refuse to pay all or any part of said principal or interest, but said defendants did, on the 1st days of April, July, and October, 1940, and on the 1st days of January, April, July and October, in the year 1941, and on the 1st days of January, April and July in the year 1942, pay to the holders of all of said extended bonds, interest thereon at the rate of five per cent (5%) per annum.

"XI. That by reason of the facts hereinabove alleged, plaintiffs claim and assert that by virtue of the terms and provisions of said indenture of first mortgage and of said bonds, and particularly the provisions of Section 11 of said indenture hereinabove quoted, the bonds owned and held by plaintiffs, and by those other persons on behalf of whom plaintiffs bring this action, are still secured by said indenture of first mortgage, and that said mortgage constitutes a first lien upon and against the property of said railway company described in said mortgage for the purpose of securing the bonds owned and held by plaintiffs and the remaining non-assenting bondholders on behalf of whom this action is brought; and that the bonds, the maturities of which were extended as aforesaid to April 1st, 1945, are secured by said indenture of first mortgage and said supplemental indenture, subject, however, to the prior payment in full of the principal of the bonds and the coupons thereon, whose payment was not so extended by reason of the fact that the owners thereof did not enter into the aforesaid agreement of extension with the said railway company. Plaintiffs further claim and assert that it is the obligation and duty of defendant railway company to pay in full the principal of all the said non-extended bonds and the interest thereon, at the rate of seven per cent (7%) per annum, before any payments are made upon the extended bonds or any interest or coupons thereof.

"XII. That defendants and each of them claim and assert that the rights of the bondholders who assented to said extension of the maturity of their said bonds and the making of said supplemental agreement, as aforesaid, are not subject, subservient or junior to the rights of plaintiffs and the remaining non-assenting bondholders, and that the bonds of plaintiffs and of said remaining non-assenting bondholders are subject and subservient to and junior in right and security to the bonds which were extended as aforesaid, and that the said bonds of said plaintiffs and said remaining non-assenting bondholders are not yet due and payable. That defendant railway company and defendant Wells Fargo Bank & Union Trust Co., as trustee under said indentures, claim that it is their right, duty and obligation to refuse to pay the principal or interest on the bonds of plaintiffs and other non-assenting bondholders and to refuse to apply moneys in their possession to such payment, and that it is their right and duty to pay and apply moneys of the defendant railway company to and on account of the said extended bonds.

"Wherefore, plaintiffs pray and demand that this honorable court declare and adjudge:

"1. That the bonds of plaintiffs and the remaining non-assenting bondholders matured and became due on April 1st, 1940 and are now due, payable and unpaid, and that there is now due on said bonds the principal sum of one thousand dollars ($1,000.00) for each bond, plus interest thereon from January 1st, 1940, at the rate of seven per cent per annum;

"2. That the bonds of plaintiffs and the remaining non-assenting bondholders are secured by said indenture of first mortgage;

"3. That the bonds, the maturities of which have been extended to April 1st, 1945, are secured by said indenture of first mortgage and said supplemental indenture, subject, however, to the prior payment in full of all of the principal and interest on the bonds of plaintiffs and the remaining non-assenting bondholders, and the lien securing said extended bonds is subject, subservient and junior to the lien securing the bonds of plaintiffs and the remaining non-assenting bondholders; that it is the duty and obligation of defendant railway company and defendant Wells Fargo Bank & Union Trust Co., as trustee under said indentures, to refrain from making any payment of principal or interest on all or any of said extended bonds until such time as the bonds of plaintiffs and of other non-assenting bondholders have been fully paid and retired both as to principal and interest;

"4. That the court, in the exercise of its discretionary power, order and require said railway company and said Wells Fargo & Union Trust Co. to deposit with the clerk of this court a sum, in cash, equal and equivalent to the principal and accrued interest of all of said non-extended bonds, said sum and fund to be held by said clerk subject to such order or orders as upon the hearing of this action, this court, in its discretion, shall deem equitable and proper in the premises;

"5. That the court award to plaintiffs, or to plaintiffs' attorneys herein, as attorneys' fees, for the prosecution of this action on behalf of all of said non-assenting bondholders, such sum and amount as may be just and equitable;

"6. That plaintiffs have such other and further relief as may be proper;

"7. That plaintiffs recover their costs herein."

In due time the Market Street Railway Company and Wells Fargo Bank & Union Trust Co. appeared and made a motion for a change of venue from San Mateo County to the City and County of San Francisco. Said motion was based on the following grounds: "That each of said defendants, Market Street Railway Company and Wells Fargo Bank & Union Trust Co. is now and at the time of the commencement of said action was a corporation organized and existing under the laws of the State of California and that the principal office and place of business of each of said defendants is now and at the time of the commencement of said action was situated in the City and County of San Francisco, State of California, and that neither of said defendants has now nor either of them at the time of the commencement of said action have or had any office in the County of San Mateo; that none of the contracts, instruments, indentures, or agreements referred to in the complaint in said action was made or was or is to be performed in the County of San Mateo and that no purported obligation or liability with respect to such contracts, instruments, indentures or agreements or any of them, or any term, provision or condition thereof arose or occurred in the County of San Mateo; that the defendants, The Anglo California National Bank of San Francisco, American Trust Company and Samuel Kahn are and each of them is improperly joined as a party defendant in said action and that neither of them is a necessary or proper party in said action; that the defendant, The Anglo California National Bank of San Francisco is a national banking association with its office and principal place of business in the City and County of San Francisco, State of California, and that the defendant, American Trust Company, is a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of business in said City and County of San Francisco; that said defendants, The Anglo California National Bank of San Francisco, American Trust Company and Samuel Kahn are not proper parties defendant and are not representative of nor can any of them defend said action on behalf of any non-appearing bondholder as alleged in said complaint, but that each of said last named defendants has been joined as a party defendant solely as a sham for the purpose of having said action tried in the County of San Mateo."

[1-3] In support of their motion said defendants tendered the affidavits of James J. Adams, secretary of the Market Street Railway Company, Samuel Kahn, one of said defendants, F. J. Brickwedel, trust officer of Wells Fargo Bank & Union Trust Co., Evan Johnson, cashier of the Anglo California National Bank of San Francisco, and Bradley B. Brown, vice president and secretary of the American Trust Company. In said affidavits it was alleged (1) that neither Wells Fargo Bank & Union Trust Co., American Trust Company, the Anglo California National Bank, nor Samuel Kahn "are representative and can defend for the benefit of all of said assenting bondholders." It was also alleged (2) that Mr. Kahn was not a bondholder; that American Trust Company was not a bondholder except that it held in its trust capacity one $1,000 par value bond issued by Market Street Railway Company. Said affidavits also set forth (3) "that neither the said indenture of first mortgage referred to in said complaint, nor the supplemental indenture, nor the alleged extension agree-

ments with the bondholders, were made or executed, or were or are to be performed, in the county of San Mateo." In the brief of the defendants much space is devoted to making a showing that the plaintiffs had not brought their case under the provisions of section 16, Article XII of the Constitution. In the brief of the plaintiffs they make no claim that they had attempted to do so. However, they earnestly claim that their complaint stated a cause of action within the provisions of section 5, Article VI of the State Constitution. They rely on their allegation that Mr. Kahn was a bondholder. The defendants contend that their affidavits show he was not a bondholder. In that connection they contend the residence of Mr. Kahn must be disregarded. They base that contention on the claim that naming him as a defendant was a sham and that Mr. Kahn was neither a necessary nor proper party. We think that claim is not supported by the record. On the hearing of the motion it was established as a fact that Mr. Kahn resides in San Mateo County. It was alleged in the complaint that he was the owner of certain of said bonds. That allegation was denied by Mr. Kahn in the affidavit made by him and also in the affidavit made by Mr. Adams as secretary of the Market Street Railway Company. As to ownership there was a conflict in the evidence. That conflict the trial court ruled in favor of the plaintiffs and such ruling is conclusive in this court. Hubbard v. Mt. Raymond Min. Co., 33 Cal.App.2d 474, 92 P.2d 411, 93 P.2d 95. The substance of the complaint is clearly an attempt to allege a bill in equity to prevent a multiplicity of suits. 1 Pomeroy Eq. Jur. §§ 255-261. It involves the rights of numerous beneficiaries, the bondholders, as to the rights of one group against the rights of another group, and the rights of the bondholders against the trustor and trustee. On the hearing of such a controversy each of said persons is both a necessary and proper party. Hutchins v. Security Trust, etc., Bank, 208 Cal. 463, 281 P. 1026, 65 A. L.R. 1059. At page 467 of 208 Cal., at page 1027 of 281 P., the court said: "It is manifest that in a controversy by one settler with the other settler and/or beneficiaries, the trustee is in no sense the representative of either faction. A trustee is given by statute the right to sue in execution of the powers conferred without joining beneficiaries as plaintiffs, but this applies only as against strangers to the instrument, and has no application to suits by or against makers and beneficiaries thereunder involving the validity of the trust instrument. This principle was carefully explained and section 369 of the Code of Civil Procedure interpreted in the case of Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275. In fact, the identical point here involved was before us in the recent case of Lake v. Dowd, Cal.Sup., 270 P. 212 [see Id., 207 Cal. 290, 277 P. 1047], and the cause was reversed for failure of the court to order of its own motion, certain of the settlers, who were also beneficiaries, made parties to the action. This doctrine was again confirmed in Title Guarantee & Tr. Co. v. Henry et al., 208 Cal. 185, 280 P. 959. No lack of interpleading, omission, or negligence of the trustee will excuse this omission. O'Connor v. Irvine, 74 Cal. [435], 444, 16 P. 236; Lake v. Dowd, supra. The theory of this principle doubtless is that no decree should be entered affecting the rights of a party without giving him an opportunity to be heard, and the negligence or failure of another will not justify his absence from the case." It follows that as an alleged bondholder Mr. Kahn under the facts was a proper and necessary party.

[4] In class (1) above designated we referred to the allegation contained in the complaint that the defendants "Wells Fargo Bank & Union Trust Company, American Trust Company, The Anglo California National Bank of San Francisco and Samuel Kahn are representative of and can defend for the benefit of all assenting bondholders;" and the denial of that allegation in the affidavits filed by the defendants. Clearly those allegations involved merely conclusions of law. 49 C.J. 71; Cullinan v. Mercantile Trust Co., 80 Cal.App. 377, 383, 252 P. 647. The allegation of the complaint and the denials thereof are not helpful to either party. 49 C.J. 783; Sacramento, etc., D. Dist. v. Superior Court, 196 Cal. 414, 422, 238 P. 687.

[5] In class (3) above stated we referred to the allegations contained in the affidavits "that neither the said indenture of first mortgage referred to in said complaint, nor the supplemental indenture, nor the alleged extension agreements with the bondholders, were made or executed, or were or are to be performed, in the county of San Mateo." In an action against a corporation only, for the purpose of fixing the venue, such facts would be material. Sec. 16, Art. XII of the Constitution.

However, when, as in the instant case, other defendants are added, the plaintiff waives the constitutional provision and the case must be disposed of under the statutes applicable. Griffin & Skelly Co. v. Magnolia & Healdsburg F. C. Co., 107 Cal. 378, 380, 40 P. 495.

[6] Language similar to but not identical with section 16, Article XII of the Constitution is to be found in Code Civ. Proc. sec. 395: "(1) In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, *or some of them,* reside at the commencement of the action, is the proper county for the trial of the action. * * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, *or any such defendant,* resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary." (Italics ours.) The defendants contend that the action is transitory, that the provisions of section 395 of the Code of Civil Procedure are controlling, and therefore their motion should have been granted. But when, as here, there are several defendants, one of whom resides in the county where the action was commenced and who was a proper and necessary party, the court does not err in refusing to grant the motion whether such defendant joins in the motion or consents thereto. McClung v. Watt, 190 Cal. 155, 158, 211 P. 17.

After the hearing in this court the parties by permission first had and obtained filed additional briefs in which they discussed the decisions in East-West Dairymen's Ass'n v. Dias, 59 Cal.App.2d 437, 138 P.2d 772, and California Collection Agency v. Fontana, 61 Cal.App.2d 648, 143 P.2d 507. We find nothing in either of said cases which is at variance with anything we have herein said.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

63 Cal.App.2d 600

BANDUCCI et al. v. BANDUCCI et al.
Civ. No. 3325.

District Court of Appeal, Fourth District, California.

March 29, 1944.

Rehearing Denied April 18, 1944.

1. Contracts ⚷88

Under statute a written instrument is presumptive evidence of a consideration, and burden of showing a want of consideration sufficient to support an instrument lies on the party seeking to invalidate or void it. Civ.Code, §§ 1614, 1615.

2. Appeal and error ⚷989

Where a judgment is under attack because it is claimed to be unsupported by the evidence, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, including presumptions, contradicted or uncontradicted, which will support the conclusion of the trial court.

3. Appeal and error ⚷996

When two or more inferences can be reasonably deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court, or if there be any reasonable doubt as to the sufficiency of the evidence, appellate courts should resolve that doubt in favor of the judgment.

4. Deeds ⚷208(1), 210
Trusts ⚷44(2)

Evidence supported finding that a deed executed by two sons to their mother was valid and supported by consideration as against sons' contentions that deed was not delivered and was not intended to pass absolute title. Civ.Code, §§ 1614, 1615.

5. Appeal and error ⚷931(1)

On appeal from a judgment all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences indulged in to uphold the judgment.

6. Trial ⚷397(5)

Where the findings made cover all the material issues, findings upon other issues which thus become immaterial are unnecessary.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Joseph Banducci and Antonio Banducci against Louis J. Banducci, administrator of the estate of Carolina Banducci, deceased, to establish a trust to the extent of an undivided interest in the real estate, wherein Angelina Rossi and Mary Pierucci intervened seeking to quiet title against plaintiffs. From a judgment in favor of defendants and intervenors, plaintiffs appeal.

Affirmed.

Harvey, Johnston & Baker, of Bakersfield, for appellants.

Kendall & Howell, of Bakersfield, for respondents Louis and Josephine Banducci.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondents Angelina Rossi and Mary Pierucci.

GRIFFIN, Justice.

Plaintiffs and appellants Joseph Banducci and Antonio Banducci, brothers, brought this action against another brother, Louis J. Banducci, as administrator of the estate of their mother, Carolina Banducci, deceased, to establish a trust to the extent of an undivided 2/8 interest in certain real property in Bakersfield. The three sisters, who were also heirs of the estate, were not made parties to the proceeding. After application therefor, leave of court was granted to Angelina Rossi and Mary Pierucci, sisters of plaintiffs, to intervene in the case. Their complaint sought to quiet title to the property against the claims of the plaintiffs.

The case was tried on the issues raised by the original complaint, the answer thereto filed by the administrator, the complaint in intervention, and the answer of the plaintiffs and the administrator thereto.

The complaint alleged that on April 19, 1939, plaintiffs and others executed and delivered to their mother a deed (absolute on its face), covering the property in question, which deed was recorded on November 29, 1940, thirteen days after the mother died; that at the time of the execution of the deed plaintiffs were each the owner of an undivided 1/8 interest in the property; that one of the named grantors, to wit, Angelina Rossi, did not sign the deed; that it was executed without any consideration and solely for the purpose of simplifying and executing an action proposed to be instituted by all parties to the deed to quiet title to the real property as against the heirs and devisees of one Pieri; that the deed was executed by plaintiffs with the understanding and agreement with the mother that she would hold plaintiffs' title in the realty in trust for them and that when a decree had been entered in the Pieri action she would reconvey an undivided 1/8 interest to each of plaintiffs; that it was further understood that the deed would not be recorded unless all grantors named in the deed would join in the execution of it and that if any grantor failed or refused to join in the execution of the deed that it would be returned to plaintiffs; that Angelina Rossi refused to execute the deed, but that nevertheless, without any authority from plaintiffs, some other person recorded it after the mother's death and that the mother did not in her lifetime commence the proposed action against the heirs and devisees of Pieri and that the administrator filed an inventory including the respective undivided 1/8 interests of plaintiffs as an asset of the estate. The complaint then alleged that the administrator refused to recognize that the deed was executed for the purposes above mentioned or that the mother received from plaintiffs the conveyance of their respective undivided 1/8 interests in the property in trust for the purposes stated in the complaint and that the administrator intended to petition the court to distribute each plaintiff's 1/8 interest to the heirs of Carolina Banducci. The complaint prayed for a decree that the administrator had no interest in each plaintiff's 1/8 interest and that it be determined that the estate received said interest in trust for plaintiffs and that he be directed to reconvey that interest to them. The answer of the administrator, in effect, denied the agreement between plaintiffs and decedent.

The complaint in intervention alleged that Carolina Banducci died November 16, 1940, and left an estate consisting of an undivided 22/24 interest in the realty here involved; alleged that plaintiffs in intervention and the other children of the deceased were entitled to their proportionate share in her estate and prayed that it be decreed that decedent was at the time of her death the owner of the undivided 22/24 of the realty and that plaintiffs in intervention owned the remainder.

Plaintiffs answered the complaint in intervention and in substance denied the allegations. Findings of fact were made by the court. Judgment was entered in favor of the respondents herein upon the complaint in intervention, quieting title to the real property involved. The decree determined that the title was vested in the heirs of the mother to the extent of an undivided 23/24 interest and in one of the plaintiffs in intervention, Angelina Rossi, respondent herein, as to an undivided 1/24 interest.

Appellants' points on appeal, if we construe them properly, are (1) that the findings are contrary to the evidence; (2) that the evidence is insufficient to support the findings; and (3) that the trial court failed to find on certain material issues.

Plaintiffs offered in evidence a letter from Louis J. Banducci, dated July 10, 1938, directed to Joseph Banducci, in which Louis informed him that he had a title search made of the property here involved and found that Pieri heirs claimed some interest therein and that it would be necessary to file a suit to quiet their title and that according to his attorney's advice the simplest way was to have all of the brothers and sisters, and also the mother, deed the property to him and have only one plaintiff. A form of deed was enclosed. He recited in the letter that he would deed it back to the respective parties when title had been quieted. Joseph Banducci testified that trouble was encountered in having the necessary parties sign the property over to Louis, as suggested in the letter; that a conversation later ensued among the brothers and sisters, and as a result thereof all agreed to deed the property to their mother for the purpose suggested. There was then received in evidence an ordinary quitclaim deed from plaintiffs to Angelina Banducci, dated April 19, 1939, reciting a consideration of $1. This deed was found among the mother's effects and later was recorded by the administrator of her estate. Louis Banducci testified that no consideration was paid for the deed; that it was not to be recorded unless all signed it. He then testified that he took care of his mother's business affairs during the last two years of her life; that he discussed with her the cloud on the title to the property; that in connection therewith he then wrote the above-mentioned letter to his brother Joseph; that the mother authorized him to "go ahead" and clear the title. This testimony received corroboration by other witnesses.

Angelina Rossi testified that in 1939, she had a conversation with her mother and her brother Joseph, in which conversation the mother said "that the quitclaim to her was for the purpose of turning all the property back to her so she could divide it equally between all six of her children; that Joseph said: "What can you do with a woman like that, she has got on her mind to make six equal shares and you can't change it"; that she had a discussion with Antonio in December, 1942; that he said, in regard to the mother holding the property in trust for them, that "they (the brothers) couldn't get her (the mother) to sign any trust deed whatever, because she wanted to make it equal"; that the Pieri matter was not mentioned to her (Mrs. Rossi) at all; that the reason she did not sign the quitclaim deed was because the brother explained to her that the mother wanted all the property conveyed back to her "so she could divide it equally" (this conversation was denied by Joseph Banducci); that nothing was said about clearing up the title; that they showed her a quitclaim deed but they could not explain it to her satisfactorily and therefore she did not sign it; that she took the deed to her attorney and he could not explain it.

The record discloses that the property here involved was acquired from the estate of Antonio Banducci, deceased, father of plaintiffs and interveners, by a decree setting apart a homestead in the names of the widow and children and for their use. Upon this evidence the court found against plaintiffs and for respondents.

Plaintiffs cite Bradley Co. v. Bradley, 37 Cal.App. 263, 173 P. 1011, 1012, which sets forth the rule that "Under the statute of frauds it is the general rule that parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor." And recites the exception to the rule therein set forth that "Where, however, by means of an oral promise made without any intention of performing it, one obtains an absolute deed without giving any consideration therefor, it is a case of actual fraud, and the statute of frauds is not a bar to relief." They cite another exception to the rule stated in Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189, which is to the effect that if a grantee, by means of a parol promise to reconvey, obtains an absolute deed without consideration from one to whom he stands in a confidential relation, the breach of the promise is constructive fraud, although at the time it was made there was no intention not to perform.

The findings of the trial court in the instant case are, in effect, that the conveyance was supported by consideration and effective. Plaintiffs allege in their complaint that on the "19th day of April, 1939" they "* * * made, executed and delivered to Carolina Banducci their deed in writing to the" property described. They made the deed a part of their complaint by reference which recited a "consideration of $1.00, receipt of which is hereby acknowledged." The answers admitted these allegations.

[1] Under Section 1614 of the Civil Code a written instrument is presumptive evidence of a consideration and under section 1615 of the Civil Code the burden of showing a want of consideration sufficient to support an instrument lies on the party seeking to invalidate or void it. See, also, Vanasek v. Pokorny, 73 Cal.App. 312, 318, 238 P. 798.

[2-5] While the evidence in the instant case might well support a contrary view to that expressed and found by the trial court, this court, on appeal, is guided by well established and time honored rules. Where a judgment is under attack because it is claimed to be unsupported by the evidence, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, including presumptions, contradicted or uncontradicted, which will support the conclusion of the trial court, and when two or more inferences can be reasonably deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. Or, if there be any reasonable doubt as to the sufficiency of the evidence to support a judgment, appellate courts should resolve that doubt in favor of the judgment. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183. Under such view of the law we cannot hold that the findings of the trial court are unsupported by the evidence. The trial court's findings relating to the effectiveness of the deed and consideration supporting it were supported by the pleadings, the evidence and presumptions prevailing. The most that can be said for appellants' argument is that there was a conflict in the evidence. On an appeal from a judgment all conflicts must be resolved in favor of the prevailing party, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. Crawford v. Southern Pacific Co., supra.

[6] The findings relating to specific allegations in certain paragraphs of the complaint dispose of all of the material issues of the case. No further findings were necessary. Where the findings made covered all the material issues, findings upon other issues which thus become immaterial are unnecessary. People's Finance & Thrift Co. of Porterville v. Van Moon, 44 Cal.App.2d 223, 225, 112 P.2d 24.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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63 Cal.App.2d 343

FRYER et ux. v. FRYER et ux.

Civ. 14233.

District Court of Appeal, Second District, Division 2, California.

March 20, 1944.

1. Waters and water courses 🔑127

In order to acquire by prescription a permanent right to water developed on land of another, the enjoyment thereof must have been adverse, continuous, and uninterrupted for not less than five years.

2. Waters and water courses 🔑127

The use of water from another's land with the latter's permission has no efficacy in gaining title, neither does knowledge of the owner that water is used by another suffice to vest title by continued use, unless for the statutory period the owner is advised that the water is being taken under claim of ownership.

3. Waters and water courses 🔑127

The law presumes that water taken from the land of a neighbor belongs to him and is used with his permission or by acquiescence.

4. Waters and water courses ⚩156(4)

Where a deed of water rights provided that all water developed on any of four lots should be put to beneficial use of all lots and a deed conveying to defendant one of the lots reserved all water developed thereon for the benefit of all four lots, such deeds were conclusive against defendant's right to take water on lot conveyed for the benefit of another lot previously acquired. Code Civ.Proc. § 1962, subd. 2.

5. Waters and water courses ⚩156(2, 9)

A contract giving defendant right to water on certain lot for benefit of another lot supplanted all prior existing water rights in such lot, and cancellation of such contract erased all bases for claims to water rights in such lot.

6. Waters and water courses ⚩127

Where defendant's use of water from adjoining lot had always been by express permission and defendant had paid all expenses in connection therewith, his taking of the water could not be regarded as hostile so as to form basis for any prescriptive right.

7. Waters and water courses ⚩158½(1)

Where lot owner failed to establish that water which had its source in a certain lot was the same as the water which percolated under his lot, he could not claim the right to use water from the other lot as being water from the "common pool".

See Words and Phrases, Permanent Edition, for all other definitions of "Common Pool".

8. Waters and water courses ⚩156(5)

Where the right to the use of water from one lot was limited by contract and deed to that lot and three adjoining lots, defendants who acquired one of such lots and was bound by the contract could not claim right to use of such water for the benefit of another lot under doctrine of correlative rights.

9. Waters and water courses ⚩158½(1)

Where contract and deed provided that water from a tank on one lot could be used for the benefit of such lot and three other lots, but the water was used only for one lot owned by defendant and one owned by plaintiff, the court properly decreed that the expenses of maintaining tank should be borne by plaintiff and defendant equally, although plaintiff also owned the other two lots.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Walter L. Fryer and Louise F. Fryer, his wife, against William Harry Fryer and Olive Stand-Lee Fryer, his wife, for declaratory relief and to enjoin defendants from interfering with plaintiffs' right to an easement over defendants' land and from interfering with plaintiffs' right to water from a tank owned by the parties as tenants in common. From an adverse judgment, defendants appeal.

Affirmed.

Horowitz & McCloskey, of Los Angeles, for plaintiffs and respondents.

Allard & Whyte, of Pomona, for defendants and appellants.

MOORE, Presiding Justice.

This action was commenced for declaratory relief and to settle a controversy between two brothers and for injunction against defendants' interfering with plaintiffs' right to an easement over defendants' land, polluting water in a tank owned by the parties as tenants in common, draining the water from the tank to such extent as would prevent its free flow therefrom, and preventing plaintiffs from keeping the tank filled.

Prior to September 5, 1935, Sarah R. Fryer was the owner of lots 1, 2, 3, and 4 of tract 2154, Los Angeles county. For about thirty years prior thereto defendants were the owners of lot 6, of the same tract. Mrs. Fryer's lands were a series of adjoining parcels aggregating about 50 acres adapted to citrus culture. Lot 6 consisted of 14 acres and had been a productive orange ranch during its ownership by defendants. On September 5, 1935, Mrs. Fryer conveyed the four parcels to her children as follows: to Walter, lots 1 and 3; to William, lot 2; to her daughter Cullie, lot 4. Both Cullie and Walter were granted rights of way over lot 2, on which at that time there was a well and a pumping plant. Evidently for the purpose of providing each of the three children with sufficient water for the development and cultivation of the lands so conveyed, on the same day by grant deed she conveyed to each of the children a one-third interest in all water, water rights and rights to develop water in and upon her four parcels. By that deed it was provided that all water developed on any one of the four parcels should belong in equal undivided shares to the three children, who should share equally the expense for the development of the water and making it available for beneficial use only upon those lands.

The controversy between the brothers had its genesis in the relation of lot 6 to the lands they had received from their mother. On April 24, 1934, defendants found it necessary to procure a loan from the Federal Land Bank of Berkeley to be secured by a lien upon lot 6. Such loan was dependent upon defendants' obtaining evidence of their ownership of definite water rights appurtenant to lot 6. Notwithstanding they had, with the permission of the mother, utilized water from lot 2 in the irrigation of lot 6, on that date William caused his mother to execute an agreement which recited her installation of a well and pumping plant on lot 2, to be maintained by her and through which she should deliver to lot 6 sufficient water to irrigate so much of lot 6 as might be specified by defendants. That agreement is hereinafter referred to as the "water contract." By its terms defendants were to pay 3¢ per inch for all water delivered to lot 6 under the contract, which declared that the water rights established thereby were for the benefit of and appurtenant to lot 6. The instrument declared that one of the reasons for the agreement was "to create a water right for said land of second party" to facilitate the procurement of the loan. The agreement also provided that it might be cancelled after the mortgage to the Federal Land Bank had been fully paid upon giving the notice provided by its terms. Having discharged the mortgage on December 31, 1942, defendants by their notice cancelled the water contract and thereby relinquished all rights which they had gained by virtue of that instrument.

On February 1, 1937, plaintiffs purchased from Cullie lot 4. Thereafter the controversy attained to serious proportions following the cancellation. Someone had polluted the water in the tank on lot 2; someone had plowed up plaintiffs' rights of way over lot 2 and defendants insisted upon using water from the well on lot 2 to irrigate lot 6 notwithstanding their cancellation of the water contract. Most of the issues between the parties were settled by stipulation in the trial court, but the claim of defendants that they had by prescription acquired the rights to the use of water developed on lot 2 for the irrigation of lot 6 was decided against them. This is the primary contention for our determination.

[1-3] Never, during the lifetime of Mrs. Fryer and prior to her water contract, did appellants utilize the water from lot 2 otherwise than with her consent. Following the execution of that instrument they used the water pursuant thereto, since in effect it had superseded every vestige of a right to water theretofore obtaining. It is the law that in order to acquire by prescription a permanent right to realty or to water developed on the land of another the enjoyment thereof must have been adverse, continuous, open, and uninterrupted for not less than five years. The use of water taken from the lands of a neighboring owner must have been adverse and hostile under claim of legal right to do so, and for the period necessary to gain title for possession under the statute of limitations. Abbott v. Pond, 142 Cal. 393, 398, 76 P. 60. The claim must have been declared to the titular owner. Unless the use has been hostile to the title of the servient estate then no titular right has become vested in him who makes the claim of title by adverse possession. Use of water from another's land with the latter's permission has no efficacy in gaining title. Neither does knowledge of the owner that his water is used by another suffice to vest title by continued use, unless for the five-year period the owner is advised that the water is being taken under a claim of ownership of the taker. Withal the law presumes that water taken from the land of a neighbor belongs to him and is used with his permission or by his acquiescence. Clarke v. Clarke, 133 Cal. 667, 669, 66 P. 10; Strong v. Baldwin, 137 Cal. 432, 438, 70 P. 288; Stufflebeem v. Adelsbach, 135 Cal. 221, 225, 67 P. 140; Half Moon Bay Land Co. v. Cowell, 173 Cal. 543, 160 P. 675.

[4] Not only did appellants gain no right by prescription, but they are confronted with written agreements which definitely refute their claims. By the deed which conveyed lot 2 to appellants, Mrs. Fryer reserved all water and water rights and rights of way over lot 2 to convey the water to any of the four lots which she had owned. Also, her deed of the water rights in the four parcels provides that all water developed on any of the four lots shall belong to the children in equal undivided shares and shall be put to beneficial use upon those four lots only. The

truth of such recital in the deed accepted by appellants is deemed conclusive and no evidence can contradict it. Subd. 2, Code Civ.Proc. 1962; Estate of Mills, 137 Cal. 298, 303, 70 P. 91, 92 Am.St.Rep. 175; Knoch v. Haizlip, 163 Cal. 146, 124 P. 998.

[5] Appellants contend that the water contract was executed for the specific purpose of enabling defendants to procure a loan on lot 6 and that their rights to the water from lot 2 for use on lot 6 had been established by over 30 years of adverse enjoyment. That contract specifically provided that it was made for the purpose of creating a water right for the benefit of lot 6. But since it supplanted all prior, existing water rights in lot 2, if any, its cancellation erased all bases for claims on the water of lot 2 for use on lot 6. The contention that they are entitled to resume the use of the water which they had enjoyed in former years under the ownership of Mrs. Fryer is overcome by the restrictive terms of the several deeds to the children.

[6] The authorities cited by appellants to the effect that they had acquired a prescriptive title to the water developed on lot 2 do not support their contention. It is of no moment in this case that a quitclaim deed to rights previously acquired by grantees does not confer additional rights, as held in the Mt. Shasta Power Corp. v. McArthur, 109 Cal.App. 171, 178, 292 P. 549. The Wucthumna case, Wutchumna Water Co. v. Ragle, 148 Cal. 759, 84 P. 162, does not support appellants' argument. The defendant there had an agreement with plaintiff's predecessor for the diversion of the water used, and it had been enjoyed adversely, notoriously, and uninterruptedly for more than five years. While Mrs. Fryer had permitted William to use the water on lot 6 for many years, he was required to pay certain operating expenses as did other neighbors who used the water, and during the same period William worked for his mother in caring for her lands. After the old well had caved in and water was no longer supplied to the neighbors from the new well, William paid his mother the operating expenses of the plant for the privilege of irrigating his orchard on lot 6. In view of William's testimony that the water was used from lot 2 on his lands with the express permission of his mother, it cannot with reason be contended that his taking of the water was an act hostile to her title. Nothing to the contrary is contained in the authorities cited by appellants. American Company v. Bradford, 27 Cal. 360, 361, 368; Gurnsey v. Antelope Creek & Red Bluff Water Co., 6 Cal.App. 387, 92 P. 326; Hudson v. Dailey, 156 Cal. 617, 105 P. 748; Moore v. Clear Lake Water-Works, 68 Cal. 146, 8 P. 816; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 P. 535, 7 Am.St.Rep. 183. The case of Copeland v. Fairview Land & Water Co., 165 Cal. 148, 131 P. 119, does not support appellants' claim and is readily distinguished.

[7, 8] An attempt is essayed to establish a right in defendants to use the water from lot 2 on lot 6 under the doctrine of correlative rights. Under this point they cite Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L.R.A. 236, 99 Am.St.Rep. 35, as announcing the doctrine that while percolating waters are part of the land and belong to the owner, the water may be used by him on lands adjoining and overlying the source of supply to a reasonable extent provided that it does not injure those who have the same rights in the common source. Their contention is that since lot 6 is a part of tract 2154 and overlies the common reservoir, it is entitled to use the water from lot 2. There are two answers to this contention: (1) It was not proved by appellants that the water which has its source beneath the lots 1, 2, 3, and 4 is the same as the waters which percolated under lot 6. If it had been so established, in the absence of contractual relations the owner of lot 6 would be within his rights in developing and using water from the common pool. Burr v. Maclay Rancho Water Co., 160 Cal. 268, 116 P. 715. (2) However, even though such proof of a common reservoir had been made, the parties, by the deeds from Mrs. Fryer and by the water contract, established their respective rights to the waters developed on lot 2. It follows that the doctrine of correlative rights is unavailing to appellants.

[9] Appellants deem themselves to be aggrieved by that portion of the judgment which provides the expense of maintaining the water tank on lot 2 should be borne by the parties in equal shares. They contend that because respondents now own an undivided two-thirds interest in the tank, two-thirds of such expense should be borne

by respondents and that the cost of operation should be based upon the hourly use made. But the tank is used for only lot 1, owned by respondents, and lot 2, owned by appellants, and is not used on lots 3 or 4.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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63 Cal.App.2d 311

RECLAMATION DIST. NO. 108 et al. v. GIBSON, County Treasurer (COOPER et al., Interveners).

Civ. No. 7048.

District Court of Appeal, Third District, California.

March 17, 1944.

Hearing Denied May 11, 1944.

1. Waters and water courses ⇨222

Statutes in effect when reclamation district bonds were issued and sold became inseparable parts of bond contracts so that authority of trustees of reclamation district to lease lands belonging to district was limited by such statutes and reasonable inferences to be drawn therefrom. Pol.Code, §§ 3454, subd. 10, 3466a, and § 3480, as amended by St.1923, p. 606.

2. Waters and water courses ⇨222

Under statute authorizing trustees of reclamation district to lease or sell lands acquired by district for unpaid assessments, trustees were authorized to lease such lands for oil and gas purposes. Pol.Code, §§ 3454, subd. 10, 3466a, and § 3480, as amended by St.1923, p. 606.

3. Landlord and tenant ⇨20
Mines and minerals ⇨56

Though there are substantial differences between a mineral lease and an ordinary usufructuary lease, the chief characteristics of both types bring them within the ordinary terms of what is commonly called a "lease."

See Words and Phrases, Permanent Edition, for all other definitions of "Lease".

4. Mines and minerals ⇨73

The interest created by oil and gas lease is a term for years, and as such is "personalty" and not "realty."

See Words and Phrases, Permanent Edition, for all other definitions of "Personalty" and "Realty".

5. Statutes ⇨231
Waters and water courses ⇨222

Code section 3480, directing county treasurer to sell at public auction land held by him as trustee of the bond fund of a reclamation district, should be construed with section 3454, and as thus construed did not require trustees to immediately sell lands acquired by purchase for delinquent assessments, but conferred upon trustees a sound discretion to determine when such sale may be made, and in the meantime to manage and control such property. Pol.Code, §§ 3454, subd. 10, 3466a, and § 3480, as amended by St.1923, p. 606.

6. Waters and water courses ⇨222

Statutory authority of trustees of reclamation district to lease land acquired for unpaid assessments constitutes an "exception otherwise provided by law" within statute requiring county treasurer upon sale of such land to execute a deed conveying title thereto free of encumbrance except as otherwise provided by law, so that such statutory requirement did not prohibit encumbering such land by executing an oil and gas lease thereon. Pol.Code, §§ 3454, subd. 10, 3466a, and § 3480, as amended by St.1923, p. 606.

See Words and Phrases, Permanent Edition, for all other definitions of "Exception Otherwise Provided By Law".

7. Waters and water courses ⇨222

The court could not assume, in absence of evidence of effect upon value of real property, that execution of oil and gas lease of lands acquired by reclamation district for unpaid assessments would necessarily reduce value of the security for payment of district bonds, and impair the obligations of bond contracts so as to prevent trustees of district from executing such lease. Pol. Code, §§ 3454, subd. 10, 3466a, and § 3480, as amended by St.1923, p. 606; Const.Cal. art. 1, § 16; U.S.C.A.Const. art. 1, § 10.

Petition by Reclamation District No. 108 and Horace B. Wulff and others, being and constituting the board of trustees of said district, for a writ of mandamus to require California Gibson, as County Treasurer of the County of Colusa, State of California, and trustee of Reclamation District No. 108, to execute an oil lease of real property belonging to the district, wherein F. F. Cooper and others, constituting the Bondholders' Protective Committee of the bondholders of Reclamation District No. 108, intervened, asserting that proposed lease impaired the obligations of bond contracts.

Peremptory writ of mandamus granted.

Downey, Brand & Seymour, of Sacramento, for petitioner.

Hudson Ford, Dist. Atty., of Colusa, for respondent Gibson.

Athearn, Chandler & Farmer and Milton T. Farmer, all of San Francisco, for intervener Cooper and others.

THOMPSON, Justice.

This is a petition for a writ of mandamus to require the respondent to execute under Section 3466a of the Political Code an oil lease of real property belonging to Reclamation District No. 108. The interveners, who hold in trust matured and unpaid bonds of said district of the face value of $702,000, have filed their answer to said petition, asserting that the proposed lease is unconstitutional and illegal because it violates the obligations of their bond contracts, contrary to the provisions of Article I, Section 10, of the Constitution of the United States, and Article I, Section 16, of the Constitution of California.

The petition alleges that Reclamation District No. 108 was regularly organized; that the petitioners are the duly elected, qualified and acting trustees of said district; that the respondent is the duly elected, qualified and acting Treasurer of Colusa County, and ex-officio trustee of said district; that the petitioners levied assessments in 1923 on the lands in said district, a portion of which, only, were paid; that upon proper proceedings, instituted under Section 3480 of the Political Code, reclamation district bonds were issued and sold in 1925 and 1927, aggregating a sum in excess of $6,000,000; that a portion of said bonds are matured, overdue and unpaid; that the original assessments became delinquent, and the lands affected thereby were sold and conveyed to the respondent County Treasurer, as trustee for said district, who still holds title thereto, and that the time for redemption of the property has expired.

It is then alleged that petitioners have the opportunity, and that it is for the best interest of said Reclamation District and the bondholders thereof, to execute a twenty year oil and gas lease on 7,200 acres of said land belonging to that district, to Loren L. Hillman, Inc., as lessee, for the consideration and upon the terms and conditions expressed in said proposed lease which is marked "Exhibit A" and attached to the petition. The lease provides for payment to the lessor of royalties equal to "one-eighth part of all the oil produced and saved from the demised premises" and "one-eighth of the net proceeds derived from the sale of gas from each well while same is being sold or used off the premises." It also provides that in the event drilling operations on said land are not commenced on or before April 6, 1944, the lessee is to pay to the lessor annually $1 per acre for the land described therein. It is alleged the trustees of said district regularly adopted a resolution on November 12, 1943, authorizing the execution of said lease, and that they have duly executed the same on their part, but that the respondent, as Treasurer of said County and as trustee of the district, refuses to do so. The petition then asks for a peremptory writ of mandamus to compel respondent to execute the lease.

By authority duly conferred, the Bondholders Protective Committee, which holds matured and unpaid bonds of said reclamation district in the aggregate amount of $350,000, upon which thirty-five per cent, only, has been paid, has intervened and filed in this proceeding its answer to the petition. The only issue raised by that answer is the contention that the proposed oil lease is illegal and unconstitutional because it violates the obligations of their bond contracts construed in the light of the statutes applicable thereto which were in effect at the time the bonds were issued and sold. In other words, it is asserted that an oil and gas lease, as distinguished from an ordinary usufructuary lease, sells and conveys an interest in the real property permitting the removal of a valuable portion thereof which cannot be restored and which therefore diminishes the value of the freehold and impairs the value of the bonds secured thereby. It is argued that since the real property was acquired by the reclamation district on sale for delinquent assessments as provided by law, the only authority which the trustees possess, as provided by Section 3480 of the Political Code, as it existed in 1923 when the bonds were issued and purchased, Stats. 1923, p. 606, is to sell the land at public auction to the highest bidder for cash. That portion of the section then read:

"If any land so held by a county treasurer as trustee of the bond fund of a district shall remain unsold after the final installment of the assessment shall have been collected by payment or sale, then such treasurer shall sell all such land so held by him at public auction to the highest bidder for cash, upon two weeks published notice; and shall deposit the proceeds of such sale in the treasury of the main county, to the credit of the bond fund of the district."

[1] It is true that the authority for the trustees of a reclamation district to lease lands belonging to the district is limited by the provisions of the statutes in effect at the time of the issuing and sale of the bonds in question or to the reasonable inferences to be drawn therefrom. Such statutes become an inseparable part of the contracts. Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972; 11 C.J.S., Bonds, p. 420, § 40e.

Ever since 1917, without modification in that respect, subdivision 10 of Section 3454 of the Political Code, Stats.1917, p. 1193, has authorized the board of trustees of a reclamation district:

"To sell, convey, transfer, lease to others or otherwise dispose of such real or personal property belonging to the said district which said board of trustees shall find no longer necessary for the construction, maintenance or operation of the works of reclamation of said district; also to lease to others or to operate for hire any tools or machinery belonging to the said district which is not at the time needed by the district."

But the intervener asserts that the foregoing authorization must be confined to the ordinary usufructuary lease, and that it may not be extended to a lease for the purpose of discovering and extracting minerals for the reason that the latter type of lease includes not only the features of an ordinary lease but also a sale and disposition of minerals which are a part of the freehold and results in a permanent reduction of the value of the real property which impairs the obligations of the bonds secured thereby. That contention raises a serious question which has not been heretofore directly determined by any cases which have been called to our attention. Two questions are thereby raised, first, was the reclamation district authorized by statute to lease the property for oil and gas purposes, and, second, must this court assume, without evidence of the effect of that lease upon the bonds, that it will impair the obligations of the contracts.

[2] In the recent case of Reclamation District No. 1500 v. Raub, 58 Cal.App.2d 491, 137 P.2d 45, this court held that a reclamation district has the authority, under circumstances similar to those of the present proceeding, to lease land belonging to the district for oil and gas purposes. The Supreme Court denied a hearing in that case. It is true that these interveners were not parties to that action. But it squarely determines that the statute authorizes the trustees of a reclamation district to lease its real property for oil and gas purposes. The Raub case appears to be controlling in that regard. The statute authorizing the leasing of land makes no distinction between oil and gas leases and ordinary usufructuary leases.

[3, 4] It is true that a distinction has been drawn by the authorities between a mineral lease and an ordinary usufructuary lease. Richardson v. Callahan, 213 Cal. 683, 3 P.2d 927; Stone v. City of Los Angeles, 114 Cal.App. 192, 299 P. 838; Chandler v. Hart, 161 Cal. 405, 414, 119 P. 516, Ann. Cas.1913B, 1094; 24 Am.Jur. 544, sec. 39. Both types, however, are included in the term "lease". The chief characteristics of both types of instruments bring them within the ordinary terms of what is commonly called a lease. In commenting on the differences existing between such instruments, the court says in the case of Dabney v. Edwards, 5 Cal.2d 1, at page 9 thereof, 53 P.2d 962, at page 965, 103 A.L.R. 822:

"It must be apparent, therefore, that even though our courts have recognized that there are substantial differences between an oil lease and an ordinary lease, that such recognition has not, by any decisions of the courts of this state, made an oil lease real property in the generic common-law sense of that phrase. * * * Our courts have held uniformly and unequivocally that the interest created by an oil and gas lease is a term for years, and as such it is personalty. Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann.Cas.1913B, 1094; Barr Lumber Co. v. Perkins, 214 Cal. 531, 6 P.2d 948."

We may not assume that merely because there are certain recognized differences between an oil or mineral lease and an ordinary usufructuary lease, the statutes applicable to reclamation districts did not contemplate the right of the trustees to execute an oil and gas lease of its real property. We are of the opinion the statute authorized the trustees, in the exercise of a sound discretion, to "sell, convey, transfer, lease to others or otherwise dispose of such real or personal property belonging to the said district," Sec. 3454, Pol.Code, for the benefit of the district.

[5] Nor may we hold that portion of Section 3480 of the Political Code, previously quoted, absolutely requires the trustees to immediately sell the lands acquired by purchase for delinquent assessments "at public auction to the highest bidder for cash." That section should be construed together with the provisions of Section 3454, supra. Otherwise it might destroy the effect of the last mentioned section, and result in great detriment and loss to the district and to the bondholders, impairing the obligations of the contracts. Immediate sale of such real property to the highest bidder for cash might greatly reduce the value of the bonds. We think the statute wisely confers upon the trustees a sound discretion to determine when such sales may be made for the best interests of the district and its bondholders, and that, in the meantime, the trustees may manage and control the property by operation or use thereof or by leasing it whichever may reasonably be deemed to benefit the district and the bondholders. With respect to authorizing, under Section 3466a of the Political Code, the trustees to manage and control the real property, it is said in Bank of Hawaii v. Gibson, 15 Cal.App.2d 407, at page 420, 59 P.2d 559 at page 565:

> "Section 3466a of the Political Code places all lands purchased by the treasurer, as trustee, under the 'management and control' of the trustees. When they lease the lands, out of the funds derived therefrom, they must first pay the expenses of 'holding and leasing' it. In determining what expenditures are essential to the 'management' and to the 'control' of these lands, and are incident to 'holding' them, some latitude must be allowed to the judgment and discretion of the trustees."

The intervener suggests that the execution of a lease on said lands creates an encumbrance in conflict with the provisions of Section 3480 which require the treasurer upon sale to execute a deed thereof to a purchaser of said land, "free and clear of all encumbrances." Section 3466a of the Political Code, which was enacted in 1931, Stats.1931, p. 773, and amended in 1935, Stats.1935, p. 2094, provides in part that:

> "Upon such last mentioned sale being made as herein provided the said county treasurer shall execute a deed to the purchaser conveying the land sold, upon payment of the price bid, which deed shall have the effect of conveying title to the land sold to the purchaser free of encumbrance, except district assessments * * * which upon the date of the sale herein provided had not been called, and except as may be otherwise provided by law, * * *."

[6] We are of the opinion the authorization for the trustees to lease the property, Sec. 3454, Pol.Code, constitutes an exception "otherwise provided by law." The express and implied authority conferring upon the trustees the power to manage and control the property necessarily comes within the exception "otherwise provided by law." It is apparently inconsistent to construe the statutes so as to first authorize the leasing of land, and to then require the land to be conveyed upon sale "free and clear of all encumbrances" of a lease. Moreover, even though a purchaser of the land might complain of the encumbrance of a lease, we do not see how the bondholders may raise that question unless the encumbrance automatically impairs the obligations of their contracts.

[7] We are of the opinion this court may not assume as a matter of law, in the absence of evidence of its effect upon the value of real property, that the execution of an oil and gas lease will necessarily reduce the value of the security for payment of bonds so as to impair the obligations of the contract. It is apparent that the annual rentals derived from the oil lease in question, or the royalties which may be paid under the terms of the contract may create a fund inuring to the benefit of the bondholders rather than to impair the obligations of their contracts. In the present proceeding there is no evidence that the land could be sold to advantage. Nor is there any affirmative showing that the execution of the oil and gas lease will either reduce the value of the bondholders' security or violate the obligations of their contracts.

The peremptory writ of mandamus should therefore issue. It is so ordered.

ADAMS, P. J., and PEEK, J., concur.

63 Cal.App.2d 555

BODY-STEFFNER CO. v. FLOTILL PRODUCTS, Inc.

Civ. 12546.

District Court of Appeal, First District,
Division 1, California.

March 29, 1944.

As Amended on Denial of Rehearing
April 28, 1944.

1. Customs and usages 🔑15(1)

Where action was based on theory that contracts containing provision for brokerage were contracts of purchase and sale, evidence that it was accepted usage and custom in canning trade to use standard form of purchase and sale contract for both sales and agency contracts, that standard form of contract was always construed as agency contract where provision for brokerage was inserted, and that word "brokerage" was always construed as providing compensation for agent and was never used in trade in sense of discount to purchaser, was admissible.

2. Customs and usages 🔑15(1)

Even though contract appears on its face to be unambiguous, parties to contract may prove that by general use of trade or business in which both parties were engaged and to which contract applied words had acquired a meaning different from their ordinary and popular sense. Civ.Code, § 1644; Code Civ.Proc. § 1861.

3. Customs and usages 🔑15(1)

Parties by their contract may evidence an intention not to be bound by usage, but mere use of language which is prima facie inconsistent with usage does not show an intention not to be bound by the usage where the usage gives to that very language a meaning different from that which would normally be ascribed to it.

4. Customs and usages 🔑15(1)

Where two parties engaged in canned goods trade in same locality enter into a contract, they are bound by a generally accepted usage of the trade in that locality giving to language actually used in their contract a particular meaning, even though that meaning may be at variance with the normal meaning which would be given to that language.

5. Contracts 🔑148

If previous writings, pursuant to terms of which contract sued on was claimed to have been executed, were intended by parties to be part of the contract, the previous writings were admissible as part of a single contract. Civ.Code, § 1642.

6. Contracts 🔑164

Where several instruments constitute a single contract, all are to be read and considered together, and such rule is applicable to agreements executed by parties at different times if the later document is in fact a part of the same transaction. Civ.Code, § 1642.

7. Brokers 🔑2, 39

The term "brokerage" or "brocage" is commonly used to designate either the commission or compensation paid to a broker for his services or his business or occupation.

See Words and Phrases, Permanent Edition, for all other definitions of "Brokerage" and "Brocage".

8. Sales 🔑58

Where alleged contracts for purchase and sale of canned tomatoes were executed on standard form of printed contract but brokerage provisions were inserted in typewriting, the rule that in construction of contract the written parts control the printed parts was applicable. Civ.Code, § 1651.

9. Evidence 🔑450(8)

Where alleged contracts of purchase and sale of canned tomatoes provided for 5 per cent. brokerage and two of the contracts referred to alleged buyer as agent, the contracts were ambiguous on their face so as to justify the introduction of evidence, apart from evidence of trade usage, to aid in their interpretation.

10. Evidence 🔑448

Where contract is ambiguous, evidence dehors the instrument itself may be considered to determine meaning of language used in the instrument.

11. Trade-marks and trade-names and unfair competition 🔑68(2)

A contract to pay brokerage to a buyer in violation of the Clayton Act is unenforceable. Clayton Act § 2(c), as amended, 15 U.S.C.A. § 13(c).

12. Trade-marks and trade-names and unfair competition 🔑68(2)

The provision of Clayton Act prohibiting payment of brokerage to buyer is only applicable to transactions affecting interstate commerce. Clayton Act § 2(c), as amended, 15 U.S.C.A. § 13(c).

13. Commerce ⚷16

A contract, although calling for performance intrastate, may affect interstate commerce so as to fall within provision of Clayton Act prohibiting payment of brokerage to buyer. Clayton Act § 2(c), as amended, 15 U.S.C.A. § 13(c).

14. Trade-marks and trade-names and unfair competition ⚷68(2)

Proof that contract relating to canned tomatoes was subject to provision of Clayton Act prohibiting payment of brokerage to buyer would be pertinent in determining true nature of contract under rule that an interpretation which gives effect to contract is preferred to one which makes it void and in defense of action on contract if they were construed as contracts of sale. Civ.Code, § 3541; Clayton Act § 2(c), as amended, 15 U.S.C.A. § 13(c).

15. Sales ⚷58

Clear typewritten provisions of contract fixing date for completion of final delivery were controlling over inconsistent printed provisions. Civ.Code, § 1651.

16. Sales ⚷89, 418(2)

Dates of delivery fixed by alleged contract for sale of canned tomatoes could be waived by oral agreement of parties in which event damages were to be assessed as of date of actual refusal to deliver. Civ.Code, § 1698.

17. Appeal and error ⚷1008(1)

Whether subsequent conduct of parties was such as to waive seller's default in delivery of canned tomatoes and validly extend time for delivery, despite statement to contrary contained in letter written by alleged buyer's attorney to seller, was question of fact.

18. Sales ⚷418(1)

Where alleged contract for sale of canned tomatoes provided for proration among buyers if seller was unable to fulfill all of its contracts for certain specified reasons, if facts entitle seller to benefit of such provisions, buyer's damages for seller's failure to deliver would be limited to amount of merchandise to which it was entitled as its pro rata share.

19. Sales ⚷85(2)

One of seller's customers under a contract to make pro rata delivery in case of shortage has no ground of complaint because distribution is made in a different proportion among others, unless he is prejudiced thereby.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Body-Steffner Company against Flotill Products, Inc., for breach of contracts. From an adverse judgment, defendant appeals.

Reversed.

Moses Lasky, Brobeck, Phleger & Harrison, and Jefferson E. Peyser, all of San Francisco, for appellant.

Rutherford, Jacobs, Cavalero & Dietrich, Newton Rutherford, D. R. Jacobs, Philip Cavalero, and Stephen Dietrich, all of Stockton, for respondent.

DOOLING, Justice pro tem.

Defendant appeals from a judgment for damages rendered against it for failure to deliver certain canned tomatoes and tomato paste pursuant to six written contracts entered into between plaintiff and defendant. In five of the six contracts a standard form of printed contract of purchase and sale adopted by the Canners League of California and approved by the National-American Wholesale Grocers' Association was used. By typewritten reference in the body of each of these five contracts an attached multigraphed sheet dealing with certain contingencies that might arise out of the war emergency was made a part of the contract. In the discussion which follows we feel justified in treating this multigraphed sheet as a general amendment of the printed form designed to meet certain unusual trade conditions created by the fact of our country being in a state of war, and hence no different in legal effect than if the provisions of the multigraphed sheet had been printed in the body of a revised printed form. In the two contracts which were earliest in time (dated May 23 and June 3, 1941, respectively) into the printed form in the blank provided for the insertion of the buyer's name were typed the words "B. H. Body, Inc. As Agents" and immediately below following the printed word "Remarks" were typed the words:

"Brokerage 5%
"B. H. Body, Inc."

It may be remarked parenthetically that B. H. Body, Inc., and plaintiff, Body-Steffner Company, are admittedly the same corporation.

In the three later contracts for which the printed form was used the words "As Agents" do not appear after the plaintiff's name but in the body of each contract after a description of the merchandi covered by the contract, and following the word "Terms," among other typewritten provisions the typewritten words "Brokerage 5%" were inserted.

The sixth contract was in letter form addressed to defendant by plaintiff and accepted by defendant by signature at the bottom thereof. It read in part: "We give you herewith prices and terms covering option on 10,000 cases 2-1/2 Standard Tomatoes for delivery to the Government," and recited among its terms "Brokerage—5%."

[1] Plaintiff recovered judgment on the theory that all six contracts were contracts of purchase and sale. Defendant contended that all six contracts were in fact contracts of brokerage or agency. In support of this defense questions were asked both on cross-examination of plaintiff's witnesses and by direct examination of defendant's witnesses and offers of proof were made in an effort to prove that it was the general and accepted usage and custom in the canning trade to use the standard form of purchase and sale contract for both sales and agency contracts; that in the trade this standard form of contract was always construed as a contract of agency and not as one of sale where a provision for brokerage was inserted in such contract; and that the word "brokerage" was always used and construed in the trade as providing compensation for an agent and was never used in the trade in the sense of a discount to a purchaser. Objections were sustained to all of such questions and offers of proof. In sustaining such objections we are convinced that the trial court committed prejudicial error.

[2] It is a rule of practically universal acceptation in common law jurisdictions that however clear and unambiguous the words of a particular contract may appear on its face it is always open to the parties to the contract to prove that by the general and accepted usage of the trade or business in which both parties are engaged and to which the contract applies the words have acquired a meaning different from their ordinary and popular sense. Civ.Code, § 1644; Code Civ.Proc. § 1861; Restatement of Contracts, § 246(a); 2 Williston on Sales, 2d Ed., § 618, p. 1556; 3 Williston on Contracts, Rev.Ed., § 648, pp. 1871, 1872, § 650, pp. 1874-1879; 9 Wigmore on Evidence, 3d Ed., § 2463, p. 204; 25 C.J.S., Customs and Usages, § 24, pp. 111, 112; 17 C.J., Customs and Usages, § 61, pp. 498, 499; 12 Am.Jur., Contracts, § 237, pp. 762, 763; note 89 A.L.R. p. 1228, et seq.

The rule is clearly and simply stated in the Restatement of the Law of Contracts, § 246, Comment on Clause (a) in the following language: "The rule stated in the Clause is not confined to unfamiliar words or to words often used ambiguously. Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear."

Thus, for example, such an apparently clear expression as "one thousand" may be shown by a trade usage to mean more than the number one thousand (Smith v. Wilson, 3 Barn. & Adol. 728, 110 Eng. Reprint 266) or less than that number (Soutier v. Kellerman, 18 Mo. 509; Louisiana Red Cypress Co. v. George Gilmore & Co., 13 Ga.App. 472, 79 S.E. 379) or to be estimated in an arbitrary manner without regard to actual number (Brunold v. Glasser, 25 Misc. 285, 53 N.Y.S. 1021; Walker v. Syms, 118 Mich. 183, 76 N.W. 320), and the word "white" may, by similar usage, be shown to include its antithesis black (Mitchell v. Henry, [1880] L.R. 15 Ch.Div. 181).

The whole subject has been so recently and comprehensively treated by our Supreme Court in Ermolieff v. R. K. O. Radio Pictures, 19 Cal.2d 543, 122 P.2d 3, that we need not discuss at length the many authorities cited by counsel on the subject. The court in that case stated the rule applicable here in a single sentence at page 550 of 19 Cal.2d, at page 6 of 122 P.2d: "Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense."

[3] It is true that the parties by their contract may evidence an intention not to be bound by the usage. But the mere use of language which is prima facie inconsistent with the usage cannot be held to show an intent not to be bound by the usage where the usage gives to that very language a meaning different from that which would normally be ascribed to it. As pointed out in the Ermolieff case at page 551, of 19 Cal.2d, at page 6 of 122 P.2d, in distinguishing certain cases hold-

ing that usage could not be resorted to where the language of the contract was such as to show that the parties intended that the usage should not apply: "They did not involve a situation where the evidence was introduced to define a term in the contract."

[4] Where two parties engaged in the canned goods trade in the same locality, as here, enter into a contract they are bound by a generally accepted usage of the trade in that locality giving to the terms and language actually used in their contract a particular meaning and legal significance, even though that meaning may be at variance with the normal meaning and interpretation which would be given to that language in the absence of proof of the usage of the trade.

Defendants also offered evidence of the prior dealings and negotiations of the parties, their practical construction of earlier contracts in similar form, and certain writings exchanged between the parties pursuant to which it was claimed that all subsequent contracts, including the six contracts here in issue, were executed. All such evidence was excluded although it was urged repeatedly to the court that such evidence, if admitted, would prove that the parties had agreed and understood that their contracts, including the six here in issue, were to be and were contracts of brokerage or agency and not contracts of sale, and that by their practical construction they had actually so construed their earlier contracts in the same form.

[5, 6] Insofar as the previous writings, pursuant to the terms of which all later contracts were claimed to have been executed, are concerned, if their offer on a second trial is supported by proof that they were intended by the parties to be a part of the contracts here in litigation they would seem to be admissible on the entirely independent ground that when several instruments constitute a single contract all are to be read and considered together. Civ.Code, § 1642; Restatement of Contracts, § 235(c). This rule is most frequently applied to writings executed contemporaneously, but it is likewise applicable to agreements executed by the parties at different times if the later document is in fact a part of the same transaction. 17 C.J.S., Contracts, § 298, p. 715; Lynch v. Bank of America N. T. & S. Ass'n, 2 Cal. App.2d 214, 223, 37 P.2d 716; Hawes v. Lux, 111 Cal.App. 21, 294 P. 1080; Burleson v. Northwestern M. I. Co., 86 Cal 342, 24 P. 1064.

[7, 8] The more fundamental dispute between the parties is whether the contracts are ambiguous on their face so as to justify the introduction of evidence, apart from evidence of trade usage, to aid in their interpretation. Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal. 2d 751, 128 P.2d 665. In the determination of this question it is to be noted that two of the contracts describe plaintiff "as agent" and all of them provide for "brokerage 5%." "The term 'brokerage' or 'brocage' is commonly used to designate either the commission or compensation paid to a broker for his services, or his business or occupation." 12 C.J.S., Brokers, § 1, p. 8; 9 C.J. 509. These provisions in the five contracts for which the printed form was used were inserted in typewriting, thus calling into play the settled rule that in the construction of a contract "the written parts control the printed parts." Civ.Code, § 1651.

[9] Despite these facts plaintiff argues, and supports its argument with an array of authorities, that the word "agent" is not always used by contracting parties in its legal sense and the words "brokerage" or "commission" are sometimes used in contracts of sale as the equivalent of "discount." In most of these cases the courts were called upon to construe the contracts in which such words were used without the benefit of extrinsic evidence. It may be conceded that if a court was compelled to construe the contracts here involved on their face and without the aid of extrinsic evidence they would be construed as contracts of sale, despite the typewritten words more appropriate to the relation of principal and agent. It remains true, however, that given their ordinary meaning these terms are inconsistent with the idea of a purchase and sale. Hiss v. Sutton, 203 Cal. 459, 264 P. 748; De la Questa v. Armstrong Holdings Co., 48 Cal.App. 487, 192 P. 135; Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 161 P. 25; Avondale Mills v. Benchley Bros., 244 Mass. 153, 138 N.E. 586; Sutton & Cummins v. Kiel Cheese & Butter Co., 155 Ky. 465, 159 S.W. 950; Clark v. Page Oil Co., D.C., 38 F.Supp. 384; Cox v. Savage, 209 Mass. 501, 95 N.E. 941. They are sufficient to cast substantial doubt upon the intention of the parties, and thus to open the door to the introduction of extrinsic evidence to explain their true intention.

[10] Where no extrinsic evidence is offered courts are too frequently compelled to construe ambiguities and to reconcile inconsistencies by a consideration of the contracts on their face; but where extrinsic evidence is offered to explain inconsistent provisions in a contract courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists. "The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or, perhaps, a corollary to the general rule above stated, that when any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself." Sandford v. Newark, etc., R. R. Co., 37 N.J.L. 1, 4, as quoted in Balfour v. Fresno C. & I. Co., 109 Cal. 221, 225, 41 P. 876, and Tennant v. Wilde, 98 Cal.App. 437, 445, 277 P. 137. We need only cite California C. P. Growers v. Williams, 11 Cal.2d 221, 229, 78 P.2d 1154, where extrinsic evidence was held proper to explain the words "renter member" written on the cover of an otherwise clear and unambiguous contract, and wherein the words as so explained modified and substantially reduced the payments plainly provided to be made by the defendant to the plaintiff in the body of the contract. We can find no substantial difference between the words "renter member" placed on the cover of the contract in the Williams case and the words "as agent" and "brokerage 5%" typed into the body of the contracts here.

Our conclusion that these contracts are ambiguous on their face makes it unnecessary for us to determine in this case whether parol evidence should not be admitted in every case to show the sense in which the parties used the language embodied in their contracts, even though the language used would normally have a clear and settled meaning. There is a considerable body of opinion among students of the subject whose conclusions are entitled to the greatest respect that parol evidence should always be admissible to show the sense in which the contracting parties used and understood the language of their written contracts. Cf. concurring opinion of Traynor, J. in Universal Sales Corp. v. California, etc., Mfg. Co., 20 Cal.2d 751, 776, 128 P.2d 665. Upon this question we need not at this time express any opinion, although the point is presented in the briefs.

These considerations necessitate the reversal of the judgment, but certain other points are raised which should properly be decided for the guidance of the superior court in the retrial of the action. We note them as briefly as we may, giving due consideration to the authorities cited.

Defendant claims that the contracts, if construed as contracts of sale, are illegal under the provisions of the Robinson-Patman Act. 15 U.S.C.A. § 13, subd. (c), which reads:

"(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[11-13] A contract to pay brokerage to a buyer in violation of this section is illegal and unenforceable. Jarrett v. Pittsburgh Plate Glass Co., 5 Cir., 131 F.2d 674; Merchants Service Corp. v. Libby, McNeill & Libby, 314 Ill.App. 121, 40 N.E.2d 835. The act, however, is only applicable to transactions affecting interstate commerce and plaintiff claims that these contracts which provide for delivery within this state do not fall within its scope. The solution of the question is one depending upon the evidence introduced and the court's findings thereon. A contract, although calling for performance intrastate, may affect interstate commerce so as to fall within the prohibition of this and similar federal legislation. "Where commodities are sold within one state, with the understanding that they are to constitute part of the stream of goods sold in interstate commerce, and this is a typical, constantly recurring course, the current

thus existing is a current of commerce among the states, and the prior transaction, though wholly negotiated and executed within a single state, is a part and incident of interstate commerce." Fitch v. Kentucky-Tennessee Light & Power Co., 6 Cir., 136 F.2d 12, 17; American Can Co. v. Ladoga Canning Co., 7 Cir., 44 F.2d 763.

[14] Defendant claims that it was the settled and almost invariable practice under these and earlier similar contracts with plaintiff to deliver the canned goods on plaintiff's order to freight cars for direct shipment to buyers outside of California. The court should allow defendant full opportunity to develop these facts. If the contracts are proved to be subject to this provision of the Robinson-Patman Act that fact will be pertinent in two aspects: 1. In determining the true nature of the contracts under the rule that an interpretation which gives effect to a contract is preferred to one which makes it void, Civ.Code, § 3541; Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 272, 65 P.2d 42; and 2, in defense of the action on the contracts if they are construed as contracts of sale.

The trial court assessed the damages as of January 5, 1942. The several contracts provided in the typewritten provisions thereof for installment deliveries at different times, but all prior to January 5, 1942. It is defendant's contention that the damages should have been assessed as of the various dates of performance provided in these typewritten provisions.

[15] Plaintiff counters by pointing to certain provisions in the printed part of the contracts providing that goods may be shipped in seller's discretion as soon as practicable after packing and that seller shall have the right to deliver the entire order at one time or in portions from time to time within the time of delivery provided. It argues that under these provisions all of the goods might have been delivered during the month of December, 1941, without violating the terms of the contracts. The typewritten provisions of the several contracts provided specific times and time limits for shipment. For example, the contract of May 23, 1941, contained the typewritten provision "Shipments:—1/4 as packed, balance in equal monthly shipments up to and during the month of November, 1941." This clearly fixed in this particular contract the last day of November as the date for completion of the final delivery. The other contracts contained similar typewritten provisions. Under the rule, above adverted to, that typewritten provisions of a contract control the printed provisions where the two are inconsistent, the clear provisions in typewriting fixing definite times for delivery must be held controlling. Hooke v. Pacific Grape Products Co., 18 Cal.App.2d 363, 63 P.2d 837.

[16] The principal dispute between the parties on this phase of the case is whether the evidence is sufficient to support a finding that the dates of delivery were effectively postponed by the subsequent conduct of the parties. Since the evidence may be different or fuller on this phase of the case on a retrial we consider it proper to determine only the correct rule of law to be applied in determining on the facts as found whether the dates of delivery were effectively postponed to January 5, 1942.

Defendant claims that, the contracts being in writing, the dates of delivery could only be postponed by a subsequent contract in writing, Civ.Code, § 1698, or by an oral promise by defendant to make later deliveries and plaintiff's action in reliance thereon to its detriment so as to constitute an estoppel against defendant to assert that the breaches occurred on the dates fixed for the several deliveries. Herein defendant argues that such estoppel may only be shown by evidence that in reliance upon defendant's promises of later deliveries plaintiff refrained from going into the market to buy tomatoes of the same amount and quality within a reasonable time after each default. Plaintiff claims on the other hand that the dates of delivery fixed by a written contract may be waived by the oral agreement of the parties, in which event the damages are properly assessed as of the date of actual refusal to deliver.

In Eskew v. California Fruit Exch., 203 Cal. 257, at pages 261, 262, 263 P. 804, at page 806, a case involving a written contract, the Supreme Court said:

"The next and final contention of appellant is that the court was in error in its admeasurement of damages for the breach of said agreement. This contention is based upon the theory that the contract for the delivery of the grapes was breached as to each carload thereof upon the failure of the defendant to deliver such carload on the date specified in the contract for the delivery thereof, and that this being so the plaintiff's damages should have been reckoned upon the basis of the market price of such grapes upon the date of the breach of each successive delivery, and not upon the date when the defendant finally and expressly refused to make delivery of the remaining carloads of said grapes. We are satisfied, however, that, under the terms of the contract and the evidence in the case the trial court was correct in its fixation of the date of October 2, 1924, as the time at which the plaintiff's damages for defendant's breach of its agreement were to be reckoned. Prior to that date and after the defendant's first failure to make delivery, in conferences between the plaintiff and the defendant, the latter repeatedly promised to endeavor to fulfill the terms of its agreement, and it was only after the market price of Zinfandel grapes of the required quality had increased to $100 a ton that the defendant finally and on the 2d of October, announced its refusal to further endeavor to comply with the terms of its agreement. This being so, the latter date was properly adopted by the trial court as the date upon which to ascertain the market value of grapes of the required kind and quality for the purpose of admeasuring the plaintiff's damages for the breach of the aforesaid agreement."

In view of this holding of the Supreme Court it is useless to discuss earlier cases in our District Courts of Appeal or cases from other jurisdictions cited by the parties.

[17] Defendant further points to a letter of November 10, 1941, written by plaintiff's attorneys to defendant in which, while insisting on full delivery under the contracts, it was stated that acceptance of any goods "shall not amount to a waiver of any defaults that have already occurred on your part or that may occur in the future." Whether the subsequent conduct of the parties was such as to waive the defaults in delivery and validly extend the time therefor, despite the statement to the contrary in this letter, would appear to be a question of fact the proper solution of which will depend on the proofs educed and the construction thereof by the trial court in the exercise of its sound discretion.

[18, 19] One other question is presented under a provision of the five printed contracts for proration among buyers if the seller is unable to fulfill all of its contracts for certain reasons specified. Whether or not the facts justifying the application of the proration clause are shown to exist will depend upon the proofs. If the facts entitling defendant to the benefit of the proration clause are established, plaintiff's damages will be limited to the amount of merchandise to which it was entitled as its pro rata share. It is no concern of plaintiff whether defendant prorated its deliveries proportionately to all parties holding similar contracts with it. "One of the seller's customers under a contract to make a pro rata delivery in case of shortage has no ground of complaint because distribution is made in a different proportion among others, unless he is prejudiced thereby." 55 C.J. 385; note in 74 A.L.R. pp. 1105, 1106 and cases cited therein; Ranney-Davis Mercantile Co. v. Shawano Canning Co., 111 Kan. 68, 206 P. 337.

The judgment appealed from is reversed.

PETERS, P. J., and WARD, J., concur.

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63 Cal.App.2d 439

SCHMIDT v. PENSION BOARD FOR ADMINISTRATION OF RELIEF AND PENSION FUND et al.

Civ. 3106.

District Court of Appeal, Fourth District, California.

March 23, 1944.

Rehearing Denied April 18, 1944.

Hearing Denied May 19, 1944.

1. Municipal corporations 🔑200

Evidence, including testimony of attending physician, supported action of city pension board denying application of city fireman's widow for pension on ground that city fireman's death from coronary occlusion was not result of any sickness caused by or resulting from discharge of his duties as member of fire department.

2. Appeal and error 🔑1011(1)

An appellate court has no power to set aside findings of a judicial body vested with fact finding power when such findings are based on conflicting substantial evidence.

3. Workmen's compensation ⚖1792

Determination of Industrial Accident Commission that death of city fireman was caused by injury arising out of and in course of employment within Workmen's Compensation Act was not "res judicata" in proceedings before city pension board on application of fireman's widow for pension on ground that fireman's death was result of sickness caused by or resulting from discharge of his duties as member of fire department. St.1937, p. 266, § 3212.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Petition by Elizabeth F. Schmidt against the Pension Board for the Administration of the Relief and Pension Fund, etc., and others, for writ of mandate to require defendants to grant a pension to the petitioner, as widow of Emil J. Schmidt, who, at time of his death, was a member of the Bakersfield Fire Department. From a judgment discharging alternative writ theretofore issued and denying issuance of a peremptory writ, the petitioner appeals.

Affirmed.

Claflin, Dorsey & Campbell, of Bakersfield, for appellant.

R. Y. Burum and John Shortridge, both of Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant Elizabeth F. Schmidt is the widow of Emil J. Schmidt who, at the time of his death, was a member of the Bakersfield Fire Department and had been hired by that department for a period of approximately 20 years. The record shows that Mr. Schmidt, during that twenty years of active service as a fireman, served in many of the various capacities incident to being a member of a fire fighting unit. He died on June 7, 1940, of heart disease known as coronary occlusion. Thereafter, and in due time, petitioner filed with the Board of Trustees (pension board) for the administration of the relief and benefit fund for members of the fire department of that city, an application as the widow of said deceased for an annual pension in the sum of $1,200, to be paid in equal monthly installments and to continue during her lifetime or until her remarriage, as provided in section (169) 5 of the Bakersfield City Charter, which section reads:

"Whenever any member shall die either, (a) as a result of any injury arising out of or sustained by him while in the discharge of his duties as a member of the Fire Department of the City of Bakersfield, or (b) From sickness caused by or resulting from the discharge of his duties as a member of such Department; there shall be paid an annual pension of Twelve Hundred Dollars, ($1200.00) in equal monthly installments on the regular paydays, to his survivor or survivors, as follows:

"(1) To the surviving widow of such member during her lifetime or until her remarriage. * * *"

Section (177)13 thereof provides for death benefits and the method for computing the amount payable to a wife when a member of the department dies because of risks other than those set forth in section (169)5. Under the charter provisions all pertinent matters pertaining to the administration of the pension fund were placed in the hands of the pension board. On June 30, 1942, a hearing was had before the pension board which found that "it was the unanimous opinion of the board that the death of Emil J. Schmidt was not the result of illness or injury incurred in the performance of duty. The board found the applicant to be entitled to disability and retirement benefits under section (177)13 * * *" and allowed such benefits. Petitioner then filed a petition for writ of mandate to require defendants and respondents to grant a pension to petitioner and place her name upon the pension roll and pay her the annual pension of $1,200. The court granted an alternative writ.

An answer was filed by defendants. The action came on for hearing and the trial court found "that Emil J. Schmidt died on the 7th day of June, 1940; that his death took place in his home at a time when he was not upon active duty as a member of said fire department" and "* * that by reason of the facts and by reason of the conflict of evidence at the hearing before said pension board, it appears that said board did not abuse its discretionary powers and did not act in violation of law * * * that * * * the petitioner became entitled to an award as provided by section (177)13 of the charter. * * *" It then rendered judgment that the alternative writ of mandate theretofore issued be discharged and denied the issuance of a peremptory writ. Petitioner then appealed. The evidence, all documentary, adduced at the trial, bearing on the question here presented, was as follows: (1) City charter; (2) transcript of proceedings and evidence taken before the pension board; (3) amended application for pension; (4) death certificate; (5) letter from Dr. Tuttle; (6) statement from a Dr. Moore, autopsy surgeon.

The only question here presented is whether or not the evidence which was considered by the pension board and trial court was conflicting, and whether or not it was sufficient to support a finding that Emil J. Schmidt did not die as a result of any injury arising out of or sustained by him while in the discharge of his duties as a member of the fire department of the city of Bakersfield or from any sickness caused by or resulting from the discharge of his duties as a member of such department.

The facts surrounding the illness and death of the deceased is set forth in the statement received in evidence in the form of a letter from Dr. Tuttle, the deceased's personal physician, which letter is directed to the state pension insurance fund. It reads as follows:

"Gentlemen:

"With regard to the circumstances surrounding the death of Emil J. Schmidt I wish to advise that I saw this man on the morning of June 7, 1940, around 10 A. M. He came in for his regular treatment. He had his treatment consisting of massage of the prostate, *diathery* to the shoulder and passive manipulation. He made no complaints of any kind to indicate he was not feeling well.

"About 8 P. M. of the same date, June 7th, 1940, I received a phone call from Mr. Schmidt's wife who indicated he was quite ill. I went to the man's home and found that he suddenly developed a severe pain under the lower part of the sternum and broke into severe perspiration. This had happened just a few moments before his wife called me.

"I found Mr. Schmidt in bed and the perspiring had stopped but recurred two or three times in the next forty five minutes. The pain continued in spite of hypodermic injections of 1/20th of a grain of Dilaudid. I also used a tissue extract—Pepronex during the care of the man. The condition was definitely suggestive of a coronary occlusion. At about 8:50 p. m. he sat up to belch and had a convulsion and stopped breathing.

"The history of the activity of the man during that day was that there was nothing noticed at all during the day of any illness. In fact Mr. Schmidt had helped his wife with the canning of some apricots during the day. He was home on that day as it was his day off work.

"On June 8, 1940, I did an autopsy with Dr. William Moore and Dr. Headen Inman present. We did not examine the body other than for the heart and found the valves of the heart in good condition but a complete occlusion of the anterior descending branch of the left coronary artery. There was a narrowing of the coronary vessel at this and one other location. A thrombosis of the vessel occurred completely blocking it.

"Past history was entirely negative and at no time during the course of his treatment was there anything to suggest any heart ailment.

"I see nothing to indicate that this man's death was brought about in any way by the injury to the shoulder or by his employment, except that his employment as a fireman could be a contributing factor in the development of sclerosis of the coronary arteries. There is no way to determine the period of time this condition had been existent.

"There is no way for me to give a definite opinion that the condition or death was due to the employment.

"A. M. Tuttle, D. O."

The death certificate signed by Dr. Tuttle indicates that he attended the deceased (aged 50 years) from November 5, 1939, to June 7, 1940; that the immediate cause of death was "coronary occlusion; duration 1 HR." and the death was due to "sclerosis coronary vessels". The transcript of the proceedings and evidence taken before the pension board shows that Mrs. Schmidt testified that her husband injured his shoulder about a year prior to his death and that he had been taking treatments for that; that when her husband came home on his day off he made complaint about a pain in the left side of his chest in the region of his heart and that he said he had it on the day before when he was on duty;

that her husband was an engineer in the fire department and had been acting as captain at various times and had fought many fires during his twenty years of service in the department; that he worked a shift of 24 hours on duty and 24 hours off duty; that he was subject to call at all times; that during their 28 years of married life he had no serious sick spells; and that the shoulder injury happened during a night when he was on duty when an alarm came in. Counsel for petitioner then stated: "Now we don't claim this shoulder injury had anything to do with this heart attack. * * *" Petitioner then testified that her husband had his tonsils removed in December, 1939, because he was advised by his doctor that his bad tonsils might be contributing to the stiff shoulder of which he complained. Other witnesses testified as to the character and hazards of the deceased's particular duties in connection with his employment. Petitioner then presented as her witness a licensed physician and surgeon, who never attended the deceased, to whom was propounded a hypothetical question based upon the deceased's age, his duties as a fireman, the fact that he came home on the day in question in an exhausted condition and complained to his wife of severe pains, that the autopsy revealed that the deceased died of coronary occlusion and that the valves of the heart were in good condition but showed a complete occlusion of the anterior descending branch of the left coronary artery; that there was a narrowing of the coronary vessel at this and one other location and that thrombosis of the vessel occurred completely blocking it off. In answer to this question the witness testified that the deceased's "occupation would be a contributing cause to the death" and that deceased's "sickness was caused by or resulted from the discharge of his duties as an employee of such department". On cross-examination the doctor testified that up to 1930 coronary occlusion had not been discovered, but since that time doctors have made investigation and that 40 per cent of the people whose deaths are from that cause are "foremen or executives * * * working at strenuous work * * * and strenuous life" ; that he had never had a fireman affected with this since 1930; that a lot of doctors died of heart trouble; that one may have coronary occlusion without arterial sclerosis, but 90 per cent of the cases have arterial sclerosis first; that the cause of that is extreme exercise, over eating, and over drinking, starting a deposit in the arteries; over smoking, and other things that might cause excitement; that if the deceased had "stopped, taken care of himself, * * * eating, sleeping, and drinking, he would have lived twenty years longer". At the hearing before the board petitioner offered in evidence the findings and award of the Industrial Accident Commission showing that the deceased "sustained injury arising out of and in the course of the employment within the meaning of and as provided by section 3212 of the Labor Code." St.1937, p. 266. This was received in evidence before the Pension Board over objection. Before the trial court, objection to its admissibility was sustained. After introducing into evidence the statement of Dr. Moore, attending autopsy surgeon, before the Pension Board, the board made its findings. His report was as follows:

"On Saturday, June 8, 1940, I attended an autopsy performed by Dr. Tuttle on the body of E. J. Schmidt. The chest only was examined. It was found that the heart revealed a thrombosis of a coronary artery. No other pathology about the heart or chest was found.

"I had never examined or treated Mr. Schmidt. I attended the autopsy at the request of Mrs. Schmidt, who is a patient of mine. Dr. Inman, pathologist, was also present at this autopsy."

[1] From an examination of the evidence we must conclude, as the trial court did, that the evidence presented to the Pension Board did create a conflict on the issue involved and the board was fully justified in holding that the deceased did not die as a result of any injury arising out of or sustained by him while in the discharge of his duties. The deceased's physician, who was familiar with deceased's ailments for several years prior to his death, who treated him prior to and on the day of his death, and who conducted the post mortem examination, was in a much better position to give an accurate opinion than was a physician who merely answered a hypothetical question bearing on the subject.

The attending physician gave as his opinion that he could "see nothing to indicate that this man's death was brought about in any way by the injury to the shoulder or by his employment, except that his employment as a fireman could be a contributing factor in the development of sclerosis of the coronary arteries. There is no way to determine the period of time this condition had been existent. There is no way for me to give a definite opinion that the condition or death was due to his employment. * * *" The effect of his opinion negatived the opinion related by the medical expert based upon a hypothetical question, and created such a conflict therewith as would authorize and support the finding made by the Pension Board. It does not necessarily follow, from the mere fact that there may be evidence that one's employment, in any field, might be a contributing factor in the development of sclerosis of the coronary arteries, that his death thereafter would be the result of illness or injury incurred in the performance of his employment. From the testimony of the so-called expert witness himself such condition may have been the result of "over eating", "over drinking", "over smoking", "excitement", and absorption of toxines in the system. The chief of the department and three other members of the Pension Board had been members of the fire department for many years. They knew how active the deceased's duties were and heard testimony on the subject. The charter provision provided that the "* * * said board shall have charge of the disbursements from such fund" and such further duties "as are necessary to carry out the purposes intended" by it.

[2, 3] An appellate court has no power to set aside findings of a judicial body vested with fact finding power when such findings are based on conflicting substantial evidence. Thoreau v. Industrial Acc. Comm., 120 Cal.App. 67, 7 P.2d 767; Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163. The determination of the Industrial Accident Commission was not res judicata, was not binding on the Pension Board, and did not prevent a contrary determination by it. Drummond v. Drummond, 39 Cal.App.2d 418, 103 P.2d 217. If this claim of the appellant was meritorious it would result in the Industrial Accident Commission having the power to deal with and dispense funds in the care and management of the Pension Board of the Fire Department of the City of Bakersfield. It would in reality do away with the duties and powers of that board. We see no connection between the two proceedings.

In view of this determination it becomes unnecessary to decide other questions raised by petitioner. The denial of the peremptory writ was proper.

Order affirmed.

BARNARD, P. J., and MARKS, J., concur.

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63 Cal.App.2d 586

PEOPLE v. JACKSON.

Cr. 1852.

District Court of Appeal, Third District, California.

March 29, 1944.

1. Incest 🔑16
Rape 🔑57(1)

In prosecution for incest and rape, testimony of prosecuting witnesses, although in some respects contradicted by other witnesses and inconsistent and out of the ordinary, was not so inherently improbable as to be unworthy of belief as a matter of law. Pen.Code, § 261.

2. Criminal law 🔑1144(16, 18)

The appellate court must assume, in the absence of a contrary showing, that the jury reached a verdict with the full realization of their sworn duty free from passion and prejudice, and that by overruling the motion for new trial the trial court was satisfied with the sufficiency of the evidence.

3. Criminal law 🔑1159(4)

That the testimony of prosecuting witnesses contained unusual circumstances would not justify reviewing court in setting aside verdict as being based on inherently improbable evidence, but it is the exclusive province of the jury to determine whether witnesses have sworn falsely.

4. Criminal law 🔑742(1)

Alleged inconsistencies, contradictions, improbabilities, and untruths in the testimony of complaining witnesses and the characters of such witnesses were all matters for the jury.

5. Criminal law ⚿1159(4)

In prosecution for incest and rape, testimony of prosecuting witnesses could not be held to be untrue or unbelievable because it revealed an exceptional depth of moral depravity of defendant, or that it would have been physically impossible for defendant to have done the things charged against him. Pen.Code, § 261.

6. Criminal law ⚿814(18), 829(16)

In prosecution for incest and rape where there was no evidence of malice or of any cause for revenge on part of prosecuting witnesses and court instructed that their testimony should be received with great caution, refusal to instruct that no class of prosecution was attended with so much danger or afforded so ample an opportunity for full play of malice or private revenge as a prosecution for rape or incest was not error. Pen.Code, § 261.

7. Criminal law ⚿829(18)

Where instructions given fully and fairly advised jury regarding the necessity that defendant be proven guilty to a moral certainty and beyond all reasonable doubt, refusing defendant's requested instruction relative thereto was not error. Pen.Code, § 1096.

8. Criminal law ⚿829(12)

Refusal to instruct that in considering the evidence as to truth or falsity of any facts, one of which merely points to defendant's guilt and the other of which raises reasonable doubt as to guilt, the jury should find such fact in defendant's favor, was not error where subject matter was sufficiently covered in another instruction.

9. Criminal law ⚿1172(6)

In prosecution for incest and rape, where all prosecuting witnesses were under age of 18, instructing jury in accordance with statute defining the various kinds of rape, although there was no evidence as to incapacity of any prosecuting witnesses to give consent because of lunacy, etc., was not reversible error. Pen.Code, § 261.

10. Criminal law ⚿1172(2, 6)

In prosecution for incest and rape, giving an instruction on circumstantial evidence was not prejudicial on ground that there was no circumstantial evidence in the case and that the instruction gave jury the impression they could find defendant guilty on suspicion. Pen.Code, § 261.

11. Criminal law ⚿829(12, 14)

Where the court instructed jury not to consider evidence that was excluded and not to be influenced by suspicion, refusing defendant's requested instruction relative thereto was not error.

12. Criminal law ⚿1036(5)

Defendant could not complain for the first time on appeal of the admission of hearsay evidence.

13. Incest ⚿14
Rape ⚿51(1)

Evidence sustained conviction for incest and rape.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Sanford E. Jackson was convicted of incest and rape, and he appeals.

Affirmed.

Archibald M. Mull, Jr., of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed by the District Attorney of Sacramento County defendant was charged with two counts of incest in that he, on December 16 and December 24, 1942, had sexual intercourse with his daughter; with two counts of rape of one Elsie M. who was then under the age of eighteen years, and with three counts of rape of Dorothy M., also under the age of eighteen years. He was found guilty of all of the seven counts, and a subsequent motion for a new trial was denied.

It is unnecessary to enter into a recital of the evidence in the case. As to each of the offenses charged there is ample direct evidence which, if not incredible, furnishes adequate support for the verdict and judgment. Appellant does not, in fact, deny this. His contention is that the verdict is unsupported by evidence because the testimony of the three prosecuting witnesses is inherently improbable and unworthy of belief; that the trial court erred in giving certain instructions, and in refusing to give certain others; and that hearsay evidence prejudicial to him was admitted by said court.

[1] As to the inherent improbability of the testimony of the three prosecuting witnesses, we have read the record in its entirety and while their testimony is in some respects contradicted by other witnesses, and some of it may be inconsistent and out of the ordinary, we cannot say as matter of law that it is inherently improbable.

In People v. Collier, 111 Cal.App. 215, at page 226, 295 P. 898, at page 902, where it was contended that the testimony of a witness was inherently improbable, the court said:

"It is not sufficient that the testimony may disclose circumstances which are unusual. Where the testimony is such that within the knowledge of reasonable men it cannot be true the appellate court might assume that knowledge and hold the testimony legally insufficient, but to do so the court must act on what is equivalent to judicial notice."

In People v. Raich, 26 Cal.App. 286, at page 288, 146 P. 907, at page 908, a section 288 case, it was said:

"The complaining witness, among other things, testified, in substance, that the lewd and lascivious conduct charged against the defendant was perpetrated upon her every day for three successive months; that through all of this time she attended school every day; and that once a week during the same time she was bathed by her mother. It is insisted that this testimony of itself shows that the story of the complaining witness was inherently improbable, and therefore utterly unworthy of belief, because, as is argued, it would have been physically impossible for the defendant to have repeatedly done the things charged against him without leaving some outward evidence of his acts upon the person and clothing of the complaining witness, and at the same time visibly and injuriously affecting her health. This may be true; but the record does not show whether any observation of the person, clothing, or health of the complaining witness was made by any person at any time. True, the mother of the complaining witness had an opportunity to make the observations referred to; but the fact remains that it does not appear that she did so; and, even though she had done so and found no evidence of the crime charged against the defendant, this would not necessarily have demonstrated the improbability of the testimony of the complaining witness."

[2] In People v. Lewis, 18 Cal.App. 359, 123 P. 232, a case similar in its facts to the one before us, defendant was convicted of statutory rape upon his stepdaughter, upon her uncorroborated testimony. This court said that it would seem almost incredible that the defendant could, in the midst of the surroundings disclosed, have kept up the frequent cohabitation with the child (as she testified) for so long a period and no one observed an incriminating circumstance tending to corroborate her story; but nevertheless it said, 18 Cal.App. at age 364, 123 P. at page 234:

"We must assume, in the absence of something in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. We must also assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial. Cases have occurred—some are cited—where the appellate court has felt itself constrained, in the interest of justice, to override the conclusions of jury and trial court, but such cases are rare, and occur only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment. But this obvious and inherent improbability must, however, very plainly appear before the reviewing court should assume the functions of the trial jury.

"In People v. Kuches, 120 Cal. [566] 569, 52 P. [1002] 1003, the court said: 'By denying the motion for a new trial the learned judge of the court below has manifested his satisfaction with its sufficiency (the sufficiency of the evidence). His opportunity to form a correct conclusion upon the weight and effect of the evidence was far better than ours, and his conclusion cannot be disturbed.' See, also, People v. Benc, 130 Cal. [159], 168, 62 P. 404; People v. Logan, 123 Cal. 414, 56 P. 56."

[3] In People v. Holquin, 48 Cal.App. 2d 551, at page 555, 120 P.2d 71, at page 73, a prosecution for rape, where it was contended that the testimony of the prosecutrix was inherently improbable, the court said,

"It is not sufficient that the testimony contain unusual circumstances. People v. Collier, 111 Cal.App. 215, 226, 295 P. 898.

It is the peculiar and exclusive province of the jury to determine whether a witness has sworn falsely. Although the testimony of the prosecutrix contains contradictions and although her testimony be contradicted by other witnesses, it is still the duty of the jury to determine whether they will believe or disbelieve the prosecutrix."

In People v. Wasenius, 113 Cal.App. 106, 297 P. 966, a section 288 case, the court stated that the testimony was of such a revolting character that a recital of same would not be made; but that there was no merit in the claim that it was inherently improbable that defendant committed the offense charged; that such cases do occur and their facts are not therefore inherently improbable. Citing People v. Troutman, 187 Cal. 313, 201 P. 928.

In People v. Dorland, 2 Cal.2d 235, 40 P.2d 474, a section 288 case, it was contended that the testimony of the boy victim was inherently improbable, one of the contentions being that it was improbable and unbelievable that defendant, an educated man of good family, would do the acts attributed to him. Other improbabilities were relied upon, but the judgment was affirmed.

In People v. Troutman, supra, at page 315, 201 P. at page 929, a section 288 case, the opinion states:

"While the testimony of the complaining witness concerning the details of the commission of the crime is so out of the ordinary in its revelation of revolting details as to be startling in the extreme and difficult to believe, still it cannot be held to be unbelievable merely because it reveals an exceptional depth of moral degeneracy. To so hold would be 'purely a speculative attempt to sound the depths of human depravity and assign arbitrary rules beyond which desire and passion are held to be incapable of seducing or impelling human nature.' People v. Von Perhacs, 20 Cal. App. 48, 127 P. 1048; Stout v. State, 22 Tex.App. 339, 3 S.W. 231."

And in People v. White, 35 Cal.App. 2d 61, 94 P.2d 617, the court said that improbability of testimony must amount to incredibility.

In People v. Von Perhacs, 20 Cal.App. 48, 127 P. 1048, a rape case, the victim, a girl of sixteen years, testified that defendant had had intercourse with her in the same room with his wife, and with the knowledge of the wife that he was in the adjacent bed with the child. This, it was contended, was inherently improbable; but the court said, 20 Cal.App. at page 51, 127 P. 1049:

"While it must be conceded that there is much force in this contention, it is nevertheless but an argument directed against the weight of the evidence and the credibility of the prosecuting witness. Doubtless such an argument was addressed to the jury, and presumably it was by them given the consideration which it deserved.

"The weight of the evidence and the credibility of the witnesses are in the first instance peculiarly within the province of the jury when deliberating upon the guilt or innocence of a defendant; and, once their verdict has been rendered, the determination of such questions rests solely with the trial judge in passing upon a motion for a new trial. His conclusion as to the sufficiency of the evidence to support the verdict will not be disturbed by this court save in those rare cases where it obviously appears that the testimony upon which the conviction was had is in and of itself, or when considered in conjunction with the undisputed facts of the case, so inherently improbable as to be impossible of belief, and therefore must be considered to be in effect no evidence at all. Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 P. 178; De Arellanes v. De Arellanes, 151 Cal. 443, 90 P. 1059; Stout v. State, 22 Tex.App. 339, 3 S.W. 231."

Also see People v Moreno, 26 Cal.App.2d 334, 336, 337, 79 P.2d 390; People v. Johnson, 46 Cal.App.2d 63, 115 P.2d 605; People v. Antunez, 28 Cal.App. 740, 153 P. 963; People v. Becker, 140 Cal.App. 162, 35 P.2d 196; People v. Amadio, 25 Cal.App. 729, 145 P. 151; People v. Ralls, 21 Cal.App.2d 674, 676, 70 P.2d 265; People v. Loehr, 35 Cal.App.2d 1, 5, 94 P.2d 390; People v. Haydon, 18 Cal.App. 543, 555, 556, 123 P. 1102, 1114; People v. Quinn, 12 Cal.App.2d 752, 55 P.2d 1277; People v. Asavis, 27 Cal.App.2d 685, 688, 81 P.2d 595; People v. Braun, 14 Cal.2d 1, 5, 92 P.2d 402; People v. Carrol, 40 Cal. App.2d 667, 105 P.2d 593.

[4] Appellant's arguments in his brief are directed at alleged inconsistencies, contradictions, and what he believes to be improbabilities and untruths in the testimony of the complaining witnesses; and, as is usual in such cases, the characters of such witnesses are attacked. But these matters were all for the jury, and though the testimony may have disclosed circum-

stances that are unusual, and though some of it may be unworthy of belief, it is the exclusive province of a jury to determine whether a witness has sworn falsely, and it may reject a portion of the testimony of such witness and yet find sufficient credible testimony to support a verdict.

In People v. Loehr, supra, nine different respects in which it was contended the testimony of the complaining witness was improbable were set forth, but the court said while the alleged variances or claimed inconsistencies and contradictions appearing in the boy's testimony afforded opportunity for a persuasive argument to the jury against the reliability of his testimony, there was nothing in it from which a reviewing court could justly conclude that his entire testimony was per se unbelievable; that reviewing judges are in no position to determine the credit which should be accorded to witnesses, or to weigh their testimony. And, as was said in People v. Lewis, supra, we must assume, in the absence of something in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. Also, as there said, we must assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial.

[5] We cannot say that within the knowledge of reasonable men the testimony of the girl witnesses in this case cannot be true, or that it is unbelievable merely because it reveals an exceptional depth of moral depravity on the part of defendant, or that it would have been physically impossible for defendant to have done the things charged against him, or that the testimony of the three girls is impossible of belief. Here appellant's arguments are really arguments upon the weight of the evidence and the credibility of the witnesses, which were matters for the jury and are not for this court.

[6] Coming now to the alleged errors in the matter of instructions, appellant complains that his proposed Instruction No. 7 should have been given. It reads:

"There is no class of prosecution attended with so much danger or which affords so ample an opportunity for the full play of malice or private revenge as a prosecution for rape or incest. Therefore, you are charged to consider the evidence before you calmly, dispassionately and deliberately as you would any other accusation and to carefully and guardedly weigh, analyze and consider the testimony against the defendant."

The first sentence of this instruction is taken from the opinion of the court in People v. Benson, 6 Cal. 221, 223, 65 Am. Dec. 506; but the court did not there say that such language should be used in an instruction to a jury. It merely said that such a case should not go to the jury upon the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the court's warning them of the danger of a conviction on such testimony. The court gave two instructions, also requested by defendant, which read:

"You are instructed that since the charge of rape or incest is one which is easy to make and difficult to disprove, the testimony of the prosecuting witnesses ought to be received with great care and caution, and the evidence in this case should be weighed with the utmost care without bias or prejudice."

"The Court instructs the jury that the evidence of children must be scrutinized with great care and in determining the credibility of such testimony, you may take into consideration the probability or improbability of such evidence, whether the child testifying tells a straight story or contradicts herself, whether her testimony is corroborated, or otherwise, whether her evidence is consistent with the physical facts as shown by the evidence, whether she has been coached, or otherwise, whether her testimony shows a knowledge of things and the use of words beyond the knowledge of children of such tender years, and from these, together with all the other rules laid down in these instructions for your guidance, determine the weight, if any, you will give to such testimony."

This was sufficient on the subject, particularly because there was no evidence of malice or of any cause for revenge on the part of the three prosecuting witnesses. Dorothy and Elsie evidenced no ill will toward him. Defendant testified that he knew of no reason why the girl witnesses should have made accusations against him, and Mrs. Jackson testified that she knew of none. And the only evidence of any differences between father and daughter were regarding the latter's absences from school, and the father's unwillingness to allow her to have amusements and be with her friends. As far as the record shows she indicated no malice or desire for revenge. Also the record shows no evidence that these witnesses had been coached.

In connection with this alleged error, appellant cites People v. Trumbo, 60 Cal. App.2d 681, 141 P.2d 225, People v. Putnam, 20 Cal.2d 885, 129 P.2d 367, and People v. Adams, 14 Cal.2d 154, 164, 93 P.2d 146.

In the Trumbo case [60 Cal.App.2d 683, 141 P.2d 226] no cautionary instructions were given. The court there was requested to give an instruction reading:

"A charge of this nature is particularly difficult for defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. In the nature of the case, complaining witness and defendant are generally the only witnesses who can testify as to the existence or nonexistence of the facts in issue. Unless you are satisfied to a moral certainty and beyond all reasonable doubt that the defendant is guilty, it is your duty to find a verdict in favor of the defendant."

The court refused and instead charged:

"The testimony of a child of tender years, such as the prosecuting witness here, ought to be viewed with care and caution, and the evidence in a case of this kind is to be weighed by you with the utmost care without bias or prejudice."

A comparison of the instruction requested in that case with the one given in this case shows that the latter contains all that was contained in the omitted instruction in the Trumbo case, and more. Also it contains all that the Putman case said should be included in a cautionary instruction, and some things that the court there said were unnecessary. It covers what the court, in People v. Adams, supra, said at page 164 of 14 Cal.2d, 93 P.2d at page 151, was sufficient to guard and fully protect the rights of the defendant.

Appellant also complains of the failure of the court to give his proposed instruction No. 18, which reads:

"The interest of a defendant in the result of an action does not deprive him of the benefit of his own testimony. The law makes him a competent witness in his own behalf, and his testimony is entitled to full and fair consideration by you, the same as that of any other witness. He is considered innocent until the prosecution establishes the contrary by convincing proof and beyond a reasonable doubt. His evidence is entitled to full credit when you believe he has spoken the truth, and the evidence of such a witness is sufficient proof of any fact to which you believe he has truthfully testified." This instruction was marked "not given" because "covered elsewhere."

Defendant's instruction No. 13, which was given, reads:

"In considering the weight and effect to be given to the evidence of the defendant, you may consider his manner, and the probability of his statements, taken in connection with all the evidence in the case, and if convincing and carrying with it a belief in its truth, act upon it; if not, you have the right to reject. But this does not mean that you have a right to arbitrarily reject it. And, in judging of the defendant who has testified before you, you are in duty bound to presume that he has spoken the truth; and unless that presumption has been legally dispelled, his evidence is entitled to full credit."

[7] The jury was fully and fairly advised regarding the necessity that defendant be proven guilty to a moral certainty and beyond all reasonable doubt, by instruction No. 15, proposed by defendant, which reads:

"You are instructed that the defendant is only on trial for the particular crimes charged in the information and his guilt of the particular crimes charged in the information must be proven to a moral certainty and beyond all reasonable doubt before you are entitled to bring in a verdict of guilty against him as to any of the charges of the information, and if you find the prosecution has not proven the offense or offenses charged in the information to a moral certainty and beyond all reasonable doubt, you must find the defendant not guilty."

They were also instructed elsewhere that it devolved upon the prosecution to establish beyond a reasonable doubt that defendant was guilty of the crime charged, and that he was presumed to be innocent; section 1096 of the Penal Code was read to them, and the court told them that defendant was not only entitled to depend upon evidence which he had offered on his own behalf but was also entitled to the benefit of any and all evidence or lack of evidence tending in any way to show his innocence, which might have been offered by the prosecution; also that good character itself might, in connection with all the evidence, generate a reasonable doubt and entitle defendant to an acquittal.

[8] Appellant also claims error in the trial court's failure to give his proposed instruction No. 11, which reads:

"In considering the evidence as to truth or falsity of any facts contended for by either side, one of which fairly points to the defendant's guilt and the other of which raises in your minds a reasonable doubt as to his guilt, you should find such fact in his favor and acquit him."

This was sufficiently covered by instruction No. 15 above set forth, and by defendant's instruction No. 14, which reads:

"You are further instructed that if, from the facts offered in this case, the jury finds that they can draw two equally reasonable conclusions, one of which points to the guilt of the defendant, and the other of which points to the innocence of the defendant, it is the duty of the jury to adopt that conclusion which is consistent with the innocence of the defendant and to find him not guilty. In other words, if you find that the evidence in this case is susceptible of two reasonable constructions, one of which would lead you to a verdict of guilty as to the defendant, the other of which would lead you to a verdict of not guilty as to the defendant, it is the duty of the jury under the law to adopt that explanation which would cause you to return a verdict of not guilty as to the defendant."

[9] It is next contended that the trial court erred in instructing the jury in accordance with section 261 of the Penal Code defining the various kinds of rape; that this was confusing to the jury and covered subjects concerning which there was no evidence. But while it is true that there was no evidence as to incapacity of any of the prosecuting witnesses to give consent because of lunacy, etc., the court instructed the jury that

"I instruct you that in this case as to the charges of rape there could be no legal consent, for here the law implies incapacity to give consent, and this implication is conclusive. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her.

"This instruction is applicable only if you find from the evidence that the prosecutrix in the rape charges are under the age of eighteen years and not the wives of the accused."

And as during the trial emphasis was put upon the age of the girls involved, all of whom were well under the age of eighteen years, we cannot say that any miscarriage of justice resulted from the reading of section 261 of the Penal Code. It is not contended that defendant was told or believed that either of the victims of rape was over the age of eighteen years.

[10] It is also the contention of appellant that the court erred in instructing on circumstantial evidence, as follows:

"There are two classes of evidence recognized and admitted in Courts of Justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony by an eye witness to the commission of the crime; and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant and which is known as circumstantial evidence.

"Crime may be proven by circumstantial evidence as well as by direct evidence of an eye witness, but the facts and circumstances in evidence should be consistent with each other and with the guilt of the defendant, and inconsistent with any reasonable theory of his innocence, and must show his guilt beyond a reasonable doubt."

Also:

"If, upon consideration of the whole case, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other or both."

Appellant claims that there is no circumstantial evidence in the case upon which the jurors could have found defendant guilty of either rape or incest, and that these instructions "gave the jurors the impression that they could find defendant guilty on their suspicion that there must have been some circumstances somewhere pointing to his guilt, otherwise he would not have been prosecuted." This is, of course, pure speculation, and we cannot say that the instructions gave the jury any such impression. Cases must be rare in which no circumstantial evidence is presented; and there was testimony in this case of circumstances which the jury had a right to consider in determining defendant's guilt. For instance, before his daughter returned to live in his home defendant employed many young girls, including Elsie and Dorothy M., to work in the small house occupied by his wife and himself, and they sometimes slept there; he and his wife took Dorothy M., with them and another man, to various dances and other places of amusement, on which occasions Dorothy sat with defendant on the front seat of his car; after his daughter had made charges against him defendant offered Dorothy $20 not to reveal their relations; and after his daughter had for over two years lived with a Mrs. Kennedy who desired to adopt her, defendant brought her to the home occupied by him and his second wife and their four small children, only after she had arrived at the age of maturity. Other circumstances might be recited but the foregoing were sufficient to justify the instruction given. Also defendant's argument on the alleged "inherent improbability" of the testimony of the prosecuting witnesses is based upon circumstances which he alleges are inconsistent with the truth of their testimony that defendant committed the offenses charged.

[11] Another alleged error is the refusal to give an instruction proposed by defendant, reading: "You are instructed that you are not at liberty in this case to find the defendant guilty upon your own unaided suspicions; in other words, the mere suspicion, however strong it may be, is not sufficient to authorize conviction of the defendant; nor are you at liberty to convict the defendant on the argument of counsel, or on account of any prejudice that you may have conceived against the defendant prior to or during the progress of the trial." But the court did advise them: "You are the exclusive judges of the weight, value and effect of the evidence and of the credibility of the witnesses. Under your oaths as jurors you are to take into consideration only such evidence as has been admitted by the Court, and you should disregard and discard from your minds every impression or idea suggested by questions asked by counsel which were objected to and to which objections were sustained. This case is to be tried only on the evidence which is before you and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted. You are not to consider evidence which has been excluded by the Court in determining any fact in the case." This instruction advised the jury that they were not to be influenced by suspicions.

[12] Another complaint of appellant is that the trial court admitted certain hearsay evidence of statements made by defendant's wife in conversation with a witness, Mrs. Bradley. But no objection to this testimony was interposed and, furthermore, defendant's counsel cross-examined the witness on these conversations, and brought out additional statements.

[13] A review of the record in this case convinces us that the trial court tried the case carefully and with due regard to the rights of the defendant and that there is ample evidence to sustain the verdict and the judgment. The veracity of the witnesses and the weight to be given their testimony were matters for the jury, and are not for a reviewing court. The jury was fully and fairly instructed by the trial court upon the law relating to the facts of the case, and we find no error resulting in a miscarriage of justice.

Accordingly, the judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.

63 Cal.App.2d 606

DERRER v. KEELER GOLD MINES, Inc.

Civ. 14229.

District Court of Appeal, Second District, Division 1, California.

March 30, 1944.

1. Appeal and error ⚷544(2)

On an appeal taken on judgment roll alone, appellate tribunal is not permitted to give consideration to alleged errors in admission of testimony or alleged insufficiency of evidence to support the findings, but confines consideration to single question of sufficiency of findings to support judgment.

2. Appeal and error ⚷907(3)

On appeal taken on judgment roll alone, unless as a matter of law it can be said that findings do not support the judgment, the judgment must be affirmed.

3. Appeal and error ⚷907(3)

Where reporter's transcript had not been filed and appeal was prosecuted on judgment roll alone, it was required to be assumed in support of judgment that all objections to evidence in support of findings were waived.

4. Appeal and error ⚷907(3)

On appeal taken on judgment roll alone, appellate court must assume that the issues on which findings were made were properly before court and that evidence was introduced without objection which would support findings as made.

5. Appeal and error ⚷907(3)

Where record, on appeal taken on judgment roll alone, contained findings of fact on issues raised by pleadings and which supported conclusions of law reached by the trial court, the inquiry was at an end and court could not determine whether trial court improperly admitted oral evidence in construing contract sued on. Rules on Appeal to Supreme and District Courts of Appeal, rules 4, 6; Civ.Code, § 1636; Code Civ.Proc. §§ 1856, 1860.

6. Appeal and error ⚷1071(1)

Where plaintiff confined his attack on appeal solely to findings in favor of defendant on defendant's first affirmative defense, findings in favor of defendant on his second affirmative defense of estoppel which constituted complete defense to plaintiff's cause of action were sufficient to support judgment for defendant.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by H. A. Derrer against Keeler Gold Mines, Inc., for money due on a contract wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Affirmed.

Harold B. Pool, of Los Angeles, for appellant.

Charles J. Katz, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal on the judgment roll alone from a judgment in favor of defendant in an action for money due on a contract.

The record before us discloses that plaintiff and defendant corporation entered into a written contract on March 5, 1941, for the lease of a certain cyanide ore milling plant and equipment owned by the corporation. The original contract was amended April 22, 1941, but the terms of such amendment are not here pertinent. A second amendment was duly executed on March 15, 1941, and it is the construction placed by the trial court upon the terms of this amendment alone that is here in question.

Keeler Gold Mines, Inc., a corporation, entered into a written contract whereby said corporation leased to plaintiff Derrer the cyanide ore milling plant and equipment situated on mining claims in the Cerro Gordo Mining District in Inyo County. Under the original lease plaintiff Derrer agreed to pay as rental the sum of 75¢ per ton of 2,000 pounds for all ore or other material put through the lease mill, with a monthly minimum rental of $300. The original lease also granted to Derrer an option to purchase the mill equipment, and contained a provision prohibiting assignment of the lease to Derrer without the written consent of Keeler. By the amendment of March 15, 1941, the rental of 75¢ per ton was reduced to 50¢ per ton and the following agreement was also entered into: *"In the event that you are obligated to and do sell you lease agreement,* we will pay you 60% of any excess of any ton rental paid us under the straight lease basis of your assignee that is over and above 50¢ per ton. Likewise we will pay you 60% of any excess of any per ton rental paid us under the purchase option basis by your assignee that is over and above $1.00 per ton; it being the intention that you shall thereby ultimately receive 60% of any excess received by us on purchase price which is in excess of $20,000. The above payments to be made you only when, as and if such payments are made us by your assignee."

Plaintiff, in his complaint filed June 30, 1942, alleged his assignment of the lease to one Charles E. Cord; set up the tonnage of ore milled by said Cord, and demanded a percentage of the amount received by Keeler from Cord over and above the 75¢ per ton rental paid by Cord. By its answer, defendant, in addition to a general denial of the allegations contained in plaintiff's complaint, set up two affirmative defenses. By its first affirmative defense, defendant alleged that immediately prior to the execution by the parties of the heretofore mentioned amendment of March 15, 1941, plaintiff represented to defendant that subsequent to the execution of the original lease, it became necessary for plaintiff to obtain ore from the Darwin Consolidated Tungsten, Inc., and in so obtaining such ore he became obligated to and did give to Darwin an agreement whereby said Darwin could require plaintiff to transfer to it the lease together with the option to purchase. Further, that plaintiff represented to defendant that if Darwin requested such transfer, plaintiff would be required to comply therewith, and would thereby lose all opportunity for profit and recoupment of moneys expended by him in reconditioning the mill; that plaintiff requested defendant to cooperate by providing such opportunity for recoupment through an allowance to plaintiff of a percentage of any excess per ton rental in case plaintiff was obliged to assign his lease to Darwin. That in pursuance of and by reason of such representations, the just mentioned affirmative defense alleged, that by the phrase "obliged to and do sell your lease agreement" was meant the obligation of plaintiff to sell to Darwin only, and did not contemplate any other sale or assignment of the lease.

By its second affirmative defense, the defendant alleged that shortly after the execution of the aforesaid amendment to the agreement under date of March 15, 1941, a dispute arose between the parties concerning the alleged obligations of defendant to plaintiff under the terms of said agreement. That plaintiff asserted his right to certain compensation from defendant by reason of said original agreement and the amendments thereto. That defendant, while denying any liability to plaintiff, but solely for the purpose of terminating such dispute, agreed to pay plaintiff monthly 10% of any per ton rental received by defendant after the latter had received for itself not less than 50¢ per ton. It was further alleged that plaintiff agreed to accept such payments from defendant in full settlement and compromise of all his claims against defendant under the agreements. That certain payments were made to plaintiff, pursuant to such compromise agreement which payments were made up to and including the month of July, 1941; that plaintiff accepted and received such payments, but, thereafter, in September, 1941, notified defendant that he would no longer accept any such monthly payments of 10%. That by reason of the conduct aforesaid, plaintiff is now estopped from asserting as against defendant any such claim or claims as were described in plaintiff's complaint.

The trial court sitting without a jury, rendered judgment in favor of defendant corporation. In exhaustive findings of fact, the court explicitly and in detail found in favor of defendant on both of the aforesaid separate and affirmative defenses, and further found that the circumstances surrounding the execution of the above-quoted amendment were as alleged in defendant's cross-complaint.

Appellant's only contention on this appeal is that the contract (the above-quoted amendment) "was clear, concise, certain and not ambiguous in any respect and was not subject to any interpretation other than as shown by the contract itself"; and that the court in interpreting it according to the oral evidence received, added something to the contract, and thereby committed reversible error.

In his brief appellant concedes "that if the amendment to the original lease * * * means what the court found it to be, then the judgment of the court is proper," but, he argues, that the amendment to the contract of March 15, 1941, being clear, concise, certain and not ambiguous, in any respect, the court fell into error in receiving testimony of and concerning the circumstances surrounding the making of the contract of March 15, 1941, and the intention of the parties at that time. Appellant urges that the phrase in the agreement reading "in the event you are obliged to and do sell your lease agreement, we will pay you 60% etc.," is susceptible of a clear and unambiguous interpretation that the parties did not intend by the quoted words to restrict the payments provided by the amendment only to a sale of the lease to Darwin Consolidated Tungsten, Inc., but, on the contrary, that such language clearly and explicitly shows that the plaintiff was to receive the payments provided for in the March 15, 1941, agreement, in the event of any sale made by him of the lease to anyone at all.

[1-5] Appellant does not contend that the findings are insufficient to support the judgment, but bases his attack on the action of the court in admitting oral evidence to explain what the parties intended by the provision in the agreement reading "In the event you are obliged to and do sell." No rule is more firmly grounded in our law than the one which provides that upon an appeal taken upon the judgment roll alone, an appellate tribunal is not permitted to give consideration to alleged errors in the admission of testimony or alleged insufficiency of the evidence to support the findings, but confines consideration on such an appeal to the single question of the sufficiency of the findings to support the judgment. And, unless as a matter of law it can be said that the findings do not support the judgment, the latter must be affirmed. Eddy v. City of Los Angeles, 28 Cal.App.2d 89, 82 P.2d 25. No Reporter's transcript having been filed herein and the appeal being prosecuted on the judgment roll alone, it must be assumed in support of the judgment that all objections to the evidence in support of the findings were waived. Crowther v. Metalite Mfg. Co., 133 Cal.App. 452, 455, 24 P.2d 551; Poledori v. Newman, 116 Cal. 375, 378, 48 P. 325. As to the nature of the evidence introduced at the trial, we have no information. If, as contended by appellant, it was addressed to the interpretation to be placed upon the above quoted language in the agreement, it should have been brought up on appeal through the medium of a reporter's transcript, or upon an agreed statement. Rules 4 and 6 of Rules on Appeal to the Supreme Court and District Courts of Appeal. In the construction of contracts the prime duty of the court is to determine, if possible, the intention of the parties (Section 1636, Civil Code); and instances are numerous where in connection with that duty parol evidence is admissible. Section 1860, Code of Civ.Proc. Appellant strongly relies upon section 1856 of the same code, but by the very terms of that section it must be read together and in conjunction with section 1860 of the Code of Civil Procedure which provides that "the circumstances under which it (the instrument) was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." For aught that appears in the record before us, appellant himself may have offered oral testimony at the trial to explain the contract, or parol evidence may have been introduced without objection. In fact, upon an appeal taken on the judgment roll alone, we must assume that the issues upon which findings were made were properly before the court, and that evidence was introduced without objection which would support the findings as made. First Trust & Savings Bank v. Warden, 18 Cal.App.2d 131, 134, 63 P.2d 329. A different situation might be presented, if the entire record were before this court. Where, as here, the record contains findings of fact upon the issues raised by the pleadings, and which support the conclusions of law reached by the trial court, the inquiry is at an end. Merron v. Title Guar. & Trust Co., 45 Cal.App.2d 60, 63, 113 P.2d 481; California Employment Comm. v. Arrow Mill Co., 45 Cal.App.2d 668, 671, 114 P.2d 727.

[6] Finally, it may be said that appellant confines his attack solely to the findings in favor of defendant on the latter's first affirmative defense. None of the other findings are challenged. And the finding based on defendant's second affirmative defense of estoppel, which in itself constituted a complete defense to plaintiff's action, is sufficient to support the judgment herein.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

63 Cal.App.2d 457

WALKER v. GREENBERGER et al.

Civ. 14120.

District Court of Appeal, Second District, Division 3, California.

March 24, 1944.

1. Negligence 🔑32(1, 2)

One who went to defendant's vegetable market to buy greens to garnish meats in meat market where he worked and who was told to go into back room and get them and who fell while in such back room was an "invitee", and defendant owed him duty of exercising ordinary care.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

2. Negligence 🔑66(1)

Customer who fell while getting greens from back room in defendant's vegetable market was chargeable with knowledge that green vegetable trimmings which he saw on floor would cause condition of slipperiness.

3. Negligence 🔑52

If danger of invitee's being injured while on property is so apparent that invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning.

4. Negligence 🔑66(2)

There is no liability for injuries from dangers that are obvious, or as well known to persons injured as to owner or occupant.

5. Negligence 🔑66(2)

Customer who was told by defendant's employee to go into vegetable washing and cutting room in rear of public market to get greens as he had done many times previously over 10 months' period, and who fell where floor was covered with vegetable leaves, where danger was obvious, could not recover for injuries.

6. Appeal and error 🔑1056(6)

In action for injuries sustained when plaintiff fell on floor of vegetable washing and cutting room in rear of public market, exclusion of evidence that witnesses had purchased vegetables in the same room on various occasions at specific invitation of owner or employee of vegetable market to purchase vegetables there, offered on issue whether plaintiff was invitee, was harmless, where defendant was not liable because of obvious condition of floor.

7. Jury 🔑131(4)

Trial court improperly refused to permit plaintiff to ask prospective jurors as to their occupations as basis for determination of whether to exercise a challenge for cause or a peremptory challenge.

8. Appeal and error 🔑1045(2)

Error in refusing to permit plaintiff to ask prospective jurors their occupations was harmless, where defendant's motion for nonsuit was properly granted.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Clarence V. Walker against Walter Greenberger and others for damages for personal injuries. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Arthur A. Jones, of Los Angeles, for appellant.

Sidney A. Moss, of Los Angeles, for respondents.

PARKER WOOD, Justice.

In this action for damages for personal injuries sustained as a result of slipping and falling on the floor of a vegetable-washing-and-cutting room in the rear of a public market, plaintiff appeals from a judgment of nonsuit. The trial proceeded before a jury.

Plaintiff was an employee of a meat market which was a department of a general retail food market. Another department therein was a vegetable market. Said departments were separately owned and operated. Defendant Wally's Gardens, Ltd., a corporation, owned the vegetable market. Defendant Saylor's Ranch Market, a corporation, owned the general market building. Defendant Greenberger was the president of both corporations. The general market building was located at the southeast corner of an intersection. The entire front of the building, a distance of approximately 136 feet, and the west side of the building, for a distance of approximately 20 feet from the front, were open. It was the type of market generally referred to as an open market. The vegetable market occupied the west front corner of the market, and the meat market was in the west rear corner thereof.

About 9 a.m. on September 2, 1941, the date of the injury, plaintiff went to the vegetable market for the purpose of buying parsley or greens to garnish the meats in the meat market. When he asked the employee in the vegetable market for "greens to put in between the meat," the employee told him "to go in the back and get them and not disturb the display [referring to the vegetable display in front of the market]." The place "in the back," referred to by the employee, was the "back room" or "cutting room" of the vegetable department, which room adjoined the rear or south wall of the meat market. One entrance to the back room was on the west side of the building about 20 feet south of the rear wall of the meat market and about 50 feet from the front of the vegetable market. Another entrance was at the rear of the building. In order to enter that room it was necessary to go upon the sidewalk which adjoined the west side of the building or to go to the rear of the building. The side entrance was a door about 3 feet wide and 6 feet high. The dimensions of the side door and the distance from the front of the vegetable market to the side door do not appear specifically in the evidence, but photographs received in evidence indicate that the estimates herein stated, upon comparison with the known distance of 20 feet above referred to and shown in a photograph, are approximately correct. The floor of that room was "medium smooth" and was "something like asphalt."

After said employee told plaintiff to go to the back room, the plaintiff walked from the front of the vegetable market and entered the back room through the side door. No one was in there when he entered or while he was there. He proceeded therein for a distance of approximately 4 feet to a stack of crates of greens by the left wall. He obtained 6 bunches of greens from the top crate which was about 3 feet above the floor, and as he was turning around to his left to leave the room, he slipped, fell, and broke his right wrist.

There was no artificial light in the room, but plaintiff "could see," and there was nothing to obstruct his view. He was wearing rubber heels on his shoes. Plaintiff testified that as he walked into the room on the date of the accident: he knew it was a vegetable-cutting room and that many of the vegetables were washed there; he saw "quite a few cuttings" on the floor; that an area on the floor about seven feet square was covered by celery leaves, celery stalks, lettuce leaves, cabbage leaves, vegetables, and cuttings; that "two-thirds of it [the space on the floor] was covered and the other was scattered around, celery stalks, cabbage leaves, and so on"; that such cuttings "were laying around in piles," and "there was quite a few piles around"; that the depth of the piles "might have been ten inches in some places, an inch and a half in other places, and an inch in other places"; that water "was all over the floor from the washing and cutting"; and he "was looking at the merchandise." He testified further:

"Q. [by attorney for defendants] What was the condition of the floor as you noticed it when you walked in there on the morning of September 2? Was anything on the floor? A. I saw quite a few cuttings.

"Q. There were celery leaves, lettuce leaves, cabbage leaves, and wet all over? A. Yes."

He also testified that the point where he slipped, "right in that spot," was covered with vegetable leaves. The trial judge asked the plaintiff as follows, referring to the date of the accident: "Did you find any place on the floor that was not covered with scraps of vegetables or water on the floor?" Plaintiff answered: "Probably a few places." The trial judge asked further: "Did you see any spots without any coverage either of water or vegetables that particular morning?" Plaintiff answered: "I really don't recall whether there was or not." Plaintiff testified further:

"Q. [by attorney for plaintiff] Mr. Walker, when you walked in there that day, did you see that there was water underneath the cuttings? A. After I fell I seen there was water.

"Q. Before you fell you didn't know there was any water underneath those greens? [Objection which was overruled.] A. No."

Plaintiff also testified that: He had been employed in the meat market 10 months prior to the accident, and every day during that period of time except his "day off" (Wednesday) he would get the greens from the vegetable market and pay for them. About one-half or three-fourths of the times he went for greens he went into the cutting room to get them. He was entirely familiar with the cutting room. Generally there was a lot of refuse and a lot of water on the floor. In the mornings that floor was always strewn with cuttings. About three-fourths of the times during the 10 months' period when he went into that room there were cuttings on the floor. "Every time I went in there it [the floor] was almost always wet." "They had a tub right there with water in it all the time." He testified further:

"Q. [by attorney for defendants] So that every morning when you went in there it was always wet, and there were vegetable stalks around on the floor? A. Yes.

"Q. And that was the condition when you went in there on September 2, 1941? A. Yes.

"Q. Now, there was not anything to obstruct your view as you walked in there, was there? You could see all right, couldn't you? A. Yes.

"Q. And in order to get to those crates, you had to walk over these cutting places? A. Sometimes.

"Q. On this particular morning, September 2, 1941? A. I don't recall, but I probably walked over * * *

"The Court: About how often take that ten months' period * * * what proportion did you have to walk over green vegetables to get the vegetables you wanted * * * half the time, three quarters of the time or what? A. I would say half the time. Judge, I really don't know. I can't recall it."

He also testified:

"Q. [by attorney for plaintiff] On the different occasions when you went in there in the past, was the floor dry at times? A. Sometimes it was, and sometimes it was wet.

"Q. Would you say it was dry half the time, more than half or not? A. No, not in the morning.

"Q. About fifty-fifty, or what? A. Certain times it might have been dry."

The testimony of plaintiff therefore shows that he had gone into the back room for greens 100 or 150 times. (He was employed there 10 months or 40 weeks or 280 days. He had one "day off" each week and presumably he did not work on Sunday, and therefore he actually worked there 5 days each week for 40 weeks or 200 days. He went into the back room on one-half or three-fourths of the days he worked there, or 100 or 150 days.) His testimony also shows that he walked over greens in the back room 50 or 75 times. (His estimate was that he walked over the green vegetables about one-half of the times he went in there.) His testimony shows further that cuttings were on the floor about three-fourths of the times he was in that room, or 75 or 110 times, and generally there was a lot of refuse and water on the floor. Apparently the floor space, except the space occupied by the vegetable crates and the washing and cutting equipment, was generally covered with a combination of deep piles of vegetable cuttings, scattered vegetable leaves and stalks, and water.

Appellant (plaintiff) asserts that he established a prima facie case of negligence on the part of defendants. He asserts further that defendants, having specifically invited him to go in the back cutting room to select the merchandise, owed him the duty of exercising ordinary care to keep the aisles therein in a safe condition.

[1, 2] Plaintiff was an invitee of the defendant Wally's Gardens, Ltd., and said defendant owed him the duty of exercising ordinary care. Plaintiff knew that back room was the vegetable-washing-and-cutting room, and that it was used daily as such. He also knew that the floor therein was practically covered, in depths varying from one to several inches, with trimmings from green vegetables. Although he did not see water under the vegetable trimmings before he fell, he knew there was a lot of water at various places on the floor. Irrespective of whether water was under the green vegetable trimmings, he was chargeable with knowledge that such green vegetable trimmings would cause a condition of slipperiness on the floor. Plaintiff acquired knowledge of the generally littered and wet condition of the floor by almost daily observation and use of it over a period of several months. Plaintiff had full knowledge of the condition of the floor.

[3-5] If a danger is so apparent that the invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning. Shanley v. American Olive Co., 1921, 185 Cal. 552, 555, 197 P. 793; Matherne v. Los Feliz Theatre, 1942, 53 Cal.App.2d 660, 666, 128 P.2d 59. "The true ground of liability rests on the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to invitees, over that of the invitee." Crawford v. Pacific States S. & L. Co., 1937, 22 Cal.App.2d 448, 449, 71 P.2d 333; Touhy v. Owl Drug Co., 1935, 6 Cal.App.2d 64, 66, 44 P.2d 405. "There is no liability for injuries from [the] dangers that are obvious, or as well known to the person injured as to the owner or oc-

cupant." Mautino v. Sutter Hospital Ass'n, 1931, 211 Cal. 556, 561, 296 P. 76, 78. It does not appear that the defendants' knowledge of the condition of the floor of the back room was superior to that of the plaintiff. A statement in Mautino v. Sutter Hospital Ass'n, supra, 211 Cal. at page 560, 296 P. at page 77, is applicable here: "If it was negligence for the defendant to maintain the floor in the condition described by the plaintiff, there appears to be no escape from the conclusion that it was negligence for the plaintiff, with full knowledge of such condition, to continue in the use thereof."

The case of Tuttle v. Crawford, 1936, 8 Cal.2d 126, 63 P.2d 1128, upon which plaintiff relies is distinguishable from the present case. In that case the plaintiff slipped on a wet area in an aisle in the market proper. It was claimed that particles of vegetable matter were also in the wet area. In holding that the question as to negligence in maintaining the floor was one of fact for the jury, the court said (8 Cal.2d at page 128, 63 P.2d at page 1129): "[T]here seemed not to be anything so *unusual* or *striking* about it [the wet area] as to have especially attracted her attention as she passed it when she proceeded to the milk refrigerator or on her return to the vegetable section." (Italics added.) The court said further (8 Cal.2d at page 130, 63 P.2d at page 1130): "The injured woman, in going to the refrigerator, passed near the discolored area, but, as there was nothing about it *to warn* her of possible danger, her attention was not specifically directed to it and, if she noticed it at all, she probably did so in a subconscious fashion." (Italics added.) The court also said (8 Cal.2d at page 130, 63 P.2d at page 1130): "The fact that the attention of persons who visit public markets is attracted by the display of the wares offered for sale and more or less absorbed by the transactions which they have in mind would seem to increase the necessity of exercising care to the end that the floor spaces and aisles allotted to the use of customers should be made safe and kept fit for such purpose." In the present case, as aforesaid, the plaintiff did not fall in an aisle in the display part of the market, but fell in a back room which plaintiff had known for several months was allotted for, and actually used as, a room for washing and trimming vegetables preparatory to placing them in the display part of the market. He also knew that the ordinary use of that room for its intended purpose caused an accumulation of green vegetable matter and water on practically the entire open floor space of the room to such an extent that obviously there was something "unusual" about the condition of the floor "to warn" him "of possible danger."

[6] Plaintiff asserts further that the trial court erred in excluding his offered testimony of several witnesses to the effect that they had purchased vegetables in that back room on various occasions at the specific invitation of the owner or employee of the vegetable market to purchase vegetables there. Such evidence was material on the issue as to whether plaintiff's status was that of invitee or licensee. If there was no liability to plaintiff by reason of the obvious condition of the floor, even if he be considered an invitee, it was immaterial whether there was a custom of making sales in that room which would tend to show that plaintiff was an invitee.

[7, 8] Plaintiff contends further that the trial court erred in not permitting counsel for plaintiff, in questioning the prospective jurors concerning their qualifications, to ask a certain juror or any juror what his occupation was. That contention is based upon proceedings in the trial court as shown by the following excerpt from the transcript:

"Q. [by Mr. Jones, attorney for plaintiff] Your occupation, Mr. Cunningham [a prospective juror]?

"The Court: That is wholly immaterial, Mr. Jones.

"Mr. Jones: It is very important, Your Honor.

"The Court: I will not permit it in my Courtroom, if you have any general occupation you may ask, but the matter of occupation is wholly immateral in a challenge for cause."

The transcript shows further as follows: "Whereupon the same question was asked of other jurors on the examination for cause and the Court ruled that such an examination for cause would not be permitted in that Court." The ruling was erroneous. Plaintiff was entitled to reasonable interrogation of prospective jurors as a basis for determining whether he should challenge the juror for cause or whether he should exercise his right to challenge the juror peremptorily. It is reasonable to assume that an answer to that question might have furnished a basis for further questions and answers relative to grounds for challenge for cause, which might have established a basis for such a challenge. Irrespective of a challenge for cause, the question was a reasonable one to aid plaintiff in determining whether to exercise a peremptory challenge. The error of the trial court was not prejudicial in this case, however, for the reason defendants' motion for a nonsuit was granted.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

63 Cal.App.2d 426

HANSON v. CITY OF LOS ANGELES.

Civ. 14344.

District Court of Appeal, Second District, Division 2, California.
March 23, 1944.

Rehearing Denied April 11, 1944.
Hearing Denied May 19, 1944.

1. Appeal and error 🔑1064(2)
Trial 🔑199

In action against city for negligence in burning weeds on lots adjacent to plaintiff's property, instructions permitting jury to determine whether city was acting within its governmental or proprietary capacity were error and prejudicial where, under conceded facts, city was engaged in governmental function.

2. Municipal corporations 🔑742(6)

Whether under given facts a municipality is engaged in a governmental or proprietary function is a question of law for trial judge, not a fact question for jury.

3. Municipal corporations 🔑739(2)

A municipality is engaged in a "governmental function" in burning dried weeds and grass on vacant lots to abate a nuisance precluding liability to adjoining lot owners.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Function".

4. Municipal corporations 🔑745½

A municipality is not liable in absence of statute to the contrary, for damage resulting from negligence of its employees when performing a governmental function.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by John Hanson against the City of Los Angeles for damages for negligence in burning weeds on lots adjacent to plaintiff's property. From a judgment for plaintiff, defendant appeals.

Reversed with directions.

Ira A. Gwin, of Los Angeles, for respondent.

Ray L. Chesebro, P. Von Schrader, and Victor P. Spero, all of Los Angeles, for appellant.

McCOMB, Justice.

From a judgment in the sum of $2,500 after trial before a jury in an action to recover damages for the negligence acts of defendant in burning weeds on lots adjacent to plaintiff's property, defendant appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

On June 9, 1941, defendant, through its duly authorized agents, while burning weeds for the purpose of abating a nuisance, on a lot adjacent to a piece of real property owned by plaintiff negligently permitted the fire to spread and destroy plaintiff's property.

This is the sole question necessary for us to determine:

Did the trial court commit prejudicial error in instructing the jury as follows:

"It is true that a municipal corporation, when exercising governmental functions as such, is not liable for damages caused by a negligent act of its employees unless it is expressly made so by statute.

"It is also true that a municipal corporation, when acting within its proprietary capacity, is liable for damages caused by negligent acts of its employees.

"It is the law that the corporation's liability for tort or negligence of its employees depends upon the nature of the work being done and the instrumentalities connected with the performance, its method and manner, at the time the act is alleged to have been committed. If the agents were acting in a governmental capacity, no liability attaches to the corpo-

ration, under the elementary rule that the state or municipality and its various subdivisions is not liable for torts of its agents while acting within a governmental capacity. On the other hand, if the agents of the corporation at the time are acting in a proprietary capacity, the city or municipal corporation is liable therefor.

"It is for you to determine from all the facts in evidence herein as to whether or not said was acting within its governmental capacity or its proprietary capacity."

[1] This question must be answered in the affirmative and is governed by the following pertinent rules:

[2] 1) Whether under a given state of facts a municipality is engaged in a governmental function as distinguished from a proprietary function is a question of law for the determination of the trial judge. It is not a question of fact to be decided by a jury. (Bertiz v. City of Los Angeles, 74 Cal.App. 792, 794, 241 P. 921; see also Pearce v. Boggs, 99 Cal. 340, 342, 33 P. 906).

[3] 2) In burning dried weeds and grass on vacant lots for the purpose of abating a nuisance a municipality is engaged in a governmental function. (See Miller v. City of Palo Alto, 208 Cal. 74, 76, 280 P. 108; Pittam v. City of Riverside, 128 Cal.App. 57, 62, 16 P.2d 768; In re Pedrosian, 124 Cal.App. 692, 697, 13 P.2d 389; 12 A.L.R., (1921), page 1143.)

[4] 3) In the absence of a statute to the contrary a municipality is not liable for damage resulting from the negligent act of its employees when performing a governmental function. (Miller v. City of Palo Alto, supra, 208 Cal. 75, 280 P. 108; Brindamour v. Murray, 7 Cal.2d 73, 78, 59 P.2d 1009; Labozetta v. City of Los Angeles, 34 Cal.App.2d 442, 444, 93 P.2d 571; Fox v. City of Pasadena, 9 Cir., 78 F.2d 948, 949).

Applying the foregoing rules to the facts in the instant case, it is evident that the trial judge violated rule 1, supra, by submitting to the jury, through the last paragraph of the quoted instructions, the question of whether or not defendant was engaged in a governmental or proprietary function at the time the alleged negligent acts were committed which resulted in damage to plaintiff.

This error was prejudicial since under the conceded facts and rule 2, supra, defendant was engaged in a governmental function in burning the weeds which resulted in the fire that caused damage to plaintiff. Therefore under rule 3, supra, defendant was not liable for the damage caused, as there was no statute in existence imposing liability under the circumstances of this case.

For the foregoing reasons the judgment is reversed and the trial court is ordered to enter a judgement for defendant.

MOORE, P. J., and W. J. WOOD, J., concur.

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63 Cal.App.2d 470

HECK v. HECK.

SAME v. HECK et al.

Civ. 3109.

District Court of Appeal, Fourth District, California.

March 24, 1944.

1. Partnership 🔑83

The general rule is that a partner is not entitled to compensation for his services to the partnership in the absence of an express or implied contract to that effect. Civ.Code, § 2412.

2. Partnership 🔑78

The failure of a partner to object to withdrawal of partnership funds by another partner may be construed as consent to such withdrawal.

3. Principal and agent 🔑170(3)

Failure to object to the act of an agent or a manager after full knowledge of it may be a ratification of such act which may be considered a circumstance pointing to prior authorization of it.

4. Husband and wife 🔑264

In divorce proceeding, evidence sustained finding of trial court that withdrawal of $65,000 from partnership by defendant partner was salary constituting community property. Civ.Code, §§ 164, 2412.

5. Divorce ⚷286

In divorce proceedings, error in determining value of community property in favor of appellant's husband who alone appealed from judgment did not constitute ground for reversal.

6. Appeal and error ⚷854(1)

If judgment is correct upon any applicable theory, it must be sustained.

7. Divorce ⚷223

It is within sound discretion of court to award a wife counsel fees sufficient to defend an action for divorce brought against her, and the amount to be awarded is also within such sound discretion.

8. Divorce ⚷286

An order fixing fees of counsel for defendant wife in divorce suit will not be reversed except for abuse of discretion.

9. Divorce ⚷223

In divorce proceeding by husband against wife who had a separate estate of the value of about $10,000, where husband had a separate estate of the value of more than $200,000 which had produced a net income of $93,214.79 in the five years preceding the action, and in addition there was a community estate of considerable value and the action was hotly contested and consumed many trial days and extended audits were necessary to determine status of property and extent of community interest, allowance of $7,000 attorneys' fees for attorneys for wife was not an abuse of discretion.

10. Divorce ⚷288

In divorce proceedings, allowance of $630 as additional fees and $56.97 as expenses to auditor was not an abuse of discretion. Civ.Code, § 137.

◆

Appeal from Superior Court, Kings County; Ernest Klette, Judge.

Action for divorce by O. C. Heck against Rose Heck, who filed a cross-complaint against O. C. Heck and against O. C. Heck and E. P. Heck, copartners doing business under the firm name of Heck Bros., and E. P. Heck. From a judgment granting Rose Heck a divorce and dividing the community property and awarding defendant additional attorneys' fees and auditor's fees, the plaintiff and cross-defendants appeal.

Judgment affirmed.

See, also, 147 P.2d 114.

Kendall & Howell, of Bakersfield, and Sidney J. W. Sharp, of Hanford, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from an interlocutory judgment in a divorce action in which it was decreed that Rose Heck, whom we will refer to as the defendant, was entitled to a divorce from O. C. Heck on the ground of extreme cruelty, and dividing the community property of those parties, awarding her $5,800 additional attorneys' fees and $686.97 additional auditor's fees.

Plaintiff concedes that the evidence was sufficient to support the judgment for divorce and no question is raised on this phase of the case. He attacks the portion of the decree dividing the community property and awarding the additional attorneys' and auditor's fees.

Plaintiff and E. P. Heck, his brother, were partners doing business under the name of Heck Bros. Prior to the marriage of plaintiff and defendant in March, 1925, the brothers owned 3,000 acres of farming land in Kings County, besides warehouses and personal property. While the title to the land was placed in the names of the individual partners it was a partnership asset (Swarthout v. Gentry, 62 Cal.App.2d 68, 144 P.2d 38) and plaintiff's interest was his separate property. At that time the partnership indebtedness amounted to about $220,000. For the next nine years the partnership business showed a net loss of over $5,000, after which it made annual profits, except for the year 1938 when it made a small loss.

The partnership business was under the management and control of plaintiff, who devoted all his time and attention to it, being actively assisted by his wife. There was no agreement that plaintiff receive anything other than his living expenses for his services. E. P. Heck received no salary.

After the partnership commenced to make a profit plaintiff withdrew from the partnership funds slightly less than $40,000 with which he acquired a home in the city of Stratford, two tracts of farming land, and a promissory note in the principal sum of $4,880.

In the complaint it was alleged that the home in Stratford, with its furnishings, and miscellaneous farm tools and equipment of the value of about $5,000, were community property. This allegation was repeated in the first and second amended complaints with the further allegation that one of the farms was also community property. In an amendment to the second amended complaint there was substituted for these allegations, the allegation that the parties had acquired no community property.

In the pleadings of defendant it was alleged that the parties had acquired as community property the home and its furnishings, the farming implements and other real and personal property of the value of about $350,000.

The trial court found that the community property consisted of the family home and its furnishings, the two farms already referred to, the promissory note for $4,880, and a $70,000 interest in property in the possession of Heck Bros. which presumably consisted of a $65,000 credit and the farm implements of the value of $5,000.

The decree awarded defendant the home and its furnishings, an undivided half interest in the two farms and the promissory note, and $32,500 in cash to be paid to her by plaintiff. All other community property was awarded to plaintiff. It is the award of the $32,500 that is the subject of the principal attack in this appeal although the others do not go uncontested. It is argued that plaintiff's interest in the partnership was his separate property; that his withdrawals of funds to the extent of a little less than $40,000 from the partnership remained his separate property; that property acquired with the money so withdrawn was his separate property.

These arguments would possess much merit were it not for certain transactions with the partnership conducted by plaintiff shortly before this action was filed in March, 1941. He then drew a check in his own favor on the partnership bank account for $65,000 for his salary at the rate of $5,000 a year for thirteen years. From this he returned the money he had previously withdrawn with which to purchase the property already mentioned. Part of these transactions consisted of bookkeeping entries, as the partnership had a bank account of $52,000 at the time the check for $65,000 was drawn.

Shortly after this transaction was completed and the entries made in the account books of the partnership showing the money was payment of salary, plaintiff was advised that he could not legally draw a salary for his services as manager of the partnership as there was no agreement permitting him to do so and as the other partner drew no salary. Sec. 2412, Civil Code. Thereupon the entries in the partnership books were changed to show that the $65,000 was a withdrawal of capital by plaintiff and not a salary paid him.

At the time of trial plaintiff had cashier's checks in the sum of $18,000 in his possession, which represented part of the money withdrawn, and a credit of $3,000 advanced on cotton futures from the withdrawal.

[1] It is a general rule that a partner is not entitled to compensation for his services to the partnership in the absence of an express or implied contract to that effect. Dugan v. Forster, 104 Cal.App. 117, 285 P. 384; Parigian v. Phillips, 138 Cal. App. 702, 33 P.2d 426; Sbarbaro v. Rosa, 48 Cal.App.2d 584, 120 P.2d 151. As there was no express contract providing plaintiff with a salary we must consider the sufficiency of the evidence to support the implied finding of an implied contract to pay plaintiff the $65,000 as salary.

[2-4] Plaintiff testified, and the partnership records support him, that this money was originally withdrawn as salary; that he devoted all his time and energy to the affairs of the partnership; that his services were reasonably worth $5,000 per year. The subsequent bookkeeping entries which showed this to be a withdrawal of capital assets merely created a conflict in the evidence which the trial court resolved in favor of plaintiff. We are cited to no part of the record in which E. P. Heck objected to this withdrawal in one form or the other. He was a party to the action and was present during at least a part of the trial. His failure to object to the withdrawal may be construed into his consent to it. Failure to object to the act of an agent or a manager, after full knowledge of it, may be a ratification of such and may be considered a circumstance pointing to prior authorization of it. Under these circumstances we may not disturb the conclusion of the trial judge that the withdrawal of the $65,000 was salary paid plaintiff by the partnership. Dugan v. Forster, supra. The earnings of a husband during coverture are community property. Sec. 164, Civ.Code.

Plaintiff argues that if this $65,000 be regarded as community property as well as the real property and the promissory note paid for with about $40,000 of that money, the finding that there was a community estate consisting of the real estate and promissory note plus the $65,000 cannot be supported because that would represent a duplication of the $40,000 of the salary which was invested in the community real property and note.

This argument would possess much merit were it not for income tax statements and amended statements of the partnership prepared under the direction of plaintiff. The amended return for 1936 showed a net partnership income of $58,642.13, with O. C. Heck, Rose Heck, E. P. Heck and Ada M. Heck each being entitled to share in it. The return for 1937 showed a net income of $70,110.76 with the same parties each being entitled to one fourth of that amount. For 1938 there was a loss of $1,447.50 with the return showing each of the two men entitled to a deduction of $361.88 and each of the women a deduction of $361.87. The return for 1939 showed a net profit of $49,255.76 with each of the four entitled to $12,313.94. There appears to be some differences between the original and the amended returns in the amount of profits but that is not important here. Thus it appears from the returns that the partnership made a net profit of $176,561.15 in those four years, of which sum Mrs. Heck was entitled to one fourth or slightly in excess of $44,000.

It is admitted that plaintiff's interest in the partnership was his separate property. It would follow ordinarily that one half of the partnership income was also his separate property. A husband may give his wife any portion of his separate estate as her separate property, or, a husband and wife may, by simple agreement, convert separate personal property into community property. Sec. 158, Civ.Code. Plaintiff testified that he did not give defendant any part of the partnership profits to be her separate property so it is not surprising that the trial judge construed the income tax returns as evidencing an agreement between plaintiff and defendant converting one half of plaintiff's separate interest in the partnership profits into community property. None of these profits were withdrawn but remained with the partnership. Thus under this view of the case there was a community interest of $44,140.29 remaining in the partnership.

The trial court divided the community property as thus defined into practically equal shares between the parties. The family home and its furnishings with a value of more than $5,000 was awarded to defendant and the farming implements of a value of $5,000 to plaintiff. The two farms and the promissory note acquired by the salary withdrawal were equally divided. Plaintiff admitted having $21,000 of the money withdrawn from the partnership, or credits resulting from its use, in his possession at the time of the trial which, when added to the $44,000 community interest in the partnership, totals $65,000, one half of which was ordered paid to plaintiff.

[5, 6] The same reasoning which resulted in the conclusion that there was an agreement converting one half of plaintiff's partnership profits into community property would, and perhaps more logically should have resulted in holding that plaintiff's entire profit from the partnership was converted into community property. This would have increased the value of the community estate by more than $44,000, making more than $88,000 of community funds retained by the partnership. This error, if any, is against defendant, who has not appealed, and in favor of plaintiff who has appealed. Thus it furnishes no ground for a reversal of the judgment on plaintiff's appeal. If the judgment is correct upon any applicable theory it must be sustained. Rickards v. Noonan, 40 Cal.App.2d 266, 104 P.2d 839.

Plaintiff complains that the allowance of $7,000 as fees for the services of attorneys for defendant are unreasonable, excessive and cannot be supported here.

The attorneys were allowed and paid $1,200 during the trial, and were allowed an additional $5,800 in the judgment. The record has been augmented to show that the attorneys fees, costs and expenses allowed defendant during the course of the trial were on account, with the court reserving the right, with the consent of the parties, to make additional allowances.

[7, 8] It is within the sound discretion of the court to award a wife counsel fees sufficient to defend an action for divorce brought against her and the amount to be awarded is also within such sound discretion. An order fixing such fees will not be reversed except on the ground of an abuse of such discretion. Farrar v. Farrar, 45 Cal.App. 584, 188 P. 289; Busch v. Busch, 99 Cal.App. 198, 278 P. 456; Westphal v. Westphal, 122 Cal.App. 388,

10 P.2d 122; Cline v. Cline, 132 Cal.App. 713, 23 P.2d 431.

Defendant had a separate estate of the value of about $10,000 from which she derived some income. Plaintiff had a separate estate of the value of more than $200,000 which had produced a net income of $93,214.79 in the five years preceding the commencement of this action. In addition there was a community estate, already described, of considerable value. Thus the ability of plaintiff to respond to the order was fully established.

[9] The case was hotly contested and consumed may trial days. Extended audits were made to determine the status of the property and the extent of the community interest and from the careful and efficient manner in which the case was tried by counsel for both parties they must have devoted considerable time outside of court to study and preparation. Under these circumstances we fail to find an abuse of discretion on the part of the trial judge in fixing the fees of counsel for defendant.

Complaint is also made of an allowance of $630 fees, and $56.97 expenses, for the services of J. W. Culliton, an auditor employed to audit the accounts of the partnership.

Under an order to show cause the auditor was allowed an original $250 for this work. Plaintiff states that he had paid him $300 for additional work and that counsel for defendant paid him an additional $100. Plaintiff argues that the additional work, for which the allowance questioned here was made, was ordered by counsel for defendant without authorization by the trial court and should be paid by her.

We have already referred to the augmentation of the record by an order, made with the consent of the parties, which seems to cover this charge and to foreclose the argument contesting this award on the ground that the allowance of the auditor's fees was made in the judgment after the work was performed.

[10] Section 137 of the Civil Code provides in effect that a trial court in its discretion may require the husband or wife to pay the other party any money necessary to prosecute or defend the action. While the fees paid to the auditor seem liberal, the necessity for the audit and the time spent upon it were more apparent to the trial court than they are here. As the question of compensation for the auditor as well as the necessity for the audit (which clearly appears) were matters committed to the discretion of the trial judge, and as no abuse of that discretion has been made to appear, we cannot reverse that portion of the judgment.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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63 Cal.App.2d 477

HECK v. HECK.

SAME v. HECK et al.

Civ. 3104.

District Court of Appeal, Fourth District, California.

March 24, 1944.

1. Contempt 🔑66(2)

An order adjudging a party in contempt of court is not appealable. Code Civ.Proc. § 963.

2. Divorce 🔑211

The amount necessary to provide support for a wife during pendency of a divorce action is within the sound discretion of the trial court.

3. Divorce 🔑211

Where husband suing for divorce had considerable means with a substantial income and retained possession of almost all of the not inconsiderable community property of the parties and wife had separate property of about $10,000 value which produced only a small income, allowance of wife of $250 per month for support pending divorce action was not an abuse of discretion.

4. Divorce 🔑182, 223

The matter of attorneys' fees to be allowed a wife to defend a divorce action, both in the trial court and on appeal, as well as the amount to be awarded, is committed to sound discretion of trial judge. Civ.Code, § 137.

5. Divorce ⚷225

A wife is not always required to exhaust the corpus of her own estate before being entitled to ask for and receive a sufficient sum with which to defend a divorce action. Civ.Code, § 137.

6. Divorce ⚷182, 223

Allowance of $300 for services for representing wife in divorce action and $1,000 for services in representing her on appeal from interlocutory judgment was not an abuse of discretion. Civ.Code, § 137.

◆

Appeal from Superior Court, Kings County; Ernest Klette, Judge.

Action for divorce by O. C. Heck against Rose Heck, who filed a cross-complaint against O. C. Heck, and O. C. Heck and E. P. Heck, copartners doing business under the firm name of Heck Bros., and E. P. Heck. From an order adjudging plaintiff in contempt of court, ordering him to pay Rose Heck $250 per month for her support and maintenance during the pendency of the action, to pay to her attorneys $300 for representing defendant on plaintiff's motion for new trial in divorce action and $1,000 for their services in representing the defendant on plaintiff's appeal from interlocutory judgment, plaintiff and cross-defendants appeal.

Affirmed.

Kendall & Howell, of Bakersfield, and Sidney J. W. Sharp, of Hanford, for appellants.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from an order adjudging plaintiff in contempt of court, ordering him to pay Rose Heck (whom we will refer to as the defendant) $250 per month for her support and maintenance during the pendency of the action, to pay to her attorneys $300 for their services rendered in representing her on his motion for new trial in the divorce action, and $1,000 for their services in representing her on his appeal from the interlocutory judgment, and the sum of $250 on account of the cost of a clerk's transcript and reporter's transcript and of briefs on appeal. No question is raised as to this last item.

This proceeding grew out of an action for divorce brought by plaintiff against defendant, and an appeal by plaintiff from an interlocutory judgment there rendered. An opinion in that case is filed herewith (Cal.App., 147 P.2d 110) which sets forth the material facts which will not be repeated here.

[1] An order adjudging a party in contempt of court is not appealable (Sec. 963, Code Civ.Proc.) so no further attention need be given that matter except to remark that, as no penalty was imposed the question of the technical contempt, if any, seems unimportant.

An order of the court and the interlocutory decree of divorce awarded defendant $175 per month as support money during the pendency of the action. After the appeal from the interlocutory decree was taken, an order to show cause was issued and this support money was increased on February 3, 1943, to $250 per month. Defendant had a separate estate of the value of about $10,000 which produced a small income. She also had possession of the family home. Further, there was an order requiring plaintiff to pay for the utilities used there which she testified he had not fully obeyed. It is urged that plaintiff had maintained herself on the former allowance and that there was no good cause shown justifying the increase.

Defendant testified that she had lived on the former allowance; that she had an infection which needed medical attention and treatment; that she needed dental work done; that living costs had increased since the rendition of the interlocutory decree on August 18, 1942; that $350 per month was necessary to pay her increased living expenses, her care during the medical treatment and for doctor's and dentist's charges.

[2] Thus we have presented on this question the familiar situation of a conflict in the evidence which the trial judge resolved against plaintiff. He was a man of considerable means with a substantial income and retained possession of almost all of the not inconsiderable community property of the parties. The question of the amount necessary to provide support for a wife during the pendency of a divorce action is within the sound discretion of the trial court. Under the facts before us we can find no abuse of that discretion in the amount awarded defendant for her support pending the appeal. No other question is argued on this phase of the case so none need be considered.

It is next argued that where the attorneys for the wife have been awarded substantial fees, and where the wife has an estate of her own, the award of $300 for fees in contesting the motion for new trial and of $1,000 for representing her on appeal, amounts to a breach of discretion on the part of the trial judge.

It would appear that the award of $300 for services at the hearing of the motion was for services already rendered. However, that question is not raised, probably because of the order referred to in the opinion rendered in the divorce action (147 P.2d 110) which permitted further allowances of attorneys' fees, costs and expenses as the case progressed.

[3-6] The matter of attorneys' fees to be allowed a wife to defend a divorce action, both in the trial court and on appeal, as well as the amount to be awarded, is first committed to the sound discretion of the trial judge. Sec. 137, Civ.Code. She is not always required to exhaust the corpus of her own estate before being entitled to ask for and receive a sufficient sum with which to make her defense. Westphal v. Westphal, 122 Cal.App. 388, 10 P.2d 122; Farrar v. Farrar, 45 Cal.App. 584, 188 P. 289. As the amount to be awarded is within the sound discretion of the trial court, it must appear that there was an abuse of discretion before an appellate court will interfere. No such abuse of discretion is made to appear here.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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63 Cal.App.2d 576

BOGGS v. BOGGS et al.

Civ. 7006.

District Court of Appeal, Third District, California.

March 29, 1944.

1. Life estates 🔑16

Where husband, to obtain mortgage loan, transferred realty to a corporation owned by him except for two qualifying shares held by wife and son, and corporation subsequently retransferred realty to husband, wife, who paid accruing installments on the loan as executrix of husband's will until decree of distribution and thereafter as life tenant under husband's will paid accruing installments out of her own funds, was subrogated to a lien for repayment by remaindermen of share of advancements made by her, though she had joined in husband's guaranty of the loan and assumption agreement.

2. Life estates 🔑16

A life tenant's failure to demand that remaindermen pay principal installments on mortgage loan as they fell due did not make her payments "voluntary" precluding contribution from remaindermen, where life tenant made some of such payments as executrix of former owner's will, and others after entry of decree of distribution providing that remaindermen's interest was subject to her right of reimbursement, and she brought action for declaratory relief concerning her right to reimbursement within a reasonable time.

3. Life estates 🔑28

A life tenant paying a charge on an estate is prima facie a creditor, unless contrary intention is indicated by some expression, and is presumed to have acted in his own interest and for his own benefit.

4. Life estates 🔑28

A life tenant is under no duty to make a declaration or perform an act demonstrating his intention to charge remaindermen for charges against the estate paid off by life tenant, but those asserting that he intended to exonerate the estate have burden of proof.

5. Appeal and error 🔑781(4)

Alleged error, in determining amount that remaindermen would be required to pay to life tenant when life tenant should in the future complete payment of installments on mortgage loan, was "moot" on appeal by remaindermen from judgment declaring life tenant's rights.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

6. Life estates 🔑16

A life tenant's right of repayment by remaindermen of installments paid by life tenant on mortgage would accrue when loan was finally paid and would not be postponed to expiration of life estate on ground of difficulties that remaindermen might have in financing repayment.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Edwa D. Ewing Boggs against John C. Boggs and others for declaratory judgment. From a judgment for plaintiff, defendants appeal.

Affirmed.

Neumiller & Ditz, of Stockton, for appellants.

O. C. Parkinson, of Stockton, for respondent.

PEEK, Justice.

This is an appeal by defendants from a judgment for plaintiff entered on her complaint for declaratory relief.

At the time of the marriage of Frank S. Boggs and Edwa D. Ewing Boggs on October 17, 1928, the husband owned, as his separate estate, certain real property located in Stockton and known as the Eden Square Apartments, together with the furnishings and equipment therein. During the month of November, 1936, Frank S. Boggs, in order to obtain a loan from the Reconstruction Finance Corporation to enable him to repair certain damage to the property, caused to be formed a corporation known as the Eden Square Corporation. On November 10, 1936, the company so formed executed and delivered to the R.F.C. its promissory note in the principal sum of $125,000 secured by a deed of trust on said real property. 1072 shares of stock of said corporation were issued to Boggs, and one share each to Edwa D. Ewing Boggs and Frank S. Boggs, Jr. No consideration was paid for the share held by plaintiff. Boggs and his wife also executed and delivered to the mortgage company their individual guarantee of payment of said obligation. During the month of December, 1938, the property was transferred back to Boggs alone by the Eden Square Corporation. At the same time a written assumption and agreement to perform all of the obligations of the Eden Square Corporation under the note and deed of trust, was executed and delivered to the R.F.C. Approximately a year later Boggs died testate. His will (which was executed while the property was so encumbered) was admitted to probate, and plaintiff, who was named as executrix therein, duly qualified as such. Under the terms of decedent's will plaintiff was given a life estate in the real and personal property, and the remainder was given to the youngest son of the testator, Frank S. Boggs, Jr. The son died during the month of June, 1942. On August 4, 1942, the final decree of distribution in said estate, in accordance with the will, was made and entered.

The trial court found that by said decree of distribution the property was distributed to the plaintiff, respondent herein, for the term of her natural life, and to John C. Boggs and Thomas W. Boggs, administrators of the estate of Frank S. Boggs, Jr., deceased, the remainder thereof in fee, upon the death of Edwa D. Ewing Boggs. The court further found that said decree of distribution provided that the remainder interest in said property be distributed subject to any lien which the plaintiff had therein as a life tenant to secure reimbursement of the principal payments made by her.

The obligation was payable in amortized payments at the rate of $1050 per month, with the usual provision for declaring the entire balance payable, and permitting foreclosure on the deed of trust, in the event of failure to pay the installments when due. The wife, as executrix of the will, paid the installments as they accrued, out of the funds of the estate, and after the decree of distribution, continued to pay the accrued installments out of her own funds. According to the briefs on file herein she has continued to make such payments.

At the conclusion of the hearing the trial court made findings of fact and conclusions of law in favor of plaintiff, and judgment was rendered accordingly in her favor. By the terms of said judgment she was given a lien upon the real property as security for the repayment of the sums already paid by her and for such additional sums as she might thereafter pay on account of the principal amount of the encumbrance. The judgment further provides that upon final payment being made of the obligations secured by said deed of trust, all sums paid on account of the principal obligation by plaintiff shall become due and repayable by defendants to plaintiff, and unless paid within a reasonable time thereafter plaintiff shall have the right to foreclose said lien by an action in the manner of, and subject to, the provisions of law for foreclosure of mortgages. It is from such judgment that defendants now appeal.

It is their contention (1) that the encumbrance on the real property is a personal obligation of plaintiff and she is not entitled to contribution from the remaindermen; (2) that any sums paid by her on account of said obligation were voluntarily paid, and by virtue of the voluntary nature of the payments she is not entitled to contribution from the remaindermen; (3) that the judgment of the trial court is in error in the computation of the amount of contribution which the remaindermen are required to pay to the life tenant, and (4) in any event under the circumstances of this case the remaindermen should not be called upon nor required to make any contribution until the expiration of the life estate.

In opposition to the contentions made by defendants the plaintiff argues that if she had not made the payments the property would have been lost by foreclosure, thus not only would she have lost her interest, but the remainder, which appellants held by inheritance from their deceased brother, would likewise have been lost; that by making the present payments she is not only paying the current expenses which properly should be borne by a life tenant but she is also paying the principal obligation which properly should be borne by the remaindermen, and that at some future time she should be reimbursed for such payments made in their behalf.

The complaint filed by plaintiff was one for declaratory relief by reason of her opinion stated therein that there was nothing of record to establish any obligation upon the part of the remaindermen, and in the absence of such determination of record it would be possible for them to dispose of their interest to an innocent purchaser who might perhaps thereby acquire rights in the property greater than those of the remaindermen themselves.

The case was tried upon stipulated facts, the documentary evidence of the note and deed of trust, the guarantee agreement, and the assumption agreement.

It is apparently conceded by all parties that as a general rule a life tenant is only required to pay the interest on the existing encumbrance and that it is the duty of the remaindermen to pay the principal. However, appellants contend that the question herein presented does not come within the general rule and would differentiate this case on the grounds that as the plaintiff executed with decedent a guarantee of performance of the original note and trust deed of the Eden Square Corporation, and later, when the property was transferred back to Boggs, she executed with him an assumption of the obligation, it therefore became the personal obligation of plaintiff.

Two cases are cited by appellants in substantiation of their first contention. Huber et al., v. Hess, 191 Ill. 305, 61 N.E. 61, and Souders v. Kitchens et al., 344 Mo. 18, 124 S.W.2d 1137. In the first case a daughter of the testator took one of two lots covered by a single mortgage. The will specifically provided for payment by her of the whole of the encumbrance. The court held that since the devise was upon the express condition that she pay the entire encumbrance it became a personal obligation on her part, and therefore her successor in interest, a judgment creditor, could not enforce contribution from a son of the testator who took the remaining lot, which, by the express terms of the will, was freed of the encumbrance.

The second case was an appeal from an order sustaining a demurrer to the answer alleging fraud, which allegations, for the purposes of the demurrer, were taken as true and construed most strongly against the pleader. It did not appear whether the loan was for the benefit of the husband or the wife, or both.

The Huber case was specifically referred to in Faulkenburg v. Windorf, 194 Minn. 154, 259 N.W. 802, 804, a case involving an encumbrance primarily for the benefit of both the husband and wife covering property in which the wife had but a life estate. The court there stated:

"The whole estate, including remainder, was charged generally with that obligation. * * * So, if the life tenant is to be denied right of contribution, it must be because she was bound in personam and contractually to pay the debt. That does not follow for the simple reason that the original promise to pay was for benefit only of the mortgagee and his assigns. Plaintiffs as remaindermen were neither parties to, nor beneficiaries of, that contract. The surviving wife and life tenant was no debtor to them. * * * In respect to such prior incumbrances upon the fee, the respective duties of life tenant and remaindermen are neither referable to, nor regulated by, any theory of contractual obligation. * * * The adjustment necessary when redemption is made by one is not in personam between the redeeming tenant and the others, but in rem between their respective interests. Obligation is not imposed on any one, but an interest in property is charged with a lien to secure the performance of an obligation. If the duty is not performed, the title subject thereto may be lost. But in no event is any duty imposed in personam."

The court further stated that such "view of the matter renders immaterial the circumstance that the life tenant became joint debtor with her husband for the original mortgage debt. The life estate which she took upon her husband's death was not, as in Huber v. Hess, supra, especially charged in rem with the payment of the whole debt. It remained no more subject to the lien of the mortgage (and that is the decisive thing) than the remainder. Hence, when the life tenant made redemption, she came into an equity equal to that of the remaindermen and so was entitled to contribution from them."

In Krebs v. Bezler, 338 Mo. 365, 89 S.W.2d 935, 936, 103 A.L.R. 1177, a case factually quite similar to the present one, a decedent left surviving him a widow and several children. At the time of his death he was the owner of two tracts of land, both encumbered, which encumbrances had been executed by himself and his wife. By the will the wife was given a life estate in the real estate and was named as executrix thereof. She duly qualified as such, and, using the assets of the estate, paid the balance of one encumbrance in full, and with her own funds paid the second encumbrance. She sought to be subrogated to the rights of the original holders of the encumbrance. The defendants contended that as she signed both notes as maker she became primarily liable thereon and was not entitled to subrogation upon the payment of her own debt. The court, in summarizing the evidence, stated that the record disclosed that she did not receive any of the proceeds herself, that her husband used all of the money for the purchase of the land in question and took title to it in his own name. Her only interest was a potential right of dower. The court then stated that:

"As between her and the holder of the notes, she would be regarded as a maker and primarily liable thereon, but, as between her and her husband or between her and the heirs who claim under the husband, she was a surety on the note and only secondarily liable thereon."

[1] The facts in the instant proceeding present a much stronger case for the wife than either of the two cited ones. Here she appears not as co-maker of the note and trust deed, but rather as an accommodation party for the benefit of her husband, or at most his surety. The real property was at all times his separate property. The proceeds of the loan were used solely for the reconstruction of the apartment building. At no time did plaintiff have any interest in the property, nor did she receive any consideration for executing the previously mentioned documents. Her only interest in the corporation was represented by but one share of stock, issued to her without consideration in order for her to qualify as a director.

Under the principle as stated it is entirely proper, in such a case, that equity should step in and subrogate her to the rights and remedies of the encumbrancer by giving her a lien on the land for the amount of the encumbrance which she has paid. Thus she is given what the testator intended her to have—the enjoyment of the estate during her natural life, subject only to the current expenses and interest on the principal obligation—and the remaindermen receive exactly what they took from their father at the date of his death—a remainder interest in the land subject to the principal obligation.

[2] The appellants next argue that as the record discloses no demand on the part of plaintiff that defendants pay the principal installments as they fall due, that, therefore, the payments made by her were voluntary, and that she is not entitled to contribution from the remaindermen. The case cited by appellants in support of this contention (Kinkead v. Ryan et al., 65 N.J.Eq. 726, 55 A. 730) merely held that the life tenant, by taking no action during the seven years elapsing from the date she paid off the encumbrance to the date of her death, thereby presented a question of fact from which it could be concluded that the payments made by her were intended as gifts, and that a court of equity will keep an encumbrance alive or

consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the party.

In the present case the payments made during the course of administration were admittedly done pursuant to her duties as executrix of the estate. Had she not done so she could have been charged with neglect in the performance of such duties. The decree of distribution in the estate provided that the remaindermen's interest was distributed subject to her right of reimbursement of the principal payments made out of the income of the property negatives any thought that the subsequent monthly payments made by her were a gift. Further negation of such contention is found in the institution of the present proceeding itself.

[3, 4] The general rule as stated in 33 Am.Jur. Sec. 461, page 997, is that:

"A life tenant paying a charge on an estate is prima facie a creditor, unless by some expression a contrary intention is indicated; without such expression, he is presumed to have acted in his own interest and for his own benefit, and he is under no obligation or duty to make a declaration or to do any act demonstrating his intention, but the burden of proof is on those who assert that in paying off the charge he intended to exonerate the estate. Hence, the mere payment of a mortgage which was a charge upon the estate, without more, is sufficient to establish the right of a life tenant making such payment to have the charge raised out of the estate."

[5] It would appear that the further contention of appellants, that the judgment is in error as regards the amount the remaindermen are required to pay, is moot in so far as the present appeal is concerned. Up to the present time plaintiff has made all payments chargeable against the property. It is possible that the occasion may never arise which would call into being the formula contended for by appellants that a life tenant is required to pay, as his part of the interest on the mortgaged property, such a sum as will equal the present value of the amount of interest he would probably have paid during his lifetime as estimated by the ordinary mortality tables; the remaindermen being required to pay the balance. The plaintiff may die before the entire encumbrance has been paid or if she pays the entire balance she may die before she is repaid by the remaindermen, and lastly, even though she should pay the balance in full, she would still owe them nothing by way of interest until they make repayment to her.

Her life expectancy under such circumstances would of necessity have to be computed as of the date of repayment, not now, nor any time prior to repayment, since up to such time of repayment, if she has paid all charges, she would owe the remaindermen nothing.

The appellants do not contend that the judgment is without the power of the trial court. Their attack is directed at the effect of that portion of the order which directs that the sums paid by respondent will be due and payable to her by the remaindermen upon complete payment of the encumbrance, and if not paid "within a reasonable time" thereafter respondent will have the right to foreclose their interest in the property. In support of such contention they argue (1) that when the respondent makes final payment of the note which is due and payable on February 10, 1947, thereafter she will have available for her own use the entire net income which undoubtedly will be more than is necessary for her requirements; (2) that since she will remain in possession after the obligation has been paid in full it will be exceedingly difficult for the remaindermen to raise sufficient funds to meet the requirements of repayment within a reasonable time as ordered by the trial court, and (3) that therefore the phrase "within a reasonable time" as used in the judgment to denote the date of repayment by them to her should be construed to mean "upon the expiration of the life estate."

[6] Although difficulties may beset the remaindermen in financing their repayment to the life tenant, the solution of their problems cannot be allowed to foreclose the rights of the respondent. To hold that no right of repayment should attach until the expiration of the life estate would be to impose upon the widow all of the liabilities of the encumbrance and to deny to her whatever enjoyment she might receive from the life estate given her by the testator.

The life estate devised to respondent was for her benefit alone. It was not created for the benefit of her heirs, neither was it created for the benefit of the remaindermen, yet, such would be the result if the contentions of appellants were to be followed, and the provisions of the will in regard to such estate would be rendered meaningless.

We are entirely in accord with the trial court in its determination of the questions here involved. The judgment correctly provided that a right of repayment exists; that the plaintiff has a lien upon the remainder, and that such right may be enforced within a reasonable time after final payment.

The questions, if any, which are left unanswered by the judgment of the trial court, can be determined only if and when contribution is sought from the remaindermen by the life tenant.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

63 Cal.App.2d 668

CALIFORNIA ADJUSTMENT SERVICE v. SIMPSON et al.

SIMPSON et al. v. CAPLAN et al.

Civ. No. 7046.

District Court of Appeal, Third District, California.

March 31, 1944.

1. Appeal and error 🔑345(1)
New trial 🔑155

Where trial court failed to determine timely motion for new trial within 60 days after filing of notice of intention to make motion, motion was denied by operation of law on date of expiration of such time, and notice of appeal filed over 30 days after such date was too late. Code Civ.Proc. §§ 660, 939.

2. Appeal and error 🔑345(1)

Under statute providing that effect of trial court's failure to determine motion for new trial within 60 days after filing of notice of intention to make motion shall be denial of motion without further order of court, no entry in trial court is necessary to start running of 30 days' time for appeal after expiration of time for determination of such motion. Code Civ.Proc. §§ 660, 939.

3. New trial 🔑155

A trial court may deny motion for new trial either by making order to such effect or by failing to act on motion within time prescribed by statute, in which case any order of such court, either denying or granting new trial is ineffective. Code Civ.Proc. § 660.

Appeal from Superior Court, Amador County; A. L. Pierovich, Judge.

Action by the California Adjustment Service against Frank Simpson and others, doing business under the firm name and style of Simpson Brothers, and Simpson Brothers, a co-partnership, in which defendants filed a cross-complaint against Benjamin C. Caplan, plaintiff, and others. Judgment for defendants and cross-plaintiffs, and plaintiff and cross-defendants appeal. On appellees' motion to dismiss the appeal.

Appeal dismissed.

Fred J. Harris and Busick & Busick, all of Sacramento, for appellants.

Allen L. Martin, of Sacramento, and Leon French, of Pine Grove, for respondents.

PER CURIAM.

This is a motion made by appellees to dismiss the appeal of appellants on the ground "That the said attempted appeal was not taken, and that the Notice of Appeal was not filed in the manner or within the time allowed by law therefor, in that said Notice of Appeal was not given or filed within sixty (60) days from the date of entry of the judgment or order of the Superior Court, nor within ninety (90) days from and after the filing of Notice of Intention to Move for a New Trial, nor within thirty (30) days from and after the denial of motion for new trial by operation of law." Judgment in said action was entered December 10, 1942. A notice of intention to move for a new trial was served and filed December 29, 1942, and hearing thereon was had January 16, 1943. Not until August 4, 1943, was a decision denying said motion filed by the trial court. Notice of appeal was filed August 13, 1943. On January 3, 1944, this motion to dismiss was filed:

Section 660 of the Code of Civil Procedure provides that: "* * * the power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore been served, then sixty (60) days after filing of the notice of intention to move for a new trial. If such motion is not determined within said period of sixty (60) days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court."

Section 939 of that Code also provides that:

"If proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, or other termination in the trial court of the proceedings upon such motion."

[1] It is contended by movants that in this case the motion for a new trial was denied by operation of law on March 1, 1943, and that the appeal comes too late. This contention must be upheld. In Burdge v. Gould, 49 Cal.App.2d 65, 120 P.2d 903, a similar situation was presented. There judgment was entered July 7, 1941, and service of notice of such entry was made on July 8th. Within ten days a motion for a new trial was made, but same was not acted upon by the court until September 8th when a written order denying same was filed. The court said that the court had sixty days from and after July 8th to pass upon the motion for a new trial, to wit, to September 6th; that such motion was denied by operation of law on September 6th, and as appellant's notice of appeal was not filed within thirty days after September 6th, it was filed too late. The court quoted from Kocher v. Fidelity & Deposit Co., 137 Cal. App. 474, 476, 30 P.2d 535, 536, to the effect that "The statute limiting the time within which an appeal may be taken is jurisdictional and mandatory; and if the appeal is not taken within the time allowed therefor, the appellate court is without power to entertain it." Also see Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423.

[2, 3] Appellant contends that if the time within which the trial court may determine a motion for a new trial expires without the court's making such determination, "a denial of the motion without further order of the court" does not become effective to start the running of the time within which an appeal must be taken until an entry is made in the trial court, that is, that though the statute says that if the motion is not determined within the time provided the effect shall be a denial of the motion without further order of the court, there must be some entry made in the trial court to constitute the "other termination in the trial court of the proceedings upon such motion," before the time to appeal begins to run. We are unable to agree with this contention. Had the Legislature intended that such an entry must be made, it would doubtless have so provided, and also would have provided by whom such an entry should be made—whether by the court, or by the judge thereof or by the clerk. It is our opinion that under section 660, C.C.P., a trial court may deny a motion for a new trial either by making an order to that effect or by failing to act upon the motion within the prescribed time; and that when it does not act within such prescribed time any order which it might make, either denying or granting a new trial, would be ineffective. See Jackson v. Dolan, 202 Cal. 468, 261 P. 706, particularly page 473 thereof, 261 P. 706, at page 708, and Jackson v. Dolan, 72 Cal.App. 51, 236 P. 319.

The appeal is dismissed.

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63 Cal.App.2d 480

GARIBALDI et al. v. DALY CITY et al.

Civ. No. 12508.

District Court of Appeal, First District, Division 2, California.

March 27, 1944.

1. Municipal corporations 🔑454

Where owners of less than 15 per cent. of land in street improvement assessment district demanded investigations and reports required by Special Assessment Investigation Act after due notice to such owners of improvement proceedings, further proceedings under such act were not mandatory. Gen.Laws 1937, Act 8490, and § 13.

2. Municipal corporations 🔑513(5)

An action, commenced over 60 days after city council adopted resolution ordering street improvement, to set aside improvement assessments was barred by limitation provisions of special assessment investigation act. Gen.Laws 1937, Act 8209; Act 8490, § 14.

3. Appeal and error ⚷909(6)

In action to set aside street improvement assessments, District Court of Appeal, on appeal from judgment for defendants, must presume that official duty to publish notice of award of improvement contract was duly performed, in absence of allegation that due publication was not made. Gen.Laws 1937, Act 8199, §§ 16, 26.

4. Municipal corporations ⚷513(7)

In action to set aside city street improvement assessments, where complaint does not plead that any owners of property in assessment district filed protest or objection under statute to any proceedings taken before publication of notice of award of improvement contract, objections thereto are waived. Gen.Laws 1937, Act 8199, §§ 16, 26.

5. Municipal corporations ⚷493(1)

The provision of Improvement Act that any person objecting to street improvement assessment, diagram or other proceedings of superintendent of streets or city engineer shall appeal to city council before hearing on assessment relates solely to protests as to proper performance of work and correctness of individual assessments and not to jurisdictional matters relevant to formation of assessment district or leading to execution of improvement contract. Gen.Laws 1937, Act 8199, § 21.

6. Municipal corporations ⚷513(7)

In action to set aside street improvement assessments, allegations of complaint as to municipal authorities' failure to comply with Special Assessment Investigation Act stated no cause of action, in absence of allegation that owners of property in assessment district filed timely protests against any proceedings taken before first publication of notice of award of improvement contract, though complaint alleged that plaintiffs appealed to city council before hearing on assessments. Gen.Laws 1937, Act 8199, §§ 16, 21; Act 8490.

7. Municipal corporations ⚷513(7)

In action to set aside city street improvement assessments, allegations that federal works agency of Works Progress Administration contributed less money for improvement than amount on contribution of which by such agency city council's resolution of intention was predicated and that total assessment of property owners was increased because of such smaller contribution stated no cause of action, in absence of charge of fraud.

8. Municipal corporations ⚷488(7)

Where owners of lands in street improvement assessment district filed no protests against award of improvement contract within statutory period of ten days after first publication of notice of award, such award could not be questioned in such owners' action to set aside assessments as void, in absence of fraud. Gen.Laws 1937, Act 8199, § 16.

9. Municipal corporations ⚷488(5)

Where owners of property in city street improvement assessment district fail to protest proposed improvement, statutory limitations on city's indebtedness are deemed waived by them. Gen.Laws 1937, Act 8490, § 10.

10. Municipal corporations ⚷513(7)

In action to set aside city street improvement assessments as void, allegations that assessments were confiscatory because total true value of all lands in district did not exceed $150,000, and hence were contrary to Debt Limitation Act, stated no cause of action, in absence of allegations as to whether any of plaintiffs owned any additional parcels included in district by council's second resolution of intention to proceed with improvement or that assessments chargeable to any of plaintiffs were increased or decreased by inclusion of such additional property. Gen.Laws 1937, Act 8490, § 10.

11. Municipal corporations ⚷493(6)

A city council's order, overruling or denying property owners' appeal thereto from street improvement assessments on ground that numerous changes in plans and specifications on city engineer's recommendation resulted in increased assessments, is conclusive on appellants, in absence of fraud or arbitrary action having semblance of fraud.

12. Pleading ⚷8(15)

Fraud must be pleaded in specific language descriptive of acts relied on to constitute fraud, and it is not sufficient to allege fraud in general terms or terms amounting to mere conclusions.

13. Municipal corporations ⚿488(8)

Any irregularity in including in street improvement assessment costs and expenses incurred in connection with other work and improvements than those ordered by city council's resolution initiating instant proceeding are waived by property owners' failure to protest against inclusion thereof within time and in manner prescribed by Improvement Act. Gen.Laws 1937, Act 8199, § 21.

14. Municipal corporations ⚿516

Property owners' failure to protest within time and in manner prescribed by Improvement Act against inclusion in street improvement assessment of costs and expenses incurred in connection with other work and improvements than those ordered by city council's resolution initiating instant proceedings renders attack on assessment for such reason "collateral" and not proper subject for court proceedings. Gen. Laws 1937, Act 8199, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

◆

Appeal from Superior Court, San Mateo County; Hon. Maxwell McNutt, Judge.

Action by Frank Garibaldi and others against the City of Daly City and others to set aside street improvement assessments and restrain issuance of assessment bonds. Judgment for defendants, and plaintiffs appeal.

Affirmed.

A. J. Scampini and L. F. Mahan, both of San Francisco, for appellants.

F. E. Hoffmann, of San Mateo, for respondents Daly City and city officials.

Kirkbride & Wilson, of San Mateo (Arthur J. Harzfeld, of San Mateo, of counsel), for respondent Hanrahan-Connolly Co.

NOURSE, Presiding Justice.

Two hundred and eleven plaintiffs representing two hundred and forty-four parcels of property commenced this action to have assessments under street improvement proceedings declared void and to restrain the issuance of bonds to cover such assessments. Defendants' demurrer to the complaint was sustained, and a temporary restraining order was dissolved. Following the judgment for the defendants one hundred and ninety-three plaintiffs paid their assessments, after bonds had been issued under the Improvement Bond Act of 1915 (Deering's Gen.Laws, Act No. 8209), and the appeals of those plaintiffs were dismissed on the ground that the issue was then moot. Garibaldi et al. v. City of Daly City et al., 61 Cal.App.2d 514, 143 P.2d 397. The total assessment for the entire improvement was $131,496.46. The remaining eighteen plaintiffs, who are the appellants herein, represent thirty parcels of land assessed for $13,824.15. Their complaint is framed in seven separate causes of action, each asserting some irregularity in the street improvement proceedings.

[1] The first cause of action is grounded on the alleged failure of the municipal authorities to comply with the provisions of the "Special Assessment Investigation, Limitation and Majority Protest Act of 1931." Deering's Gen.Laws Act No. 8490. It is alleged that the city council on February 5, 1940, adopted a resolution of intention to proceed with the proposed improvement at a total estimated cost of $254,287, of which cost the federal Works Progress Administration was expected to contribute $178,808, the remainder to be assessed against the real property of the proposed assessment district. Prior to the adoption of this resolution proceedings were had under Act No. 8490, and after due notice to the property owners approximately seven and one-half percent of the property owners appeared and demanded that investigations be made in accordance with the Act.

Resolution No. 630 adopted August 29, 1938, determined the general nature of the proposed improvement and "the boundaries or extent of the district or lands to be specially assessed", the estimated cost and the declaration that it was anticipated that 45% of the total cost would be contributed by federal agencies. Notice thereof, with reference to plans, maps and specifications on file with the city clerk, was given to all the plaintiffs herein, and the complaint alleges that "each and all of them * * * did not demand the making of the investigations or reports" provided for in Act 8490. Thereupon the city council duly passed its resolution No. 645 finding that less than 15% of the land owners had demanded the investigations and that the investigations and reports required by the Act had thus been waived.

When the city council, acting under section 13 of the Act, found that less than "fifteen per cent" of the area had made the demand, it properly concluded that further proceedings under the Act were not mandatory. But it is argued that the proceedings covered by the resolution of February 5, 1940, were substantially different from those instituted by the resolution of 1938 and for this reason the procedure outlined in Act No. 8490 should have been strictly followed.

[2] The respondents make several answers to the argument, but it is sufficient to note that section 14 of Act No. 8490 provides that "Any action * * * in which the validity of any of the proceedings taken under the provisions of this act is questioned or attacked must be commenced within sixty days after the date of the adoption of the resolution or ordinance finally ordering the * * * improvement." The complaint alleges that five of the property owners in the proposed district protested the doing of the proposed improvement upon the ground, among others, that the provision of Act No. 8490 had not been complied with, that these protests were heard and overruled, and that, on February 26, 1940, the city council adopted the resolution ordering the performance of the work. Of these five protesting owners four have paid the assessment and their appeals have been dismissed. The fifth is not named as a plaintiff and hence is not a party to this appeal. If the protests of these owners are available to the remaining parties they are met by the limitation of the time to commence proceedings. The time to sue under that Act for a failure to comply with any of its provisions commences to run on the date of the adoption of the resolution "ordering the * * * improvement." Hence that time expired sixty days after February 26, 1940. But this action was not commenced until January 28, 1942, and this cause of action is completely barred by these provisions of the Act.

[3, 4] Appellants argue that, notwithstanding these provisions of the Act they were permitted to sue under section 26 of the "Improvement Act of 1911" (Deering's Act No. 8199) under which the improvement proceedings were taken. This section authorizes a suit to test the validity of an assessment within thirty days "after the recording of the warrant, diagram and assessment" and appellants state that this action was commenced within that time. If this were the only limitation found in the Act of 1911 there would be force in the argument. But section 16 of that Act provides: "At any time within ten days from the date of the first publication of the notice of award of contract, any owner * * * who claims that any of the previous acts or proceedings, * * * are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. * * * All objections to any act or proceeding occurring prior to the time within which such objections are permitted to be filed in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived, provided the resolution of intention to do the work has been actually published, as provided in this act." The contract was executed on April 24, 1940; the work was completed December 3, 1941; the date of publication of notice of the award does not appear. But the complaint fails to plead that due publication was not made, and we must presume that this official duty was performed in due course. It does not plead that any of the property owners filed a protest or objection under the provision of section 16 to any of the proceedings theretofore taken, and hence such objections must be deemed to have been waived.

[5, 6] The allegation that after the completion of the contract the appellants appealed to the city council in protest of the assessment is based upon exhibit 9 which is attached to the complaint. This appeal expressly states that it is made under the provisions of section 21 of the 1911 Act. This section provides that: "After the contractor of any street work has fulfilled his contract" notice thereof shall be given to the property owners and a time set for hearing objections. Any person feeling aggrieved "by any act or determination of the superintendent of streets, or city engineer in relation thereto * * * or having or making any objection to the correctness of the assessment or diagram or other act, determination or proceedings of the superintendent of streets, or city engineer, shall prior to the day fixed for the hearing upon the assessment, appeal to the city council * * *."

It is apparent that this section relates solely to protests as to the proper performance of the work, and the correctness of the individual assessments. It does not relate to the jurisdictional matters relevant to the formation of the district or to those matters which lead up to the execution of the contract. Those matters are subject to protest under section 16 of the 1911 Act, and in this case the protests were filed many months after the time fixed in that section. The clear purpose of these provisions of the Act is to require all questions of jurisdiction, and all questions of regularity in the organization of the district, and all procedural matters leading to the letting of the contract, to be determined before the work under the contract is commenced. We conclude that since the first cause of action pleads an attack upon the original proceedings based upon protests which were not made within the prescribed time it fails to state a cause of action.

[7] The second and third causes of action are based upon allegations that by section 6 of the resolution of intention No. 693 it was declared that the work would be prosecuted if the federal works agency of the Works Progress Administration contributed thereto the sum of $178,808, whereas that agency contributed but $122,000; that the sum to be raised by assessment of the property owners was $75,000 whereas because of the smaller contribution, the total assessment amounted to $131,000. There is no charge of fraud, and it does not appear at what stage of the proceedings the decision of the federal authorities to contribute the smaller sum was communicated to the city authorities. It is alleged that, prior to the time when the work was commenced, no one of the appellants filed any protest upon this ground, that five only of the appellants did file protests upon the ground that the Debt Limitation Act had not been followed, but there is no allegation which would serve to stay the operation of section 16 of Act No. 8199 which provides that when no protest has been made to the award of the contract within the time set therein all such protests shall be deemed waived.

[8] The third cause of action rests upon the same state of facts and is supported in argument upon the theory that the contract awarded for the improvement was limited in amount by the resolution of intention. This contract is attached as an exhibit and does not support the argument. However, in the absence of fraud, the amount contemplated by the contract cannot be questioned in this attack upon the assessment since such objections are deemed waived by section 16 of the same Act. Act No. 8199.

[9, 10] The fourth cause of action alleges that the assessment was confiscatory because the total true value of all the lands in the district was not in excess of $150,000. From this it is argued that the assessment was made contrary to the provisions of section 10 of the Debt Limitation Act. But this section provides its exceptions and when the property owners fail to protest the proposed improvement the debt limitations found in the Act are deemed waived. From the first cause of action, which is made a part of this one, it appears that the first resolution of intention No. 630 contemplated the improvement of 21,000 front feet of streets and alleys in the proposed district and that the second resolution covered 27,000 front feet. But it does not appear and cannot be ascertained from any of the pleadings whether any of the appellants now protesting was an owner of any of the additional parcels included by resolution No. 693.

And it does not appear that the assessment chargeable to any one of these appellants was increased or decreased by the inclusion of these other properties. On the whole the complaint fails to show whether these appellants were injured in any respect by the inclusion of other lands in the district and the consequent increase in the total cost of the improvement.

The fifth cause of action also attacks the assessment upon the ground that section 10 of the Debt Limitation Act was exceeded. What has been said in reference to the fourth cause of action applies equally here.

[11] The sixth cause of action pleads that numerous changes in the plans and specifications resulted in an increase in the assessment of $50,000. It is not alleged, however, that these changes in the plans were unnecessary; that the appellants suffered any detriment because of them; or that, in making the changes, the city authorities acted fraudulently, unreasonably, or arbitrarily. The basis of the attack made under this cause of action is that the city engineer recommended that the type of construction of the pavement first contemplated would not hold up under heavy traffic and, upon his advice, there was substituted a four inch base with a one and one-quarter wearing surface for the two inch base originally planned. If the protest or appeal of the property owners may be treated as properly raising this objection to the

assessment the order of the city council in overruling or denying the appeal must be held conclusive upon the protestants in the absence of fraud, or arbitrary action having the semblance of fraud. This is the accepted rule of Hannon v. Madden, 214 Cal. 251, 5 P.2d 4, and similar cases. Of all the cases cited by appellants in connection with their sixth cause of action no one has any support for the point advanced. In the Hannon case, which they cite, the Supreme Court said (214 Cal. at page 257, 5 P.2d at page 6): "Where an appeal has been taken to the council, its decision may be attacked in a legal proceeding only upon pleading and proof that the board acted fraudulently or that its action is so palpably unreasonable and arbitrary as to raise an inference of plain abuse of discretion as a matter of law. Cutting v. Vaughn, 182 Cal. 151, 187 P. 19; Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 P. 217, L.R.A.1918E, 197; Lambert v. Bates, 137 Cal. 676, 70 P. 777; Hutchinson Co. v. Coughlin, 42 Cal.App. 664, 184 P. 435."

[12] This ruling is cited with approval in the late case of City and County of San Francisco v. Boyd, 22 Cal.2d 685, 690, 140 P.2d 666. The Hannon case was followed to the same point in Richardson v. City of Redondo Beach, 132 Cal.App. 426, 433, 22 P.2d 1073, and also in support of another rule which is controlling here—the failure to properly raise the issue of fraud. In this respect it is said in the Hannon case, 214 Cal. at page 267, 5 P.2d at page 11: "It is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions."

[13, 14] The seventh cause of action is a general attack upon the assessment as a whole under the charge that it included "a sum in excess of $10,000 for costs and expenses incurred in connection with work and improvement other than the work and improvement proposed to be and ordered done" under the resolution initiating these proceedings. The allegation is made upon information and belief unsupported by any allegation that it was called to the attention of the city council by protest or appeal, or that the alleged excess was included in the assessment fraudulently or arbitrarily. If there was any irregularity in the inclusion of such sum in the assessment it must be deemed to have been waived by the failure to protest within the time and in the manner prescribed in the Improvement Act. Section 21 of this Act (No. 8199) declares that the decisions of the city council shall be final and conclusive on appeal "as to all errors, informalities, and irregularities which said city council might have avoided, or have remedied during the progress of the proceedings or which it can at that time remedy." Manifestly if the assessment included an item not connected with the project of improvement the city council could remedy the defect when that matter was called to its attention by protest or objection. But if none is made the error is deemed waived. Failure to protest within the limits of the statute renders the attack collateral and is not a proper subject for court proceedings. Woodill v. City of Glendale, 208 Cal. 564, 282 P. 797.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

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63 Cal.App.2d 638

KELLY et al. v. CITY OF SAN DIEGO et al.

Civ. 3309.

District Court of Appeal, Fourth District, California.

March 30, 1944.

1. Licenses 🔑7(3)

A city ordinance imposing daily tax on occupants of automobile house trailers in trailer camps was not valid as making reasonable, natural, and logical classification of transients living in such trailers as distinguished from those living in hotels, lodging houses, etc., because trailer dwellers pay no property taxes for support of general municipal activities, while such other transients contribute to city's financial support by paying rent to their landlords who pay such taxes.

2. Automobiles 🔑21

Automobile house trailers are not subjects of general taxation, but owners thereof are charged fees, which are not taxes as usually understood, but charges imposed for privilege of using highways of state.

St.1941, p. 605, §§ 10751, 10752; p. 2386, § 11005.

3. Licenses 🔑7(3)

The fact that owners of automobile house trailers pay fees for privilege of using highways of state and are exempt from general taxation on such vehicles, while permanent structures, in which other transients reside, are subject to such taxation, does not validate city ordinance imposing daily tax on occupants of such vehicles in trailer camps as based on just classification. St.1941, p. 605, §§ 10751, 10752.

4. Licenses 🔑7(3)

A municipality may classify business and impose different license burdens on different classes by ordinance where there is intrinsic, natural, and reasonable ground for distinction, but cannot tax some businesses falling within a class while exempting others of same class.

5. Licenses 🔑7(3)

A city ordinance imposing daily tax on occupants of automobile house trailers in trailer camps is void as unreasonably discriminating between such occupants and other transients of same class living in houses, apartments, hotels, and lodging houses.

6. Appeal and error 🔑1170(3)

In action to enjoin collection of daily taxes levied by city on occupants of automobile house trailers in trailer camps, denial of defedants' motion to strike allegations of amended complaint that plaintiffs were workers engaged in necessary war industries, regular purchasers of war bonds, and registered voters of city was not prejudicial to defendants, even if such allegations were surplusage as amounting to mere "flag waving". Const. art. 6, § 4½.

7. Appeal and error 🔑1170(3)

In action to enjoin collection of daily taxes levied by city on occupants of automobile house trailers in trailer camps, denial of defendants' motion to strike allegations of amended complaint that many trailer dwellers in city did not own trailers, but rented them from camp operators, was not prejudicial to defendants, even if erroneous, in view of proper allegations in pleadings that some of plaintiffs owned trailers in which they lived while others rented them from camp operators. Const. art. 6, § 4½.

8. Evidence 🔑5(2)

The Fourth District Court of Appeal may take judicial notice that great numbers of persons have moved to San Diego to work in war industries, overcrowding ordinary living quarters and compelling many people to live in automobile house trailers.

9. Pleading 🔑6

A matter of which court may take judicial notice need not be alleged.

10. Appeal and error 🔑1170(3)

In action to enjoin collection of daily taxes levied by city on occupants of automobile house trailers in trailer camps, denial of defendants' motion to strike allegations of amended complaint that great numbers of persons have moved to city to work in war industries, overcrowding ordinary living quarters and compelling many people to live in trailers, was not prejudicial to defendants, since such allegations were unnecessary as respecting matter of which court could take judicial notice. Const. art. 6, § 4½.

11. Appeal and error 🔑1170(3)

In action to enjoin collection of city taxes on occupants of automobile house trailers in trailer camps, denial of defendants' motion to strike allegation of amended complaint that defendants threatened to arrest and prosecute plaintiffs for failure to pay taxes "and thereby hinder production of war materials and machines" was not prejudicial to defendants, though quoted phrase was a conclusion. Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Frank M. Kelly and others against the City of San Diego and others to enjoin collection of daily taxes on occupants of automobile house trailers in trailer camps within such city. From a judgment enjoining collection of the taxes, defendants appeal.

Affirmed.

Jean F. Du Paul, City Atty., and Bertrand L. Comparet, Deputy City Atty., both of San Diego, for appellants.

John T. Holt, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment holding a daily tax, levied by the City of San Diego on house trailers, to be paid by the occupants, unconstitutional and void and enjoining its collection.

The trial court held the tax void because of discrimination between members of the same class, part of which were required to pay the tax while others of that class were exempt from it. Other questions are argued by counsel but we find it unnecessary to consider them because the one question of discrimination is decisive of the case.

Plaintiffs were workers in war industries in San Diego, or were wives of men in the armed services. They lived in trailers which were located in trailer camps duly licensed by the city of San Diego.

Ordinances of the city of San Diego prohibited persons from living in trailers not located in licensed trailer camps, except for an initial period of fifteen days where no trailer camp space was available.

Other ordinances of San Diego provided a rather elaborate procedure for the establishment, maintenance and operation of trailer camps in that city. Health and sanitation facilities were required and frequent inspections were to be made. These measures clearly come within the police powers of the city and no question is raised as to their validity.

A space 20 feet wide and 30 feet long was required for each trailer and the operator of the camp was required to pay a license of $2 per year for each unit of space in his camp, with a minimum annual license of $15. It was made unlawful for any person to remain or live in any automobile trailer camp for more than six months in any twelve month period, subject to the exception that if a shortage of adequate housing existed the Director of Public Health might grant special permits to those "engaged in vital defense work" allowing them to remain for additional three month periods.

Section 2 of ordinance 2556 (New Series), which gives rise to this litigation, provides as follows:

"There is hereby imposed a service charge or tax of ten cents (10c) per day per unit, on the occupant or occupants of each trailer occupying a unit of space in any trailer camp within the City of San Diego. Said charge shall be payable by such occupant or occupants to the operator of the trailer camp in which such trailer is located, at the same time and for the same period that the rental or charge for the unit of trailer space in such trailer camp is paid."

The operator of the trailer camp was required to pay the service charges collected by him to the city treasurer. Refusal of an occupant of a trailer to pay the service charge was made a misdemeanor subjecting the one in default to fine and imprisonment.

Plaintiffs all lived in trailers in licensed trailer camps. Some of the trailers were owned by the occupants and some by the operators of the camps. Some had paid the license tax because of fear of arrest and prosecution, while others, who had refused to pay the tax, had been arrested and were awaiting trial at the time this action was filed. It is admitted there were about 1400 trailers in licensed trailer camps in San Diego with about 5000 occupants.

Plaintiffs seek to support the judgment on the ground that the classification made by the ordinance is discriminatory and unreasonable in that it places the burden of the license on occupants of trailers in licensed trailer camps while it imposes no such charge on transients living in hotels or lodging houses or persons without property taxable by the city of San Diego who occupy furnished apartments and furnished houses. It is urged that the tax is levied on the right to occupy living quarters and that no logical distinction can be made in the class occupying them simply because some are fortunate enough to dwell within permanent structures, while others have to live in temporary quarters in a trailer camp; that to exempt the former and tax the latter is to exempt the fortunate and tax the unfortunate, which has never been permitted under Federal and State Constitutions.

[1] Defendants seek to justify the tax on the ground that the classification is reasonable, natural and logical because the trailer dwellers do not pay, directly or indirectly, any property tax for the support of the general municipal activities of the city, while dwellers in houses, apartments, hotels and lodging houses contribute to the financial support of the city by paying rent to their landlords who in turn use a portion of the rent to pay the city taxes on the land, buildings and furnishings.

This argument overlooks the fact that each trailer occupies 600 square feet of land in the trailer camp and that this land is assessed by the city and is subject to the payment of city taxes. Further, before a trailer camp can be licensed certain improvements must be erected to provide sanitation and to promote the health of the trailer dwellers. These improvements are subject to assessment and taxation for general municipal purposes. Also, the city levies a direct license tax on operators of trailer camps which must be paid into the city treasury and may be used for general municipal purposes. If the payment of rent by those who live in permanent structures can be regarded as a contribution to the general city revenues through the payment of taxes by the owners of the structures, the same process of reasoning leads to the conclusion that trailer dwellers also contribute to the general municipal revenues through the payment of rent to the camp operator, who must pay the license on the camp, and, through the payment of municipal taxes on the land and improvements in the trailer camp by the owner. Thus this argument fails on analysis and shows no logical distinction, as far as contributing to city revenues goes, except perhaps in the amount contributed, between tenants occupying permanent structures and those occupying trailers. Both indirectly contribute to the general revenues of the city of San Diego through the payment of rent.

[2] It is also argued by defendants that a logical and lawful distinction which furnishes the basis of just classification is to be found in the method of taxation of the trailers and of permanent structures. Trailers are not the subject of general taxation. Stats.1935, p. 1312, as amended, Sec. 10751, Revenue and Taxation Code, St.1941, p. 605. Owners are charged a fee, which is not a tax as usually understood, but is a charge imposed upon them for the privilege of using the highways of the State. Ingels v. Riley, 5 Cal.2d 154, 53 P.2d 939, 103 A.L.R. 1. It is levied at the rate of 1¾ per cent of the actual market value of the vehicle. Sec. 10752, Revenue and Taxation Code, St.1941, p. 605. Forty per cent of this revenue is paid to the cities and counties of the State in proportion to their populations, the money to be expended "for law enforcement, for the regulation and control and fire protection of highway traffic, and for any other State purpose." Sec. 11005, Revenue and Taxation Code, St. 1941, p. 2386. Thus automobile trailers are exempt from general taxation while permanent structures are not.

Defendants rely on the case of Continental Baking Co. v. City of Escondido, 21 Cal.App.2d 388, 69 P.2d 181, 183, as supporting their argument that the difference in the method of taxation of trailers and permanent structures furnishes a valid ground for classification under which the provisions of the ordinance must be sustained. An ordinance of the city of Escondido imposed a license fee of $50 a year upon any bakery which was upon the tax rolls of the city, and a license of $150 a year on a bakery outside of Escondido which sold and delivered bakery products within the city.

The classification was held to be valid and the ordinance was upheld, the court saying:

"That the ordinance here in question may not be said to be a mere subterfuge for such oppression we think is clear. Persons conducting bakeries within the city of Escondido are obliged to pay an ad valorem tax to the city on the real and personal property devoted to their businesses. Those engaged in the bakery business elsewhere pay no such tax to the city of Escondido. This fact alone furnishes sufficient justification for imposing a greater license fee upon the latter class."

In reaching this conclusion the District Court of Appeal discussed with approval and quoted from Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, as follows:

"The Supreme Court held unconstitutional an ordinance which placed a license tax upon persons doing a laundry business within the city who had no place of business within the city and entirely exempted from license tax persons doing a laundry business at a fixed place of business within the city. The court in that case recognized the rule laid down in Ex Parte Haskell, supra [112 Cal. 412, 44 P. 725, 32 L.R.A. 527], but distinguished that case in the following language:

" 'But the right to make such distinctions is not broad enough to allow a municipality to tax persons doing a particular kind of business within the city and to entirely exempt other persons doing the same kind of business in essentially the same way.' "

[3] Under the rule announced in the Bueneman case, and approved in the Con-

tinental Baking Company case, the difference in the methods of taxation of trailers and permanent structures cannot aid defendants. Taxes on real estate, and the privilege charge placed on automobile trailers, are based on ownership and primarily are paid by the owners. The license tax involved here has nothing to do with ownership of property. It is a charge imposed on the right of certain people to occupy a certain kind of dwelling that affords some protection from the elements. It is a tax on occupancy. The house, apartment, hotel or lodging furnishes protection from the elements as does the trailer. We can see no valid distinction, for the purpose of classification, between the occupancy of a trailer and the occupancy of a permanent structure except perhaps the greater comfort and convenience of the latter and the higher rent paid. The occupant of the trailer is taxed under the provisions of the ordinance, while the occupant of the permanent structure is entirely exempt from the license. Thus under the rule announced in Bueneman v. City of Santa Barbara, supra, and approved in Continental Baking Co. v. City of Escondido, supra, the city of San Diego may not levy a license tax on occupants of automobile trailers while entirely exempting others of the same class (occupants of permanent structures) from the same or any other similar charge.

Further, the classification approved in the Continental Baking Company case is based on whether or not there is property on the assessment rolls of the city. No such classification is attempted in the ordinance in question. The property tax, and the automobile trailer charge are based on ownership, and, if the reasoning in the Continental Baking Company case be followed, there might possibly be a lawful classification of owners of trailers as contrasted to the owners of permanent rental structures. Here we do not have a license tax based on ownership but upon occupancy. What might be the basis of a valid division of owners into classes cannot serve as the foundation for a lawful classification of an entirely different class, namely, occupants.

Because we have quoted from and discussed the case of Continental Baking Company v. City of Escondido, supra, it must not be construed as indicating that we approve all of the reasoning of that case.

[4] There are many decisions of our California courts dealing with municipal ordinances imposing license taxes on various trades, avocations, business and professions. While some are not easily harmonized with others there is one principle recognized by all of them. It is this: The municipality may classify business where there is an intrinsic, natural and reasonable ground for such distinction, and may impose a different license burden on the different classes. It cannot classify, except on such basis, and cannot tax some falling within a class while exempting others of the same class. See Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; In re Richardson, 170 Cal. 68, 148 P. 213; Town of St. Helena v. Butterworth, 198 Cal. 230, 244 P. 357; Bueneman v. City of Santa Barbara, supra; E. A. Hoffman Candy Co. v. City of Newport Beach, 120 Cal.App. 525, 8 P.2d 235; In re Hoskins, 16 Cal.App.2d 251, 60 P.2d 535; In re Fassett, 21 Cal.App.2d 557, 69 P.2d 865; Soares v. City of Santa Maria, 38 Cal.App.2d 215, 100 P.2d 1108; Van Gammeren v. City of Fresno, 51 Cal.App.2d 235, 124 P.2d 621.

[5] When measured by the foregoing rules we cannot regard the classification made by the ordinance as reasonable. It is a tax on occupancy and, because the living quarters of one group of persons are more commodious and comfortable than those of another group, furnishes no ground for distinction and for exempting the more fortunate from the charge while imposing it on their less fortunate neighbors. Because it does this the ordinance is discriminatory and void.

[6] Defendants urge prejudicial error in the denial of their motion to strike portions of the amended complaint.

Two groups of allegations to which the motion is directed are to the effect that the plaintiffs are workers engaged in necessary war industries, are regularly purchasing war bonds and are registered voters of the city of San Diego. The argument is made that these allegations amount to mere "flag waving" and have no proper place in the pleading. We may concede this to be true. While those allegations may have been surplusage they did no harm to the cause of defendants and supplied no reason for the ultimate decision of the case.

[7] It is next urged that allegations to the effect that there were many trailer dwellers in San Diego who did not own the

trailers in which they lived, but rented them from the operators of trailer camps, should have been stricken from the pleadings. We may again concede, without holding, that those allegations should have been stricken without finding prejudice in the ruling. It was alleged that some of the plaintiffs owned the trailers in which they lived while others rented them from the camp operators. Thus the same issue was squarely presented by proper allegations in the pleadings so it was properly before the court.

[8-10] Next, the motion was directed to allegations to the effect that great numbers of persons have moved to San Diego to work in war industries, overcrowding ordinary living quarters and compelling many people to live in trailers. This is a condition known to every person in and around San Diego of which we may take judicial notice and of which we have personal knowledge as the law requires us to move to that city on May 1st of each year. While a matter of which a court may take judicial notice need not be alleged (Los Angeles Paving Co. v. Los Angeles Foundry Co., 181 Cal. 685, 186 P. 593), no prejudice resulted in the failure to strike this portion of the pleading.

[11] The last specification of the motion was directed to the hereinafter quoted phrase in a paragraph alleging that defendants threatened to arrest and prosecute plaintiffs for failure to pay the license tax "and thereby to hinder the production of war materials and machines". The quoted phrase is obviously a conclusion of the pleader but again we can find no prejudice in the refusal to strike it from the pleading as it had no effect on the ultimate decision of the case.

We are prohibited from reversing a judgment "for any error as to any matter of pleading, or for any error as to any matter of procedure," that is not prejudicial to the party complaining. Sec. 4½, Art. VI, Const. Thus any errors arising from the ruling on the motion to strike cannot furnish grounds for a reversal of the judgment as no prejudice resulted.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

23 Cal.2d 821

McKESSON v. DONAGHUE, Registrar of Voters.

S. F. No. 17011.

Supreme Court of California.
March 23, 1944.

1. Statutes 🔑71

The statutes relating to election of judges do not violate the "uniformity" provisions of the Constitution. St. 1939, pp. 296, 297, §§ 10600–10602; St. 1941, p. 2892, § 10601.5; Const. art. 1, § 11; art. 4, § 25; art. 6.

2. Statutes 🔑231

In determining whether preliminary declaration of intention to become a candidate for judicial office is required in case of sponsors' declaration of candidacy, all pertinent sections of the Elections Code must be construed together in a manner consistent with their respective purposes. St.1939, pp. 296, 297, §§ 10600–10602; St. 1941, p. 2892, § 10601.5.

3. Elections 🔑126(1), 144

Compliance with section 10601 or section 10601.5 of the Elections Code was intended to be incumbent only upon candidates for judicial office by virtue of a personal declaration therefor and not upon candidates by virtue of filing of a sponsors' declaration. St. 1939, pp. 296, 297, §§ 10600–10602; St.1941, p. 2892, § 10601.5.

4. Elections 🔑126(4), 144

Under statutes relating to election of judges, Legislature intended to require "declaration of intention" only with respect to personal declarations of candidacy and not with respect to sponsor method of nomination. St.1939, pp. 134, 297, §§ 2620, 10601; St.1941, p. 2892, § 10601.5; Act Feb. 2, 1944, Sp.Sess., §§ 2600.5, 2621.5.

5. Elections 🔑141

The sponsor system of nominating candidates for nonpartisan office should be allowed full scope of function with respect to judicial as well as other officers, in absence of contrary legislative declaration. St.1939, pp. 134, 297, §§ 2600, 10601; St. 1941, p. 2892, § 10601.5; Act. Feb. 2, 1944, Sp.Sess., §§ 2600.5, 2621.5.

6. Elections 🔑126(4), 144

The statutes relating to election of judges evidence legislative intention that aspirant for numerically designated judicial office must "indicate" the particular office for which he is to be a candidate, which indication must appear in declaration of intention of one who personally declares his candidacy, and in case of candidate nominated under sponsor method, such indication should appear in sponsors' declaration of candidacy or in candidate's acceptance of nomination. St.1939, pp. 296, 297, §§ 10600–10602.

7. Elections 🔑145

The statute providing that "every candidate" for judicial office not more than ten nor less than five days prior to first day on which his nomination papers may be circulated shall file a declaration of intention to become a candidate for such office does not use quoted words as including candidates nominated by sponsors' declaration. St.1941, p. 2892, § 10601.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Every Candidate".

8. Elections 🔑144

A candidate for unexpired term of judicial office by virtue of filing of a sponsors' declaration was not governed by statute requiring declaration of intention to become a candidate for judicial office. St. 1939, pp. 296, 297, §§ 10600–10602; St. 1941, p. 2892, § 10601.5.

SCHAUER and TRAYNOR, JJ., dissenting.

◆

In Bank.

Original proceeding in mandamus by William B. McKesson to compel Michael J. Donaghue, as Registrar of Voters of the County of Los Angeles, to include on the ballot for the consolidated primary election to be held on May 16, 1944, the petitioner's name as a candidate for office No. 14, unexpired term, of the Superior Court of the County of Los Angeles, wherein respondent filed a demurrer.

Peremptory writ of mandate issued.

Norman A. Bailie, Frank B. Belcher, Fred M. Cross, George W. Dryer, Raymond Haight, and Wm. C. Mathes, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and Ernest R. Purdum and Edward H. Gaylord, Deputies Co. Counsel, all of Los Angeles, for respondent.

W. H. Anderson and Rollin L. McNitt, both of Los Angeles, for Dailey S. Stafford.

CURTIS, Justice.

This is an original proceeding in mandamus to compel the respondent, as Registrar of Voters of the County of Los Angeles, to include on the ballot for the forthcoming consolidated primary election to be held on May 16, 1944, the petitioner's name as a candidate for "Office No. 14 (unexpired term)" of the Superior Court of the County of Los Angeles. The matter is submitted on petition and demurrer, and on a stipulation waiving oral argument and permitting immediate disposition of the controversy.

The determination of this proceeding requires the construction and reconciliation of certain sections of the Elections Code so as to effectuate the legislative intent with respect to the nominating procedure to be followed in presenting to the electorate candidates for judicial office.

The petition sets forth the following facts: In August, 1943, the Honorable Benjamin J. Scheinman, a duly elected and qualified Judge of the Superior Court of the County of Los Angeles, entered the armed forces of the United States, and for several months last past he has been, and now is, absent from the state on ordered military service. This situation, under the doctrine of the case of People v. Sischo, 1943, 23 Cal.2d 478, 144 P.2d 785, created a temporary vacancy in Judge Scheinman's office, the term of which will expire on January 8, 1945. Pursuant to sections 2573 and 2574 of the Elections Code, St. 1939, p. 123, the Secretary of State certified to the respondent on February 16, 1944, that the judicial offices in the county of Los Angeles to be filled at the election on May 16, 1944, were twenty superior court judgeships, each for a term of six years commencing January 9, 1945, and the single judgeship on said court for the unexpired term of Judge Scheinman. Accordingly, and as required by section 2575 of the Elections Code, the respondent published a notice of offices for which candidates were to be nominated or elected at the May 16th election, and included in such listing was the temporary judicial vacancy in said superior court caused by Judge Scheinman's military absence from the state and specified "Office No. 14 (unexpired term)."

On February 28, 1944, the Governor of this state appointed William B. McKesson, the petitioner herein, to fill the interim appointive portion of the term of Judge Scheinman, and on March 2, 1944, the petitioner duly qualified as Judge of the Superior Court of the County of Los Angeles. On March 7, 1944, a sponsors' declaration of the candidacy of the petitioner for the remainder of the unexpired term was executed by the proper number of qualified sponsors (Elec. Code, secs. 2612–2617, St.1939, pp. 130, 131, St.1941, p. 1164), a declaration of acceptance of the nomination was executed by the petitioner (Elec. Code, sec. 2618, St.1939, p. 133), and on that date (seventy days before the May 16th election), as prescribed by section 2621.5 of the Elections Code, enacted at the special session of the Legislature in January, 1944, and effective February 2, 1944), both documents, with the requisite filing fees, were delivered to the respondent. The respondent accepted these papers, but he has announced that he will take no further steps in the matter because the petitioner failed to file his *declaration of intention to become a candidate* for the judicial office mentioned. Elec. Code, secs. 10600–10602, St.1939, pp. 296, 297, St.1941, p. 2892. Accordingly, unless this court directs the respondent to cause the petitioner's name to be printed on the ballot for the May 16th election, he will not do so.

It is the petitioner's position that sections 10600 to 10602 do not affect his situation because he is a candidate for judicial office by virtue of the filing of a *sponsors' declaration* rather than a *personal declaration of candidacy.* The respondent, on the other hand, claims that said sections of the Elections Code apply to *all* candidates for judicial office, regardless of the form of nomination. In this argument the respondent is joined by Dailey S. Stafford, who on February 11, 1944, and within the time specified (secs. 10601, 10601.5) filed his declaration of intention to become a candidate for the unexpired term of Judge Scheinman; and on March 2, 1944, he filed his personal nomination papers and paid the requisite filing fee. As such candidate said Dailey S. Stafford is a party whose interest will be directly affected by the outcome of this proceeding, and accordingly he has so identified himself herein. Code Civ.Proc. sec. 1107.

To be considered at the outset are the sections of the Elections Code the application of which constitutes the principal point of dispute between the parties:

Section 10600: "In any election at which *two or more judges* or justices of any court are to be voted for or elected *for the same term,* it shall be deemed that there are as many separate judicial offices to be filled as there are judges or justices of the court to be elected. Each separate office shall be *designated by a distinguishing number* not greater than the total number of the offices. * * *" (Emphasis added.) (Based on former Stats. 1927, ch. 316, p. 528.)

Section 10601: *"Each candidate for a numerically designated judicial office,* not more than ten nor less than five days prior to the first day on which his nomination papers may be circulated and signed, or *not more than ten nor less than five days prior to the first day on which his nomination papers may be presented for filing, shall file* in the office in which his nomination papers are required to be filed, *a written and signed declaration of his intention to become a candidate* for that office and shall state in his declaration for which of the numerically designated offices he intends to become a candidate." (Emphasis added.) (Based on former Stats. 1927, ch. 316, p. 528.)

Section 10601.5: *"Every candidate for a judicial office, not more than 10 or less than five days prior to the first day on which his nomination papers* may be circulated and signed or *may be presented for filing, shall file* in the office in which his nomination papers are required to be filed, *a written and signed declaration of his intention to become a candidate* for that office." (Emphasis added.) (Added by Stats. 1941, ch. 1160, p. 2892, sec. 1.)

Section 10602: "The numerically designated offices shall be grouped and arranged on all ballots in numerical order. No person may be a candidate nor have his name printed upon any ballot as a candidate *for any numerically designated office* other than the one indicated by him *in his declaration of intention to become a candidate."* (Emphasis added.) (Based on former Stats. 1927, ch. 316, p. 528.)

[1] In passing, it may be said that this legislation, affecting judicial offices only, is not open to objection as violative of the "uniformity" provisions of the State Constitution. Art. I, sec. 11; art. IV, sec. 25. The distinction is a natural and reasonable one pursuant to the treatment of the judiciary as a separate class in article VI of the State Constitution, and these sections of the Elections Code unquestionably apply uniformly to all who fall within their purview. Steiger v. Collins, 215 Cal. 634, 12 P.2d 426; Baertschiger v. Leffler, 36 Cal.App.2d 208, 97 P.2d 501.

[2] Relating the present factual situation to the legislative plan embraced within the above-quoted sections, the petitioner first argues that the *interim elective term* which he seeks is not a "numerically designated office" and consequently the procedural requirements referable to a candidate therefor have no bearing here. He cites as prerequisites under section 10600 the following conditions: (1) "two or more judges" to be elected, and (2) "for the same term." To illustrate his point of distinction he refers to the aforementioned listing of judicial offices in the county of Los Angeles to be filled at the May 16th election: *twenty* superior court judgeships, each for a six-year term commencing January 9, 1945, as contrasted to the *single interim judgeship* on the same court, with the term beginning May 16, 1944, and ending January 8, 1945—less than eight months. But for the purposes of this opinion, it does not matter whether the petitioner is a candidate for a numerically or non-numerically designated office, for he undoubtedly is a "candidate for a judicial office" and would be required to file a preliminary "declaration of his intention" under section 10601.5, unless it appears that the *sponsor method of candidacy* would not reasonably comprehend such procedural step. In determining this critical point, of course, all pertinent sections of the Elections Code must be read together and construed in a manner consistent with their respective purposes.

It appears from said code that the Legislature intended to set up *two systems* for the nomination of candidates for office: (1) by *personal declaration,* and (2) by *sponsors' declaration.* Thus, under section 2600, St.1939, p. 126, it was provided:

> "No candidate's name shall be printed on the ballot to be used at the direct primary unless a declaration of his candidacy is filed not less than sixty and not more than ninety days prior thereto.
>
> "The *declaration may be made by the candidate,* or, on his behalf by *sponsors of the candidate.*
>
> *"When* the declaration is *made by sponsors the candidate's affidavit of acceptance shall be filed with the declaration."* (Emphasis added.)

(The 60-day period was changed to 65 days for a limited period by section

2600.5, added at the special session of the Legislature in January, 1944, above mentioned.)

[3] The petitioner contends that the efficient operation of the two forms of nomination established by the Legislature would not sustain the application of the provisions of either section 10601 or section 10601.5, supra, to the *sponsor method,* and that compliance with said sections was intended to be incumbent only upon candidates for judicial office by virtue of *personal declaration* therefor. Upon analysis of the import of the pertinent sections herein and with due consideration for the purposes to be achieved by the two independent nominating procedures as provided, the petitioner's position seems to accord with the legislative intent.

[4] Under section 2600.5, supra, the earliest date on which the sponsors could have filed a declaration of candidacy for the petitioner was February 16, 1944—"90 days prior to the" May 16th election. As previously stated, such declaration and the petitioner's affidavit in acceptance of the nomination were delivered to the respondent for filing on March 7, 1944—"70 days prior to the" May 16th election. Sec. 2621.5, supra. Turning to the pertinent time limitation of section 10601.5, supra, the requirement that the candidate shall file his declaration of intention "not more than 10 or less than five days *prior to the first day on which his nomination papers * * * may be presented for filing*" undoubtedly refers to "90 days prior to the" election. Sec. 2600.5, supra. Thus, to apply such provision here, it would have been necessary for the petitioner to have filed a declaration of his intention to become a candidate for the above-mentioned interim office sometime during the period between February 7 and February 11, inclusive, 1944. Section 2620, St.1939, p. 134, expressly authorizes the sponsor method of nomination for "nonpartisan" office, and strict compliance with such independent method did not require that the petitioner's nomination papers be executed and delivered to the respondent for filing until March 7, 1944, as in fact was done here—"70 days prior to the" May 16th election, although 25 days beyond the time allowed for the filing of a "declaration of his intention to become a candidate for" judicial office. It is not reasonable to assume that the Legislature intended to so emasculate the function of the independent sponsor system of nomination for judicial candidates.

[5] The petitioner's claim as to the Legislature's intent to require the filing of a "declaration of intention" only with respect to *personal declarations* of candidacy finds still further support when the time element in sections 10601 and 10601.5 is correlated with the sponsor concept of nomination for judicial office. As above noted, the time for the filing of nomination papers by sponsors is fixed at the earliest date of 90 days before the primary election. Sec. 2600.5, supra. Under the express terms of sections 10601 and 10601.5 the electors are provided with the opportunity of learning "not more than 10 or less than five days prior to" the earliest date authorized for the filing of nomination papers, the persons who, by the filing of their "declaration of intention," aspire to judicial office. This five-day gap before nomination papers either by the candidate or sponsors may be filed must have been intended for some purpose, and its value becomes apparent in conjunction with the authorized *sponsor* procedure. Sec. 2612 et seq. Thus, in this time the electors, if not satisfied with those who have declared their intention to become candidates, may proceed to inquire into the qualifications of other persons and propose under the sponsor system someone whom they consider better fitted for the office in question. Such possible procedure demonstrates the beneficial purpose of the sponsor system, which should be allowed full scope of function with respect to judicial as well as other offices, in the absence of an express legislative declaration necessitating its rejection. Such interpretation of the preliminary requirement as to aspirants for judicial office under sections 10601 and 10601.5 gives effect to the purport of the statutory language and at the same time correlates the purpose of such advance procedural step with the *independent* sponsor method of nomination long-recognized by the Legislature as an *equivalent means* of proposing a candidate for public office. In this manner both divisions of the Elections Code, as here noted, may operate expeditiously and in harmony one with the other.

[6] In this connection, it should here be noted that by the enactment of sections 10600–10602 the Legislature has clearly evidenced its intention that an aspirant for a numerically designated judicial of-

fice must "indicate" the particular office for which he is to be a candidate. Section 10602 requires that such indication must appear in the "declaration of intention" of one who personally declares his candidacy. In the case of a candidate nominated under the sponsor method, such indication should appear either in the sponsors' declaration of candidacy or in the candidate's acceptance of the nomination. Thus, full effect is given to the Legislature's intent requiring particularity as to numerically designated judicial offices.

[7, 8] Still other considerations present themselves with respect to the propriety of limiting the provisions of sections 10601 and 10601.5 to candidates for judicial office by *personal nomination.* Under the express language of these sections, only *candidates,* not sponsors, may file the "declaration of intention." If the candidate by *sponsors' nomination* is required to file such preliminary "declaration of intention" and thus to indicate his purpose to become a candidate, then what would be the object in having his *sponsors also file* a declaration of his candidacy? Such duplication of procedural steps is not compatible with the independent function of the two systems of nomination authorized by the Legislature. Sections 2600, 2600.5 supra. Moreover, if sections 10601 and 10601.5 governed candidates by *sponsors' nomination,* then when the sponsors would have authority to file their nominating papers—at the earliest "90 days prior to the" election—they could *only* present a candidate who had already declared his intention. Thus, the sponsors' declaration of candidacy would be a superfluous action insofar as putting any new name before the public for office, and would serve simply to add some political prestige to a candidate already in the running. Such limited concept is not in accord with the essential purpose of the sponsor method of nomination, as above discussed, and it is not reasonable to conclude that the Legislature intended its function to be so restricted with respect to judicial offices. Rather the import of the *sponsor system of nomination* attains greater significance in relation to judicial offices when correlated with sections 10601 and 10601.5, as above indicated.

In opposition to the petitioner's claim that he, as a candidate for a non-numerically designated office under the sponsors' system of declaration, was not required to comply with section 10601.5, supra, the respondent relies principally upon the opening words of said section—"every candidate"—as including *"one put forward for election,* whether with or against his own will; *one put forward by others for an office;* * * *." 29 C.J.S., Elections, § 1, p. 19. He also argues that if said section is construed as not comprehending a person nominated as petitioner was here for the judicial office in question, then one late in declaring his *intended candidacy,* as prescribed, could still become a candidate under the sponsor system by securing sponsors to act on his behalf so as to relieve himself of the consequences of his default under section 10601.5. These points of argument are worthy of mention and have been considered, but they cannot prevail herein in view of other matters above recited as evincing the legislative intent to establish two nominating systems of independent force and effective operation to permit the electors to exercise the widest choice possible in presenting a list of qualified candidates for judicial office. In these circumstances section 10601.5, as here pertinent, must be interpreted in harmony with this fundamental observation. In thus holding that the petitioner, as a candidate by sponsor declaration, was not required to comply with said section 10601.5, it is clear that the validity of the filing of his nomination papers is not open to question and his name as a candidate for the judicial office here involved must be placed on the sample and official ballot at the forthcoming primary election.

Let a peremptory writ of mandate issue forthwith.

GIBSON, C. J., and SHENK, CARTER, and EDMONDS, JJ., concur.

SCHAUER, Justice.

I dissent. I am unable to find in the statutes in question any invalidity or any ambiguity or any conflict upon which to predicate an "interpretation" or "reconciliation" which inexorably has the effect of striking down a law which for a number of years has been salutary in its government of all candidacies for judicial office. This law was enacted as a legislative contribution toward building up the standards of the judiciary in this state. In providing for separate judicial offices, in requiring that all judicial candidacies be declared for specifically designated offices and that each judicial office candidate file a written notice of intention designating the office for which he would be a candidate at a time not less than five nor more than ten days before the date on which nomination papers for any office could be circulated or filed, the Legislature attempted to secure for the people—and heretofore has been consistently understood to have secured for them—a special period of not less than five days in which the people could give special consideration to the candidates for the highly important judicial offices. By requiring that candidacies for judicial office be officially announced thus in advance of candidacies for all other offices the Legislature gave added protection to the people in their opportunity to become better advised as to the relative merits of the announced judicial office candidates and thereby contributed also to the security of tenure of worthy incumbents. The natural effect of this legislation has been salutary and far reaching.

The holding of the majority that the sections of the Elections Code requiring that each candidate for judicial office file a notice of "intention to become a candidate" have no application to a candidate whose declaration of candidacy is filed by sponsors rather than by himself can well operate to destroy all the efficacy of the law in question insofar as the preliminary notice of intention and the special period for consideration of judicial candidates is concerned. It will simply be a matter of choice with each candidate for judicial office as to whether he shall refrain from filing a notice of intention to become a candidate and thereafter have sponsors submit his declaration or whether he shall file a notice of intention and thereafter *either* file his own declaration of candidacy *or* procure sponsors to file it for him. Certainly the filing of a notice of intention to become a candidate would not preclude a person from having his declaration of candidacy filed by sponsors. It is to be noted that a declaration of candidacy by sponsors cannot in any event be filed unless the candidate has previously or concurrently consented to become such candidate. Section 2600 of the Elections Code requires that "When the declaration is made by sponsors the candidate's affidavit of acceptance shall be filed with the declaration," and section 2613 requires that "In the document in which the verification deputies are appointed the five persons joining as provided in section 2612 shall make affidavit that the candidate therein named * * * has given his consent to be proposed for nomination to such office."

The direct primary law had been enacted long prior to the enactment of sections 10600–10602 of the Elections Code. The provisions of section 2600 et sequitur providing the two alternative methods for filing declarations of candidacy were extant and in effect when the provisions of sections 10600–10602, applying specifically to candidates for judicial office, were adopted. The latter sections by their very terms not only do not except candidates whose declarations of candidacy are filed by sponsors, but they expressly include candidates under both procedures, as will appear from the language of such sections hereinafter quoted. The requirement for the filing of a notice of intention is no more inconsistent with procedure by the one system than it is with procedure by the other. No person can be declared a candidate without his consent, whether the declaration be by sponsors or by himself. If sponsors are to induce a person to become a candidate for a judicial office they can induce him to declare his intention five days earlier just as well as five days later.

The pivotal point of the controversy is the question as to whether petitioner's admitted failure to file, within the time specified by section 10601.5 of the Elections Code, the "written and signed declaration of his intention to become a candidate" for the office, as provided for by that section, justifies the respondent in his announced intention of omitting petitioner's name from the list of qualified candidates and from the ballots. By reason of the fact that the Legislature has expressly made the statute mandatory and inclusive I am compelled to the conclusion that the writ should be denied.

The essential facts are as follows: In August, 1943, the Honorable Benjamin J. Scheinman, a duly elected and qualified Judge of the Superior Court of the County of Los Angeles, entered the armed forces of the United States, and for several months last past he has been, and now is, absent from the state on ordered military service. This situation, under the doctrine of the recent case of People v. Sischo, 1943, 23 Cal.2d 478, 144 P.2d 785, created a temporary vacancy in Judge Scheinman's office, the term of which will expire on

January 8, 1945. Pursuant to sections 2573 and 2574 of the Elections Code, the Secretary of State certified to the respondent on February 16, 1944, that the judicial offices in the county of Los Angeles to be filled at the forthcoming election on May 16, 1944, were twenty superior court judgeships, each for a term of six years commencing January 9, 1945, and the single judgeship on said court for the unexpired term of Judge Sheinman. Accordingly, and as required by section 2575 of the Elections Code, the respondent published a notice of offices for which candidates were to be nominated or elected at the May 16th election, and included in such listing was the temporary judicial vacancy on said superior court caused by Judge Scheinman's military absence from the state and specified "Office No. 14 (unexpired term)."

On February 11, 1944, within the time and otherwise as provided by section 10601.5 of the Elections Code, former Judge Dailey S. Stafford, a member of The State Bar, legally qualified and entitled to become a candidate for the office, filed with the respondent Registrar of Voters a written and signed declaration of his intention to become a candidate for the office of the unexpired term of Judge Scheinman and subsequently has in all respects complied with the pertinent provisions of the Elections Code entitling him to be included in the list of qualified candidates and on the ballot for the office in question. As a real party in interest he has joined in this proceeding. On Febuary 28, 1944, after the time for filing notice of intention of candidacy for the unexpired term had expired, the Honorable Earl Warren, Governor of this state, appointed William B. McKesson, the petitioner herein, to fill the interim term of Judge Scheinman, but under such appointment Judge McKesson can hold the office only until "the next election by the people," leaving the remainder of Judge Scheinman's unexpired term (expiring January 8, 1945) to be filled at such election. Cal. Const., art. V, sec. 8; People v. Sischo, 1943, supra, 23 Cal.2d 478, 144 P.2d 785. On March 2, 1944, the petitioner duly qualified as Judge of the Superior Court of the County of Los Angeles. On March 7, 1944, a sponsors' declaration of the candidacy of the petitioner for the portion of the unexpired term to ensue after the "next election by the people" was executed by duly qualified persons (Elec. Code, secs. 2612-2617), a declaration of acceptance of the nomination was executed by the petitioner (Elec. Code, sec. 2618), and on that date (seventy days before the May 16th election, as prescribed by section 2621.5 of the Elections Code, enacted at the special session of the Legislature in January, 1944, and effective February 2, 1944) both documents, with the requisite filing fees, were delivered to the respondent. The respondent has filed these papers in his office, but he has announced that he will take no further steps in the matter because, as previously noted, the petitioner failed to file any *declaration of intention to become a candidate* for the judicial office mentioned, as assertedly required by section 10601.5 of the Elections Code. Accordingly, unless this court directs the respondent to cause the petitioner's name to be printed on the ballot for the May 16th election, he will not do so.

Section 10601.5 of the Elections Code, hereinabove referred to, provides that "*Every candidate for a judicial office, not more than 10 or less than five days prior to the first day on which his nomination papers* may be circulated and signed or *may be presented for filing, shall file* in the office in which his nomination papers are required to be filed, *a written and signed declaration of his intention to become a candidate* for that office." (Italics supplied.) (Added by Stats. 1941, ch. 1160, p. 2892.) To have complied with this section it would have been necessary for petitioner to have filed his declaration of intention with the respondent during the period of February 7 to 11, inclusive, 1944. Admittedly he did not make such filing.

Other sections of the Elections Code which are discussed by the parties include:

Section 10600: "In any election at which *two or more judges* or justices of any court are to be voted for or elected *for the same term*, it shall be deemed that there are as many separate judicial offices to be filled as there are judges or justices of the court to be elected. Each separate office shall be *designated by a distinguishing number* not greater than the total number of the offices. * * *" (Italics supplied.) (Enacted 1939; based on former Stats. 1927, ch. 316, p. 528.)

Section 10601: "*Each candidate for a numerically designated judicial office,* not more than ten nor less than five days prior to the first day on which his nomination papers may be circulated and signed, or *not more than ten nor less than five days prior to the first day on which his nomination papers may be presented for filing, shall file* in the office in which his nomination papers are required to be filed, *a written and signed declaration of his intention to become a candidate* for that office and shall state in his declaration for which of the numerically designated offices he intends to become a candidate." (Italics supplied.) (Enacted 1939; based on former Stats. 1927, ch. 316, p. 528.)

Section 10602: "The numerically designated offices shall be grouped and arranged on all ballots in numerical order. No person may be a candidate nor have his name printed upon any ballot as a candidate *for any numerically designated office* other than the one indicated by him *in his declaration of intention to become a candidate.*" (Italics supplied.) Enacted 1939; based on former Stats. 1927, ch. 316, p. 528.

In the majority opinion it is stated that "But for the purposes of this opinion, it does not matter whether the petitioner is a candidate for a numerically or non-numerically designated office, for he undoubtedly is a 'candidate for a judicial office' and would be required to file a preliminary 'declaration of his intention' under section 10601.5, unless it appears that the *sponsor method of candidacy* would not reasonably comprehend such procedural step." Thus the effect of the majority opinion is to hold that the language of the above quoted section "No person may be a candidate nor have his name printed upon any ballot as a candidate for any numerically designated office other than the one indicated by him in his declaration of intention to become a candidate" is meaningless insofar as a candidate proposed by sponsors is concerned.

Petitioner contends: (1) That "Sections 10600, 10601 and 10602 of the Elections Code do not apply" to the situation portrayed in that they have reference only to "numerically numbered" judicial offices, i.e., to an election "at which two or more judges or justices of any court are to be voted for or elected for the same term," that the unexpired term of Judge Scheinman is *the only unexpired term* in which there is a vacancy to be filled by the 1944 election in Los Angeles county and hence that it must be distinguished from the several "numerically numbered" full terms;

(2) That "Section 10601.5 of the Elections Code does not require a candidate who is nominated pursuant to the provisions of Section 2612 et seq. of the Elections Code [declarations by sponsors] to file a declaration of intention";

(3) That, even if section 10601.5 does apply "to declarations of candidacy by sponsors [sec. 2612 et seq.], it does not impose any penalties" for noncompliance, does not alter the duties of the respondent otherwise provided by law, and, in effect, is merely directory; and

(4) "Sections 10601 and 10601.5 of the Elections Code are special legislation and therefore unconstitutional."

Petitioner's proposition number 1 may be conceded for the purposes of this opinion, but his propositions numbered 2, 3 and 4 cannot be sustained.

In contending that "Section 10601.5 of the Elections Code does not require a candidate who is nominated pursuant to the provisions of section 2612 et seq. of the Elections Code to file a declaration of intention," petitioner makes the abstractly plausible argument that it would be in the public interest to permit declarations of candidacy by sponsors after the time for personal declarations of intention by prospective candidates had expired, because it would be only after that time had been reached that the interested public could survey the announced field and determine that it was in the public interest to induce some other candidate or candidates to enter the race. Ignoring the self-evident fact that the public could before, just as well as after, the event mentioned interest itself in inducing desirable candidates to offer themselves, and recognizing as a purely abstract hypothesis that, in the reality of human nature, it is quite likely that the event of a discredited candidate's declaration standing without competition might well induce an activity of public interest which had theretofore been lacking, we are still bound to scrutinize the law, and, at least if it be unambiguous and clearly applicable, to enforce it as written.

Section 10601.5, hereinabove quoted, is not on its face ambiguous. It says that "Every candidate for a judicial office... shall [within the time limited] file in the office in which his nomination papers are required to be filed, a written and signed declaration of his intention [observe that this denotes an intention as to the *future*] to become a candidate for that office." The words "Every candidate for a judicial office" could not be made more certain.

Surely the word "every" does not need definition. The word "candidate" is defined in 29 C.J.S., Elections, § 1, p. 19 as "one who seeks or aspires to some office or privilege, or who offers himself for the same; a person offering himself to the suffrage of the electors; one put forward for election, whether with or against his own will; *one put forward by others for an office; one who is selected by others for an office or place* * * *." (Italics supplied.) The argument of petitioner that he was not a candidate at the time specified for filing the declaration of intention and that therefore the requirement of the law does not apply to him is almost too weak to merit comment. If that argument is sound as to petitioner then it is equally sound as to every other candidate for a judicial office who may elect to withhold a declaration of candidacy until it suits his convenience to finally make up his mind and declare it. By the simple expedient of withholding a declaration, he could avoid entirely the application of the law. Both section 10601 and section 10601.5 use the word "candidate" with context which clearly shows that the Legislature applied the word indiscriminately and equally to those whose candidacy is announced by sponsors and those who personally declare it. Section 10601 requires that "Each candidate for a numerically designated judicial office, not more than ten nor less than five days prior to the first day on which his nomination papers may be *circulated and signed,* or not more than ten nor less than five days prior to the first day on which his nomination papers may be *presented for filing,* shall file * * * a written and signed declaration of his intention to become a candidate for that office * * *." (Italics supplied.) And section 10601.5 declares that "Every candidate for a judicial office, not more than 10 or less than five days prior to the first day on which his nomination papers may be *circulated and signed* or may be *presented for filing,* shall file * * * a written and signed declaration of his intention to become a candidate for that office." (Italics supplied.) The reference in each section to the day on which nomination papers may be "*circulated and signed*" is a reference to nomination papers circulated by the candidate on *his own declaration* of candidacy and the reference in each section to the day "on which his nomination papers *may be circulated and signed or may be presented* for filing" is a reference to the sponsor initiated declaration. *The day is the same in each instance*; the only reason which has been suggested for the Legislature's having been at pains to specifically enunciate both contingencies is a guarding against ambiguity which might defeat the law in one case or another—an ambiguity which petitioner's able counsel have diligently sought but not found. The meaning of the words "judicial office" as used in the questioned section (sec. 10601.5 of the Elections Code) is not disputed but is no more nor less clearly defined by sections 31 and 32 of the Elections Code. The word "shall," as used in the Elections Code, is defined as to its critical implication in section 15 thereof. The definition is: "'Shall' is mandatory and 'may' is permissive."

Various provisions found in article IV of chapter 2 of division 5 (sec. 2599 et seq.) of the Elections Code, dealing with the direct primary law generally and not exclusively with judicial officers, further support the inevitable conclusion which I reach. Section 2600 provides that "No candidate's name shall be printed on the ballot to be used at the direct primary unless a declaration of his candidacy is filed not less than sixty and not more than ninety days prior thereto [the 60-day period is changed to 65 days for a limited period by section 2600.5, added at the special session of the Legislature in January, 1944]. The declaration may be made by the candidate, or, on his behalf by sponsors of the candidate. When the declaration is made by sponsors the candidate's affidavit of acceptance shall be filed with the declaration." Section 2603 provides that "A candidate who personally declares his candidacy shall cause sponsor certificates to be executed by his sponsors, pursuant to this article," and section 2612 delineates the alternative procedure, prescribing that "A declaration of candidacy may be made by sponsors, as follows: Any five voters of any county * * * may join in proposing a candidate for nomination, and in appointing verification deputies * * * to secure the signatures of sponsors to the declaration of candidacy of the proposed candidate. * * *" Section 2618 adds that "The number of signatures on declarations of candidacy by sponsors shall be the same, in the aggregate, as the number of sponsors required by this article of a candidate who personally declares his candidacy."

That it is not contemplated by the general direct primary law (as distinguished from the special provisions as to judicial office candidates) that candidates may be proposed by the sponsor declaration method at any later date than candidates may file their own declarations, is established by section 2621, which enacts that "The declaration of candidacy by the candidate personally and the declaration of acceptance of nomination shall be subscribed and sworn to * * * and at least sixty-five days before the August primary election shall be delivered to the county clerk [or registrar of voters] in the county in which the candidate resides."

Section 2670 (in art. V, ch. 2, div. 5, Elec. Code), under the heading "Nomination Papers," establishes that the "declarations of candidacy and sponsor certificates" constitute the "nomination papers" which are referred to in the controlling section with which we are dealing (sec. 10601.5).

Other provisions of the direct primary law might be mentioned as further supporting my view, but I am satisfied that enough have been set forth to irrefragably establish that section 10601.5 was intended to be and is applicable to and controlling of all judicial candidacies, whether initiated by sponsors' declarations or by those of the candidates personally. In conclusion on this phase of the matter it is pertinent to observe that sections 10600, 10601, and 10602 cover fully the cases of all candidates for "numerically designated" judicial offices and that section 10601.5, enacted subsequent to the other sections, can be only surplusage and utterly meaningless unless it is given application to nonnumerically designated judicial offices.

On behalf of petitioner it is next contended that "even if section 10601.5 does apply 'to declarations of candidacy by sponsors [sec. 2612 et seq.] it does not impose any penalties' for noncompliance, does not alter the duties of the respondent otherwise provided by law, and, in effect, is merely directory." This contention has already been substantially answered. The word "shall," it has been shown, is expressly made mandatory by section 15 of the Elections Code. It has long been the established law of this state that failure of a candidate to comply with a mandatory provision of the election law creates a default from which the courts cannot relieve him. Sinclair v. Jordan, 1920, 183 Cal. 486, 487, 191 P. 910; Hartigan v. Jordan, 1920, 184 Cal. 72, 192 P. 1084; Griffin v. Dingley, 1896, 114 Cal. 481, 483, 46 P. 457; see, also, Steiger v. Collins, 1932, 215 Cal. 634, 638, 12 P.2d 426. The provisions of section 10601.5 have special application to judicial offices, and must control over other provisions of law defining generally the duties of the respondent.

Lastly, it is urged that "Sections 10601 and 10601.5 of the Elections Code are special legislation and therefore unconstitutional." These sections are special legislation in relation to judicial offices but judicial offices constitute a well defined, natural and reasonable class and a proper field for special legislation which is applicable alike to all persons within the field. This legislation has a uniform operation within the class and does not offend the requirements of section 25 of article IV of the Constitution. See Roystone Co. v. Darling, 1915, 171 Cal. 526, 543, 154 P. 15; Steiger v. Collins, 1932, supra, 215 Cal. 634, 12 P.2d 426; Baertschiger v. Leffler, 1939, 36 Cal. App.2d 208, 213, 97 P.2d 501.

From what has been said it follows that respondent was correctly advised as to the law governing the case and is correct in his announced intention not to include the name of petitioner in the list of qualified candidates for the office in question or on the ballots to be prepared for such office. While I deeply regret that upon my view of the law the name of Judge McKesson, whose personal qualifications are unquestioned, cannot properly be printed on the ballot at the ensuing primary election, I cannot join this court in striking down or failing to apply a valid law designed for the public benefit and salutary in its government of all candidates for judicial offices of the type involved, because in an isolated case it might seem to impose hardship upon one individual and possible loss to the state.

It seems apparent that the advancement of the primary election date from August to May due to the emergency of war, has furnished the basis for the unfortunate situation depicted in this case. Petitioner simply was appointed too late to enable him thereafter to qualify for printing of his name on the ballots to be used at the ensuing May election. If his appointment had been made after the time for filing sponsors' certificates had expired, or after the ballots had been printed and distributed, the legal situation would be no different from what it is. It would only be more obvious. The statute in question makes no distinction between incumbents of an office and aspirants for it. They are all included in the words "Every candidate for a judicial office," and, if they are to have their names appear on the printed ballots, must comply with the conditions expressly made precedent and essential to that end. The fact that petitioner had not been appointed when the time for filing declarations of intention of candidacy expired is immaterial. As an individual citizen and member of the State Bar, he had a right, equal to that of every other qualified citizen, to file a declaration of intention within the prescribed period. Every qualified citizen had a right to file within that period; none is given a right to file at any other time.

The demurrer to the petition should be sustained without leave to amend and the application for the writ of mandate denied.

TRAYNOR, J., concurred.

23 Cal.2d 794

GAGE v. JORDAN, Secretary of State, et al. (RETIREMENT LIFE PAYMENTS ASS'N, Inc., et al., Interveners).

L. A. No. 18816.

Supreme Court of California.

March 21, 1944.

Rehearing Denied April 17, 1944.

1. Statutes 🔑35½

All doubt as to construction of pertinent statutory provisions is to be resolved in favor of the initiative, and such legislation is to be given the same liberal construction as that afforded election statutes generally, but the interpretation must be reasonable.

2. Statutes 🔑181(1), 184

Where language of statute is susceptible of more than one meaning, court must accept that intended by framers of legislation, and purpose and object sought to be accomplished are of prime importance in ascertaining intention of legislators.

3. Statutes 🔑181(2)

Where language of statute is fairly susceptible of two constructions, one which in application will render it reasonable, fair and harmonious with its manifest purpose, and another which will be productive of absurd consequences, the former will be adopted.

4. Mandamus 🔑74(3)

Mandamus to compel Secretary of State and registrar of voters of county to omit from ballot proposed constitutional amendment on ground the measure had never qualified was proper remedy. St. 1939, p. 84, §§ 1401, 1452; Const. art. 4, § 1, pars. 8–10.

5. Constitutional law 🔑9(1)
Statutes 🔑35½

Constitutional provision relating to the initiative and referendum, together with statutes enacted pursuant to it, connote intention that insufficient petitions shall lapse and become functus officio. St. 1939, p. 84, §§ 1401, 1452; Const. art. 4, § 1.

6. Constitutional law 🔑9(1)

Initiative petition must be filed with county clerk or registrar of voters within such limited time as will enable him to determine whether signers of petition were qualified electors. Const. art. 4, § 1.

7. Constitutional law 🔑9(1)

Initiative measure, having once failed to qualify for ballot for want of enough signatures, was not automatically revitalized by sufficient decrease in number of votes cast at subsequent gubernatorial election to bring number of signatures secured within the 8 per cent. limit based upon number of votes cast at subsequent election. St.1939, p. 84, §§ 1401, 1452; Const. art. 4, § 1.

8. Constitutional law 🔑19

Contemporaneous construction placed upon constitutional provision relating to initiative measures by Legislature of 1911, which drafted the constitutional provision, would be considered in determining its meaning. Pol.Code, § 4058; St. Ex.Sess. 1911, c. 33, p. 131, § 1. Const. art. 4, § 1.

9. Constitutional law 🔑9(1)

The 1943 statute providing that no petition shall be circulated until after official summary date and that first petition with signatures must be filed with county clerk or registrar not later than 90 days from official summary date, and that no clerk or registrar shall accept first petitions on proposed initiative measure thereafter was a legislative recognition that framers of Constitution never intended that initiative measures should remain alive year after year and qualify at a distant future election. St.1943, p. 1127; Const. art. 4, § 1.

10. Constitutional law ⟹9(1)

Constitutional provision prescribing manner of affixing and dating signatures for initiative measures was intended to make certain that no initiative measures shall appear upon ballot unless petitioned for by requisite number of electors then qualified to vote upon measure at forthcoming election. Const. art. 4, § 1, pars. 9, 10.

11. Constitutional law ⟹5

Word "presentation" as used in constitutional provision relating to initiative measures is not synonymous with "filing" as used in same provision, since ordinarily a document is presented to an official for filing, but the filing is subsequent to the presentation. Const. art. 4, § 1.

To "present" means to lay before, or submit to, a person or body for consideration or action, as to present a memorial, petition or indictment, whereas to "file" means to deliver a paper or instrument to proper officer so that it is received by him to be kept on file, or among the records of his office, of the receiving officer to place a paper or instrument on file among the records of his office by receiving, indorsing, entering or the like.

See Words and Phrases, Permanent Edition, for all other definitions of "Filing", "Present", and "Presentation".

12. Constitutional law ⟹9(1)

Constitutional provision relating to initiative measures contemplates that all steps in initiative proceedings shall be taken not less than 130 days prior to general election next following institution of the proceeding, and that sufficiency of the petition is to be tested by last preceding gubernatorial vote, and the presentation precedes the filing of the petition. Const. art. 4, § 1, pars. 2, 9, 13.

13. Constitutional law ⟹9(1)

Where initiative petition was presented in May, 1940, the last preceding general election within constitutional provision relating thereto was the election of 1938, and hence the petition lapsed when it failed to qualify for November 1940 ballot. Const. art. 4, § 1; St. 1939, p. 84, §§ 1401, 1452.

EDMONDS, J., dissenting.

In Bank.

Mandamus proceeding by Ralph P. Gage, against Frank M. Jordan, as Secretary of State, and others, in which the Retirement Life Payments Association, Inc., and others intervened to compel the Secretary of State and the Registrar of Voters of Los Angeles County to omit from any ballot at any general or special election to be held in the future the proposed initiative constitutional amendment known as the Retirement Life Payment Amendment.

Writ issued.

O'Melveny & Myers, Louis W. Myers, and Pierce Works, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, and Robert W. Kenny, Atty. Gen., Charles W. Johnson, Supervising Deputy Atty. Gen., and Arthur McHenry, Deputy Atty. Gen., for respondent.

Ellis E. Patterson, of Los Angeles, John J. Taheny, of San Francisco, Jack B. Tenney, of Los Angeles, Paul F. Fratessa and Philip C. Boardman, both of San Francisco, and J. Lamar Butler and Lawrence W. Allen, both of Los Angeles, for interveners.

CARTER, Justice.

Petitioner, a qualified elector of Los Angeles County, applied to this court for a writ of mandate to compel the Secretary of State and the Registrar of Voters of Los Angeles County to omit from any ballot at any general or special election to be held in the future, the proposed initiative constitutional amendment known as the "Retirement Life Payment Amendment," and entitled by the Attorney General, "Gross Income Tax, Warrant Credits." Petitioner also asked that the Secretary of State be compelled to correct certificates of qualification transmitted by him in June, 1943, to the county clerk or registrar of voters of each county in the state by notifying those officials that the certificates should be disregarded, that the measure has never qualified, and that it must be omitted from any future ballot.

An alternative writ issued, in return to which the Attorney General filed a demurrer and answer and the sponsors of the measure also intervened and answered. There is no dispute as to the facts. The issues joined present solely the problem of proper construction and application of article IV, section 1, of the Constitution of this state, particularly the provision of the second paragraph of said section which reads as follows:

"The first power reserved to the people shall be known as the initiative. Upon the *presentation* to the Secretary of State of a petition certified as herein provided to have been signed by qualified electors, equal in number to eight per cent of all the votes cast for all candidates for Governor *at the last preceding general election,* at which a Governor was elected, proposing a law or amendment to the Constitution, set forth in full in said petition, the Secretary of State shall submit the said proposed law or amendment to the Constitution to the electors *at the next succeeding general election occurring subsequent to 130 days after the presentation aforesaid of said petition,* or at any special election called by the Governor in his discretion prior to such general election. * * *" (Italics ours.)

The initiative measure here involved was first promulgated in 1940. On March 5th of that year the sponsors obtained from the Attorney General a title and summary preparing the measure for submission to the voters as proposed article XXXII of the Constitution. Petitions for signatures were circulated in various counties and on May 29, 1940, the first certificates were received by the Secretary of State from county clerks. Supplemental certificates were received up to August 16, 1940, when a total of 196,498 signatures of qualified electors had been certified.

The "last preceding" general election for Governor had been held in November, 1938, at which 2,651,463 votes were cast. As specified in the above-quoted provision, 8 per cent of this number or 212,117 signatures were required to entitle an initiative measure to a place on the ballot "at the next succeeding general election occurring subsequent to 130 days after the presentation aforesaid of said petition." The circulation of original, as distinguished from supplemental, petitions had been discontinued on June 28th, which was exactly 130 days prior to November 5, 1940, the date of the "next succeeding general election." Therefore, because of lack of sufficient signatures the measure did not qualify for a place on the ballot in November, 1940. A last minute attempt to certify enough additional signatures to qualify the measure was unsuccessful (Thompson v. Kerr, 1940, 16 Cal.2d 130, 104 P.2d 1021), and the certified signatures lay dormant in the office of the Secretary of State through all of 1941 and 1942.

At the general election in November, 1942, however, only 2,234,545 votes were cast for Governor, 8 per cent of that number being 178,764. Hence if the qualification, certification, and presentation of signatures to the Secretary of State in 1940 did not become ineffective and void upon the failure of the measure to qualify for the 1940 ballot, there were by reason of the intervening 1942 election, enough signatures to qualify the measure for the 1944 ballot. Thus the question is directly presented of whether or not an initiative measure, having once failed to qualify for the ballot for want of enough signatures, is automatically revitalized by a sufficient decrease in the number of votes cast at a subsequent gubernatorial election to bring the number of signatures secured within the 8 per cent limit based upon the number of votes cast at said subsequent election.

In addition, it appears that in 1943, signatures were sought in Imperial County, where petitions had not previously been circulated, and that in May of that year thirty-nine qualified signatures from that county were certified to the Secretary of State. This made a grand total of 196,537 signatures. But without these additional signatures there had already been certified more than sufficient to qualify the measure for the 1944 ballot on the basis of 8 per cent of the votes cast in 1942, if that basis could properly be employed upon the theory that the time for "presentation" to the Secretary of State (see above quoted provision) had not lapsed upon the failure of the measure to qualify for the 1940 ballot. Thus the further question is also presented whether an initiative petition received by the Secretary of State and continuing to be circulated is not to be regarded as finally "presented" to or "filed" by him until it has sufficient signatures to qualify for the ballot, regardless of how many years this may take. In this connection, paragraph 13 of section 1, supra, provides that "a petition shall be deemed to be filed with the Secretary of State upon the date of the receipt by him of a certificate or certificates showing said petition to be signed by the requisite number of electors of the State."

Preliminary to a discussion of these questions, it may be noted that the problem is one of first impression upon which no authority directly in point has been found in this or any other jursidiction of the United States. It must therefore be solved by a proper and reasonable construction of the quoted provision, read in pari materia with the full context of the section and all other pertinent legislation. No similar situation will arise in the future because the Legislature in 1943 incorporated in the Elections Code a statute containing a time limitation provision (see Elec. Code, sec. 1407, Stats.1943, p. 1127).

[1-3] The desirability of having initiative measures, particularly those of such importance as the present one, reach the ballot without delay or excessive expenditures of time, money, and effort is a factor of which the courts are ever mindful. All doubt as to the construction of pertinent provisions is to be resolved in favor of the initiative and such legislation is to be given the same liberal construction as that afforded election statutes generally. Ley v. Dominguez, 1931, 212 Cal. 587, 299 P. 713; see, also, California Teachers' Ass'n v. Collins, 1934, 1 Cal.2d 202, 34 P.2d 134; Willett v. Jordan, 1934, 1 Cal.2d 461, 35 P. 2d 1025; Uhl v. Collins, 1932, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1371; Hinkley v. Wells, 1922, 57 Cal.App. 206, 206 P. 1023. However, the interpretation adopted must be reasonable and where the language is susceptible of more than one meaning, it is the duty of the courts to accept that intended by the framers of the legislation, so far as its intention can be ascertained. Pacific Indemnity Co. v. Industrial Acc. Comm., 1932, 215 Cal. 461, 464, 11 P.2d 1, 82 A.L.R. 1170; City and County of San Francisco v. Industrial Acc. Comm., 1920, 183 Cal. 273, 191 P. 26. The purpose and object sought to be accomplished by the legislation are of prime importance in ascertaining that intention. City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595; California Drive-in Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028; In re Estate of Ryan, 21 Cal.2d 498–513, 133 P. 2d 626. Furthermore, where the language is fairly susceptible of two constructions, one which, in application will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. Jersey Maid Milk Products Co. v. Brock, 13 Cal. 2d 620, 648, 91 P.2d 577; Department of Motor Vehicles v. Industrial Acc. Comm., 14 Cal.2d 189, 93 P.2d 131; 23 Cal.Jur. 766.

[4] Under circumstances such as those here presented, mandamus is the proper remedy. Felt v. Waughop, 193 Cal. 498, 225 P. 862; Bordwell v. Williams, 173 Cal. 283, 159 P. 869, L.R.A.1917A, 996, Ann.Cas. 1918E, 358.

[5] Article IV, section 1, of the Constitution, which was adopted in 1911, specifies in detail the manner in which the legislative power reserved to the People may be exercised by means of the initiative and the referendum. It sets forth a complete plan or scheme and when read in its entirety, together with statutes enacted pursuant to it, it clearly connotes an intention that insufficient petitions shall lapse and become functus officio; that is, it imports a time limitation running from the "last preceding general election" to the "next succeeding general election occurring subsequent to 130 days after the *presentation* aforesaid of said petition." The significance of the term "presentation" will be discussed later.

The steps in the initiative procedure are first, the entitling and summarization of the measure by the attorney general (sec. 1, supra, par. 8; Elec.Code, secs. 1401, 1452, St.1939, p. 84), and second, its circulation among the voters. Sec. 1, supra, par. 9. The petition for signatures of electors may be circulated in sections, each section containing a full and correct copy of the title and text of the proposed measure. Sec. 1, supra, par. 9. Each section may be filed with the clerk or registrar of voters of the county in which it was circulated, but all sections circulated in any county are to be filed at the same time. Sec. 1, supra, par. 10.

[6, 7] There is, it is true, no prohibition against circulation of sections of petitions in any county indefinitely, and no specific time provision for completion of the entire process other than the period between general elections prescribed by the second paragraph of section 1, first herein quoted, or, more specifically, between a period commencing 130 days before a general election and 130 days before the second succeeding election. Obviously, with a then two-year period for registration, it was necessary that the petition be filed with the county clerk or registrar of voters within such a limited time as would enable him to deter-

mine whether the signers were qualified electors. The detailed provisions of section 1, providing an entire plan of procedure, impose meticulous time limitations for completion of various intermediate steps of the process, all of which would be utterly meaningless if petitions could be held over as valid indefinitely, or could be revitalized by any subsequent drop in the gubernatorial vote.

Consider the following provisions, which seem obviously to be directed at insuring that a measure, *if it qualifies,* shall go upon the ballot at the next succeeding general election occurring 130 days or more after the presentation to the Secretary of State of the initial certified petition, and that *if it does not qualify,* the entire procedure must be instituted anew:

1. The percentage of vote at the "last preceding general election" determines the qualification standard. Sec. 1, par. 2, supra.

2. The proposed law must, if qualified for the ballot, be submitted "at the next succeeding general election occurring subsequent to 130 days after the presentation * * * of said petition." Sec. 1, par. 2, supra.

3. To insure completion of the process within this period, the measure must first be submitted to the Attorney General for a title and summary. The submission must be made "prior to circulation of any initiative * * * petition for signatures thereof," (see art. IV, sec. 1, par. 8), and the Attorney General must provide a ballot title and return the measure to the Secretary of State within *10 days* after it is filed with him. Elec. Code, secs. 1401, 1452. Paragraph 8, supra, of section 1, also states that the persons presenting a measure to the Attorney General with a written request for title and summary "shall be known as 'proponents' of said proposed measure," and that "The Attorney General shall preserve said written request until after the next general election." Hence "after the next general election," there is no longer any title and summary, and without a title and summary there can be no "proponents" and no "measure."

4. All sections circulated in a county must be filed with the clerk at the same time, to the end that the signatures may be checked within the short period of 20 days. As stated in paragraph 10 of section 1, supra: "Within *twenty days* after the filing of such petition in his office the said clerk, or registrar of voters, shall determine from the records of registration what number of qualified electors have signed the same. * * *"

5. Additional help is provided; to wit: "If necessary the board of supervisors shall allow said clerk or register [of voters] additional assistance for the purpose of examining [said] petition and provide for their compensation." Sec. 1, supra, par. 10.

6. The clerk or registrar "upon completion" of the examination is to "forthwith transmit" the petition, together with his certificate to the Secretary of State. Sec. 1, supra, par. 10.

7. The time within which the Secretary of State may act is definitely limited. "When the Secretary of State shall have received" the certified petition signed by the requisite number of qualified electors, "he shall *forthwith* transmit" to the clerk or registrar his certificate showing that fact. (Italics ours.) Sec. 1, supra, par. 13.

8. A limited period for filing supplemental petitions is specified. "Within *forty days* from the transmission" of the petition and certificate by the clerk to the Secretary of State, a supplemental petition, identical with the original but containing additional names, may be filed with the clerk or registrar. (Italics ours.) Sec. 1, supra, par. 10.

9. *Ten days* are allowed the clerk to certify the result of his examination of the supplemental petition to the Secretary of State. Sec. 1, par. 12, supra.

Hence in each respective county where petitions are circulated, the process must be completed within 70 days from the first filing of sections of any petition with the county clerk or registrar, to wit: 20 days to check first sections, 40 days to secure supplemental names, and 10 days to check supplemental names. At the expiration of this period it becomes the ministerial function of the Secretary of State to *forthwith* certify the measure for the ballot if it has sufficient qualified signatures, measured by the last preceding gubernatorial vote. Sec. 1, supra, pars. 2, 13.

In view of these express time limits and provisions for "forthwith" action, any construction of the second paragraph of section 1 which would destroy their effectiveness and render them meaningless would be clearly unreasonable and contrary to the intent of the framers of the legislation.

In addition to the evidence of intent supplied by the provisions above discussed, it may be worthy of note that paragraph 7 of section 1 affords protection to measures which have qualified but which, due to negligence or misprision, have not been placed on the ballot. It provides: "If for any reason any initiative * * * proposed by petition as herein provided, be not submitted *at the election specified in this section,* such failure shall not prevent its submission at a succeeding general election * * *." (Italics ours.) This language affords support for the construction urged by petitioner here because it shows that only in the case of the stated exception may a measure go on the ballot at an election later than the "*succeeding* general election."

[8] Contemporaneous construction placed upon section 1 by the Legislature of 1911, the same Legislature which drafted the constitutional provision, is also significant. Political Code section 4058 (Stats. 1911, p. 577), in specifying the procedure for county initiatives, provided that if an initiative petition was found to be insufficient, it should be "returned to the person filing the same, without prejudice, however, to the filing of a *new* petition to the same effect." (Italics ours.) In incorporating this section in the Elections Code as section 1607, the Legislature of 1939 emphasized the point by providing that "the failure to secure sufficient signatures shall not prejudice the filing later of *an entirely new petition* to the same effect." A similar provision with reference to municipal initiatives was also enacted. Stats. Extra Sess., 1911, chap. 33, p. 131, sec. 1.

[9] The most recent direct expression of the legislative intent is that already referred to, the enactment of new section 1407 of the Elections Code (Stats. 1943, p. 1127) providing that no petitions shall be circulated until after the official summary date and that first petitions with signatures must then be filed with the county clerk or registrar "not later than *90 days* from the 'Official summary date' * * * and no clerk or registrar of voters shall accept first petitions on such proposed initiative measure thereafter." Is not this a clear recognition that the framers of the Constitution never intended that initiative measures should remain alive for year after year in the hope that they might ultimately qualify at some distant future election?

[10] The detailed provisions of paragraphs 9 and 10 of section 1, prescribing the manner in which signatures are to be affixed and dated also fortify the conclusion that the life of the petitions is not to be unlimited. The manifest purpose of such provisions, as stated in Chester v. Hall, 55 Cal.App. 611, 204 P. 237, and approved in Boggs v. Jordan, 204 Cal. 207, 216, 267 P. 696, 699, "is to guard against signatures by persons who are not qualified electors at the time of signing," thus making certain that no initiative measure shall appear upon the ballot unless it has been petitioned for by the requisite number of electors who are then qualified to vote upon the measure at the forthcoming election at which it is to be submitted. In other words, it is intended that the signers of the petition shall be qualified electors at the time of signing and that the measure shall be submitted at the *next* general election, at which they are qualified to vote. As electors change each year, through death, coming of age, removal, neglect to qualify, and the like, any construction of section 1, supra, which would permit the qualified electors of one year to largely determine the measures liable to go on the ballot in a subsequent year would lead to confusion and uncertainty, and would be contrary to public policy.

Illustrative of the impossible situation to which such a construction might lead, consider a measure first circulated prior to 1943, upon which signatures are allowed to cumulate year after year until the measure ultimately qualifies with reference to the last gubernatorial election preceding the last certification to the Secretary of State from any county in the state. Under this theory, as long as there remains one county out of the fifty-eight in the state in which a section of the petition has not been filed, the measure is eligible to qualify at some future gubernatorial election when the accumulative total of signatures of electors, past, present, living, dead, or removed from the state, shall equal the required 8 per cent of the vote cast at the then "last preceding general election." Such a measure first proposed in 1912 might ultimately (allowing one filing in one county per year) qualify for the ballot circa A. D. 1970, or if there were one filing in one county every other year, it might qualify about A. D. 2028. That the constitutional provision could so operate was obviously never intended by the framers, and such a construction is too unreasonable to contemplate. Present day electors are not interested in initiating legislation to be finally adopted by their children or children's children.

The measure here under consideration was initiated with the intent that it should appear on the 1940 ballot. Since that year, there has been a drastic change in economic conditions, the nation has found itself in an exhaustive war, vast numbers of the people have surged to the western coast and many others have been removed by reason of war conditions. It may safely be assumed that many who signed as sponsors of the measure might refuse to sign were it submitted to them today, and the present electorate should not be burdened with their undertaking. The fact that it is not only reasonable, but desirable to limit the time for the qualification of initiative measure is commented upon as follows in the case of State ex rel. Kiehl v. Howell, 77 Wash. 651, 138 P. 286, 287:

"It, of course, is necessary that some practical test be provided for determining whether the signers of the petitions are legal voters. It is, of course, but fair that the petitions should, so far as practical, be signed only by those who would be voters at the election. This can be secured with greater certainty by having the petitions signed as near the time of the election as practical. We all know that our electorate is not the same from year to year. We are of the opinion that it is within the power of the Legislature to fix a reasonable limit of time preceding the election within which an initiative measure may be filed with the Secretary of State." See, also, State ex rel. Ilg v. Myers, 127 Ohio St. 171, 187 N.E. 301, where a somewhat similar problem was resolved in accord with the views here expressed.

[11] Much of the argument in the briefs centers upon the meaning of the word "presentation" as used in section 1, and its asserted synonymy with the word "filing" as used in that section. The words in their usual and ordinary sense are not generally defined as synonymous. For example, Webster's New International Dictionary, 2d ed., defines to "present" as, among other things, "to lay before, or submit to, a person or body for consideration or action; as to *present* a memorial, petition, or indictment," whereas to "file" is defined as: "(a) To deliver (a paper or instrument) to the proper officer so that it is received by him to be kept on file, or among the records of his office. (b) Of the receiving officer, to place (a paper or instrument) on file among the records of his office by receiving, endorsing, entering, or the like." In this state the distinction between the two expressions was early noted in the case of In re Estate of Sbarboro, 1883, 63 Cal. 5. To express the difference precisely it would be proper to say that ordinarily a document is "presented" to an official for "filing," but the filing is subsequent to rather than concurrent with the presentation.

In section 1 the word "presentation," or "presenting," or "presented" appears nine times, while the word "file" or "filing" or "filed" appears eleven times. Although the respective terms appear clearly to have been chosen with understanding of their exact meaning and to have been used with precise discrimination, yet it is argued that the "presentation" under paragraph 2 of section 1, first herein quoted, does not in fact occur until sufficient signatures have been certified to qualify the measure for the ballot; or, in other words, that the "presentation" is synonymous with the "filing" referred to in the provision of paragraph 13 of section 1, which states "a petition shall be deemed to be *filed* with the Secretary of State upon the date of the receipt by him of a certificate or certificates showing said petition to be signed by the requisite number of electors of the State."

Under this theory it is said that initiative petitions are neither presented nor filed until they are certified to have been signed by a sufficient number of qualified electors, and that this may occur either in the year that the initiative measure is first promulgated and sections from certain counties are presented, or in some later year. To state the process another way then, the time at which the requisite percentage of signatures is obtained, is to determine the time of "presentation" and also which election is the "last preceding general election," and which is the "next succeeding general election * * *" at which the measure must be submitted to the voters. In the present case it is said that at no time prior to November, 1942, did the petitions bear sufficient signatures; therefore upon the certification in May, 1943, of thirty-nine signatures from Imperial county, it became the duty of the Secretary of State to consider the petition finally "presented" or "filed," under the signature computation based on returns from the *then* "last preceding general election," the election of 1942, and to certify the measure for the ballot in 1944.

[12, 13] The very statement of this complex proposition is indicative of its weakness. Section 1 clearly provides in express terms for "presentation" to the Secretary of State of a certified petition, which is to qualify the measure for the ballot at the next succeeding general election if sufficient signatures are obtained within the required time. It contemplates that all steps in the initiative proceeding, shall be taken not less than 130 days prior to the general election next following the institution of the proceeding, and that the sufficiency of the petition is to be tested by the last preceding gubernatorial vote. In view of the privilege given of circulating the petition in sections, and of filing supplements to it, it appears that the additional sections and supplements necessarily relate back to the "presentation" date of the first section presented. Thereafter, within the period, the petition is either "deemed to be filed" by reason of the certification of enough signatures, or else it lapses because of its failure to qualify for the subsequent election. This construction is not only reasonable, but is gives effect to *all* of the pertinent provisions of the section without straining the phraseology, and it appears to accord with the intent of the framers of the legislation. That the presentation precedes the filing of the petition is indicated by the provision in paragraph 9 of section 1 that "Unless and until it be otherwise proven upon official investigation, it shall be presumed that the petition presented contains the signatures of the requisite number of qualified electors." This must refer to the required 8 per cent as there is no limit on the number of signatures to be obtained in any particular county and the Secretary of State is the official whose duty it is to determine the requisite number of qualified signers to authorize the filing of a petition.

Here the petition was "presented" in May, 1940; the "last preceding general election" was the election of 1938, hence the petition lapsed when it failed to qualify for the November, 1940 ballot.

Let a peremptory writ of mandate issue forthwith.

GIBSON, C. J., and SHENK and CURTIS, JJ., concur.

SCHAUER, Justice.

I concur. Under the theory advocated by respondents and interveners a group of persons, relatively small in the total population of the state, could settle in one county, register as electors, sign sections of the petition, file it in that county, then move on to another county, register there, sign and file new sections of the petition there, and repeat the process in as many counties of the state and over such a period of time as might be necessary to reach the goal of the number of qualified signatures equal to 8 per cent of the number of votes cast for Governor at some election many years subsequent to the presentation of the first section of the petition.

Although the constitutional provision is unfortunately ambiguous, this court could not justify giving it a construction which would not only admit of, but would commit us to permit, such an absurd application of the law as that suggested above. Furthermore, to uphold respondents' and interveners' contentions that the constitutional provision contains no limitation upon the time within which petitions must be qualified would be tantamount to holding that the pertinent 1943 act of the Legislature (Elec. Code, sec. 1407, Stats. 1943, p. 1127) is unconstitutional.

TRAYNOR, Justice (concurring).

The vital question in this proceeding is whether an initiative petition that fails for want of enough signatures to qualify the proposed measure for submission to the voters at the next general election after the receipt of the petition by the Secretary of State, remains effective indefinitely thereafter, enabling the proposed measure to qualify for the ballot on the basis of any general election for Governor that succeeds the receipt of the petition by the Secretary of State. The answer to this question turns on the meaning of the second paragraph of section 1 of article IV of the California Constitution, which provides: "Upon the presentation to the Secretary of State of a petition certified as herein provided to have been signed by qualified electors, equal in number to eight per cent of all the votes cast for all candidates for Governor at the last preceding general election, at which a Governor was elected, proposing a law or amendment to the Constitution, set forth in full in said petition, the Secretary of State shall submit the said proposed law or amendment to the Constitution to the electors at the next succeeding general election occurring subsequent to 130 days after the presentation aforesaid of said petition, or at any special election called by the Governor in his discretion prior to such general election."

This provision is ambiguous. It does not make clear what constitutes the presentation of the petition, for it speaks, not simply of the presentation of a petition, but of the presentation of a petition certified to have been signed by the requisite number of qualified electors. It cannot be determined whether such a petition has been presented without first ascertaining what is the last preceding general election, which is the basis for determining whether the 8 per cent requirement has been met. The last general election preceding the presentation of the petition, however, as well as "the next succeeding general election occurring subsequent to 130 days after the presentation" of the petition, cannot be ascertained without first determining what constitutes that presentation. The identification of either event depends upon the identification of the other under a literal construction of the second paragraph of section 1, and is therefore bound to be frustrated in this circle.

The Attorney General, conceding that the paragraph in question is ambiguous, contends that the riddle is solved by the thirteenth paragraph of section 1 if the word "filed" therein is construed, as he contends it should be, to mean "presented." That paragraph provides: "A petition shall be deemed to be filed with the Secretary of State upon the date of the receipt by him of a certificate or certificates showing said petition to be signed by the requisite number of electors of the State." Even if it were assumed that the word "filed" in the foregoing provision is synonymous with the word "presented," however, the last preceding general election as well as the presentation of the petition, would remain unidentified, for the petition would not be filed or presented until the Secretary of State received certificates showing the petition "to be signed by the requisite number of electors of the state." Since the Secretary of State would not know whether the petition was signed by "the requisite number of electors of the state" until he knew what "the last preceding general election" was, the Attorney General's contention leads directly back to the second paragraph of section 1.

It is contended that since the petition may be presented in sections, the presentation of the petition is not a single act but a continuing process. Under this theory the receipt of the last certificate is as much a presentation of the petition as the receipt of the first, so that the last preceding general election may be regarded as the one preceding the receipt of the last certificate if all the certificates show that the petition has been signed by the requisite number of electors. There is no more reason, however, for selecting the date of receipt of the last certificate as the date of presentation than there would be for selecting the date of receipt of the first. Moreover, if all the certificates in the hands of the Secretary of State prior to 130 days before the next general election do not show that the petition has been signed by the requisite number of electors the receipt of neither the first certificate nor the last can fix the date of presentation.

The contention is then advanced that regardless of how many general elections occur after the certificates are first received by the Secretary of State, as soon as any general election occurs at which a governor is elected and at which the total number of votes cast for all candidates for Governor is such that the total signatures shown by the certificates then in the hands of the Secretary of State equals at least 8 per cent of that total vote, the petition must be regarded as presented, and that election becomes the "last preceding general election." Under this theory the date of presentation would be a constantly shifting one that would not become fixed unless the number of signatures certified to be signed to the petition equalled at least 8 per cent of the votes cast at the most recent general election at which a Governor was elected. The identification of one unknown, namely, the date of presentation, is thus arrived at by determining that the other unknown, namely, "the last preceding general election," is any general election after the initiation of the process that would qualify the measure. Under this interpretation the words "the last preceding general election, at which a Governor was elected" would become the most recent general election at which 8 per cent of the total number of votes cast for all candidates for Governor equals or falls short of the number of signatures certified to have been signed to the petition. "The last preceding general election" could thus be any general election succeeding the institution of the initiative proceeding, depending upon the number of votes cast at the election and on the number of signatures certified to be signed to the petition. The words *"the* last *preceding* general election" however indicate plainly that the framers of section 1 were referring to one particular election. The general election preceding the institution of the initiative proceeding seems more likely to be in accord with their intention than one of a number of general elections succeeding the institution of such proceeding. In any event, the attorney general's interpretation is certainly not compelled by the language of section 1. Since it would lead to the absurdities so graphically described in the majority opinion and thus violate the principle that constitutional provisions will not be interpreted to produce an unreasonable or absurd result, it must be rejected. See 23 Cal.Jur. 722-3, 766-7.

It remains for the court, therefore, in the light of section 1 as a whole, to identify "the last preceding general election," as well as the presentation of the petition, so that the section can operate in accord with the probable intention of its framers. A consideration of the instances in which there can be no doubt as to the operation of the section removes much of the confusion regarding its operation in a case like the present one.

If the Secretary of State receives a petition, prior to 130 days before the next general election, certified to be signed by electors equal in number to at least 8 per cent of all the votes cast for Governor at the general election, at which a Governor was elected preceding the receipt of the petition, he must submit the proposed law or constitutional amendment to the electors at the next general election, or at any special election called by the Governor before such general election. If he receives a petition that, prior to 130 days before the next general election, is not so certified, he cannot submit the proposed law or constitutional amendment to the voters at the next general election, or at any intervening special election. What happens to such a petition? Is it revitalized by the receipt of additional certificates certifying that more signatures have been added to the petition? If the base election for determining whether the petition has the requisite number of signatures is the election preceding the receipt of the petition by the Secretary of State it would be idle for the Secretary of State to receive additional certificates certifying that more signatures have been added to the petition, for it cannot be submitted at the next general election following the receipt by the Secretary of State of the petition. That election may already have been held. In any event the 130-day requirement cannot be met; for that reason the Secretary of State in 1940 refused to accept signatures from Tuolumne County certified to be signed to the very petition involved in this case, for they were received within less than 130 days before the election held on November 5, 1940.

It appears from the foregoing description of the procedure followed when a proposed measure clearly does or does not qualify for submission at a particular election, that the base election must be the election preceding the receipt of the petition by the Secretary of State, for otherwise he could never determine whether a petition had, within the time prescribed, the requisite number of signatures. He makes that determination in the only way that he can under the Constitution by ascertaining the total vote for all candidates for Governor at the last general election at which a Governor was elected preceding the receipt by him of the petition. If the petition were not regarded as presented to him, he could not proceed with his determination whether it had, within the prescribed time, the requisite number of signatures. Only by regarding the receipt by him of the petition as the presentation of the petition to him can he determine what is the next preceding general election, the basis of his determination whether the petition has been signed within the prescribed time by electors equal in number to at least 8 per cent of the total vote for all candidates for Governor at that election.

Since the foregoing procedure is the one that the Secretary of State follows, and the only one that he can follow if he is to comply with the 8 per cent requirement and the 130-day limitation in passing upon initiative measures that clearly do or do not qualify for submission to the electors at a particular general election, it must be regarded as the procedure that the framers of section 1 envisaged for all cases. This procedure conforms to the provisions of section 1. Thus it appears that the presentation of the petition may be made in sections (par. 9); that the presentation of each section consists of the transmission by a county clerk or registrar of a printed copy of the petition with his certificate showing the number of qualified signatures thereto that have been filed in his county (par. 10); that the presentation of the several sections may occur at different times, since each county clerk or registrar is required to transmit his section as soon as he completes his examination of the signatures (par. 10); that the Secretary of State has no duty to perform in this regard other than to receive the sections presented to him by the county clerks or registrars until the total number of signatures certified in the several sections is at least 8 per cent of all the votes cast for Governor at the last general election at which a Governor was elected preceding the presentation. If the signatures certified in the sections meet that requirement prior to 130 days before the next succeeding general election, the Secretary of State must submit the proposed measure at that election. It follows that a petition is presented to the Secretary of State upon the first date when one or more sections, containing "a full and correct copy of the title and text of the proposed measure" are received by him duly accompanied by a certificate from the county clerk or clerks transmitting the petition as to the number of signatures obtained in the particular county or counties. Thereafter the Secretary of State simply keeps count of additional signatures certified to be signed to the petition, to determine whether or not the measure qualifies for submission at the next general election occurring more than 130 days after the receipt of the petition. If it qualifies it goes on the ballot; if not, it does not go on the ballot and is thenceforth defunct. The Secretary of State is without authority to submit a measure at a subsequent election, that does not qualify for submission at the election succeeding the presentation of the petition, for the Constitution authorizes submission of the measure only at the next succeeding general election occurring subsequent to 130 days after the presentation of the petition or at any special election called by the Governor before such general election. If the measure qualifies for submission to the electors at that next succeeding general election, however, but for any reason it is not submitted, then under the seventh paragraph of section 1, it may be submitted at a succeeding general election.

Since the proposed measure did not qualify under the prescribed procedure for submission to the electors at the election held on November 5, 1940, and since the Constitution does not authorize the Secretary of State to submit, at any subsequent election, a measure that fails to qualify for the next succeeding general election occurring after the presentation of the petition, the proposed measure cannot be submitted to the electors.

EDMONDS, Justice (dissenting).

In 1911, by an amendment to the Constitution, the people of California declared that they "reserve to themselves the power to propose laws and amendments to the constitution, and to adopt or reject the same at the polls, independent of the legislature, * * *." Election laws are to be liberally construed, and a proposed initiative measure should have a place upon the ballot unless, considering the fundamental purpose of the constitutional reservation of power, it may fairly be said that the requirements for such legislation have not been met. Indeed, courts should protect the right of the people to initiate and vote upon a measure which, in the opinion of some electors, would advance social or economic conditions, with the same regard for democratic principles as is demanded when the right of free speech is under consideration. Yet by the decision in the present case, notwithstanding the fact that the Constitution does not directly limit the time within which a petition to place a proposed measure on the ballot may be circulated, because of general provisions specifying the procedure to be followed in connection with the verification of voters' signatures by the county election officials, the People are denied the right to vote upon "The Retirement Life Payments Amendment." I cannot subscribe to such a narrow construction of the Constitution.

Certainly paragraph 2 of the constitutional provision is unfortunately worded. It declares: "Upon the presentation to the Secretary of State of a petition certified as herein provided to have been signed by qualified electors, equal in number to eight per cent of all the votes cast for all candidates for Governor at the last preceding general election, at which a Governor was elected, proposing a law or amendment to the Constitution, set forth in full in said petition, the Secretary of State shall submit the said proposed law or amendment to the Constitution to the electors at the next succeeding general election occurring subsequent to 130 days after the presentation aforesaid of said petition, or at any special election called by the Governor in his discretion prior to such general election." Const. art. IV, sec. 1. The use of the word "presentation" in the quoted sentence gives rise to the principal difficulty in this case, for the Constitution also specifies: "A petition shall be deemed to be filed with the Secretary of State upon the date of the receipt by him of a certificate or certificates showing said petition to be signed by the requisite number of electors of the State." But when all of the constitutional provisions are read together, it is clear that a petition, as distinguished from a section of a petition, is presented to the Secretary of State only when it bears a sufficient number of signatures to qualify the proposed measure for a place upon the ballot.

The constitutional provision specifying the procedure for the qualification and submission of an initiative or referendum measure uses the word "presentation" or "presenting" or "presented" nine times. The word "file" or "filing" or "filed" appears eleven times. The use of each of these words, when considered in connection with its context, shows a discriminating choice of language. For example: "Any initiative or referendum petition may be presented in sections, but each section shall contain a full and correct copy of the title and text of the proposed measure." Certainly the word "presented" as here used is not synonymous with "filed," for an initiative measure "shall be deemed to be filed" with the Secretary of State only when he has received a certificate or certificates signed by the requisite number of electors.

Other sentences also show that the Constitution's draftsman clearly understood the meaning of the words he selected. The sponsors of an initiative measure are defined as the persons "presenting" a request to the Attorney General for the preparation of a title and summary of it. By another provision the persons who shall "prepare and present" arguments for and against each measure shall be selected by the presiding officer of the Senate. In a subsequent paragraph relating to the rights of proponents, there is a restriction concerning any section or supplement "presented for filing." Another use of the word in the same manner appears in the requirement as to the printing of the title, "Initiative measure to be presented to the Legislature." Here are instances of a precise use of the word "present" in its customary and usual meaning, which is: "To lay before, or submit to, a person or body for consideration or action; as to present a memorial, petition or indictment." Webster's New International Dictionary, 2d Ed. But the filing of a paper or document connotes the finality of official action which follows presentation.

Applying these definitions to the constitutional provisions, it clearly appears that the "presentation" to the Secretary of State of a petition certified as having been signed by the required number of qualified electors is not a single act. "Any initiative * * * petition may be presented in sections," the Constitution reads. Each county clerk or registrar of voters must examine the signatures upon each section of a petition filed with him. As soon as he completes such examination, he shall "forthwith" attach his certificate to a copy of the petition, except the signatures, "and shall forthwith transmit said petition, together with his said certificate" to the Secretary of State. Obviously, in practice, these documents will be received at different times, and, of necessity, the "presentation" to the Secretary of State of a petition by sections can only be made by the delivery to him through a county clerk or registrar of voters, of a copy of the petition with a certificate made by the local election officer that it has been signed by a stated number of electors, qualified to do so. Other than to receive the sections, the Secretary of State has no duty to perform unless and until the aggregate of the number of signers certified in the several sections amounts "to eight per cent of all the votes cast for all candidates for Governor at the last preceding general election, at which a Governor was elected." If and when the number of signatures as certified to him total that amount, the petition "shall be deemed to be filed" and he shall "submit the said proposed law or amendment to the Constitution to the electors * * *."

Under this construction, there is no time limit within which the qualification of an initiative petition must be completed. Sections of the petition may be circulated indefinitely in any county. But upon the filing of a section or sections with a county clerk or registrar of voters, all further action in that county must be completed within seventy days. There is no prohibition, however, against circulation of the petition in any other county, and signatures may be obtained until the aggregate of them, as certified by the local election officials, reaches the required number.

Admittedly with no limitation of time for the qualification of a proposed measure except the requirements as to circulation in a particular county, a law or constitutional amendment might be submitted to electors many years after the petition for its enactment was signed by some of them. But a court may not place restrictions upon the procedure for direct legislation which are not found either in the Constitution or in any statute enacted to facilitate its operation. Certainly section 45 of the Elections Code, which is relied upon by counsel for Gage, makes no requirement as to the time when an initiative measure must be placed upon the ballot. Based upon section 1083a of the Political Code, a predecessor statute, it declares that only one who is a registered qualified elector may sign an initiative petition, and that he must also write the date of signing and his place of residence. In Chester v. Hall, 55 Cal.App. 611, 204 P. 237, the Political Code section was upheld as legislation which facilitates the operation of the constitutional plan and places safeguards around the exercise of the right to have a proposed law or constitutional amendment voted on by the people. See, also, Boggs v. Jordan, 204 Cal. 207, 214, 267 P. 696. But the statute cannot reasonably be construed as a requirement either that each signer of an initiative petition be a qualified elector both at the time of affixing his signature and on the date of the election at which the proposition is submitted to a vote, or as a restriction upon the time within which such a petition may be presented to the Secretary of State.

As another ground for the issuance of a writ of mandate in this proceeding, it is insisted that the gubernatorial election which fixes the number of signatures required for a petition is the one which immediately precedes every step in the initiative procedure including presentation. In support of that construction, reference is made to provisions of the Constitution and of the Elections Code with relation to the preparation of a title and summary for any proposed measure.

Section 1452 of the Elections Code allows any one interested in direct legislation, "at any time prior to one hundred thirty days before the election at which the measure is to be voted upon," to request a ballot title for it. As construed by counsel for Gage, this means that the request must be made prior to 130 days before the next general election. But the language cannot be so limited. By the express terms of the statute, the election at which the proposed measure is to be voted upon need not necessarily be the next one after the request for a title is made, and the proponents of the constitutional amendment which is the subject of the present proceeding, more than 130 days before the date of any election to be held in the year 1943, complied with the requirement regarding entitlement.

The constitutional mandate directing the Attorney General to preserve the written request for a title and summary "until after the next general election" (art. IV, sec. 1, par. 8), also relied upon by counsel for Gage, is more to the point. From this language it is argued that the initiative process must be commenced and completed between two consecutive general elections. Certainly the direction to the attorney general affords some basis for believing that the draftsman of the Constitution intended that the record of the request for entitlement be kept only until the electors had voted upon the measure, and that this would occur at "the next general election." But such a conclusion is largely surmise, and in construing constitutional provisions concerning a matter so important to the public interest as the legislative power reserved to the people, a limitation of time may not be implied where none is expressed. Both constitutional and statutory provisions relating to direct legislation should be liberally construed with a purpose to protect the reserved right of the citizen. Uhl v. Collins, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1371; Ley v. Dominguez, 212 Cal. 587, 299 P. 713.

And as I read the opinion in State ex rel. Ilg v. Myers, 127 Ohio St. 171, 187 N.E. 301, the decision supports the position of the Secretary of State in the present case. Under the Ohio Constitution, the court held, the "preceding election" to be used as a base for computing the qualification of an initiative petition "is clearly the election immediately preceding the filing of the petition." The record showed that the date of filing was one day prior to the gubernatorial election of 1932. Subsequent to that election the Secretary of State ascertained that, based upon the vote cast for Governor in 1930, which was the election for Governor next preceding the filing of the petition, there were insufficient signatures to qualify the measure. Thereafter additional signatures were procured and filed. Upon the basis of the vote cast at the election of 1930, the petition then had the necessary number to qualify the proposal. According to the election of 1932, it still lacked the number fixed by the Constitution as requiring submission to the electors. The court decided that the election of 1930 governed.

Apparently in Ohio, although a petition is circulated for signature in separate parts, all of the parts are filed with the Secretary of State who ascertains the number of signatures which are valid. The date upon which the petition was filed, said the court, determined the "preceding election" which must be used as a base in determining its qualification although another gubernatorial election had intervened during the time allowed for securing additional signatures. Using the date of filing as the decisive factor in the present proceeding, "the last preceding general election, at which a Governor was elected" is the one of 1942.

To me, the action of the Legislature of 1911 fortifies this conclusion, for the statutes enacted at that time, as I read them, show a purpose to place a limitation upon the circulation and qualification of a county and a city initiative measure which does not apply to one to be submitted to the electors of the entire state. In that year, section 4058 of the Political Code was enacted, St.1911, p. 577. It made provision for the submission to the electors of a county of either an initiative or a referendum measure, and declared that any petition for that purpose which was found insufficient should be returned to "the person filing the same, without prejudice, however, to the filing of a new petition to the same effect." Other legislation related to the procedure for initiative and referendum measures in cities and towns and also directed that any petition found insufficient should be returned to its proponent. Stats.1911, p. 359. Subsequently, by action at the extra session of 1911, the Legislature declared that in lieu of returning an insufficient petition, it should remain on file as a public record. Stats.Ex.Sess.1911, p. 125 as to county measures; p. 131 as to city or town proposals.

Certainly the legislative action shows an awareness that the Constitution does not limit the time for the circulation and qualification of a proposed initiative measure and a determination that there should be a restricted period during which a petition may be signed by electors and submitted to a vote in a county, a city or a town. The enactment of 1943 also indicates legislative cognizance that the Constitution does not set any particular period for the circulation of an initiative petition (other than that relating to the examination of signatures by local election officials), and the qualification of the proposal. Article IV, section 1, of the Constitution is self-executing, "but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." In connection with the declaration of the Constitution, it may be noted that this court, in accordance with what it declared to be the uniform rule, has upheld the power of the Legislature "to enact statutes providing for reasonable regulation and control of rights granted under [the] constitutional provisions." Chesney v. Byram, 15 Cal.2d 460, 465, 101 P.2d 1106, 1109. Other cases to the same effect include First M. E. Church v. Los Angeles County, 204 Cal. 201, 267 P. 703, and Chester v. Hall, supra.

For these reasons and, in particular, giving effect to the cardinal rule of construction that every intendment of the constitutional provisions and of statutes enacted to facilitate their operation is in favor of the qualification of an initiative measure, I believe that the electors of the state are entitled to vote upon "The Retirement Life Payments Amendment."

Rehearing denied; EDMONDS, J., dissenting.

63 Cal.App.2d 661

PEOPLE v. ONE 1941 BUICK 8, 4-DOOR SEDAN, ENGINE NO. 54135130.
Civ. 7037.

District Court of Appeal, Third District, California.

March 31, 1944.

Rehearing Denied April 19, 1944.

1. Carriers 🔑4

A taxicab business of carrying passengers for hire constitutes a "common carrier". Civ.Code, § 2168.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Carrier".

2. Forfeitures 🔑1

The law does not favor forfeiture, and a statute which authorizes it should be strictly construed in favor of owner.

3. Constitutional law 🔑70(1)
Statutes 🔑181(1)

In construing a statute, courts must interpret meaning from language employed and are powerless to insert into a statute qualifying provisions not contained in language used, to carry out an assumed legislative intent.

4. Intoxicating liquors 🔑246

Independently of common carrier exclusion clause, provision of Alcoholic Beverage Control Act authorizing forfeiture of automobile used to violate the act does not contemplate that owners of automobiles which are illegally used without knowledge or consent of owners shall become liable to forfeiture under all circumstances. Gen.Laws 1937, Act 3796, § 3; Gen.Laws Supp.1941, Act 3796, §§ 51g, 52 (f) (i).

5. Intoxicating liquors 🔑246

A taxicab, which was actually being used in business of a common carrier at time driver, without knowledge of owner, made sale of whisky to passengers riding in vehicle, was not subject to forfeiture to the state for violation of Alcoholic Beverage Control Act. Gen.Laws 1937, Act 3796, § 3; Gen.Laws Supp.1941, Act 3796, §§ 51g, 52(f) (i).

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding by the People of the State of California for the forfeiture of one 1941 Buick 8, Four-Door Sedan, Engine No. 54135130, wherein Mrs. Marie Littlefield filed a claim. From a judgment declaring the automobile forfeited to the State, the claimant appeals.

Reversed.

Robert A. Zarick, of Sacramento (Anthony J. Kennedy, of Sacramento, of counsel), for appellant.

Robt. W. Kenny, Atty. Gen., James H. Oakley, Asst. Atty. Gen., and Rose M. Sheehan, Ward Sullivan, and Allen L. Martin, Deputy Attys. Gen., for respondent.

THOMPSON, Justice.

This is an appeal from a judgment rendered under Section 52 of the Alcoholic Beverage Control Act, Stats.1935, p. 1123, and amendments thereto, Deering's Supp. to Gen.Laws of 1941, p. 2006, Act 3796, forfeiting to the State a Buick taxicab automobile because the driver thereof, without the knowledge of the owner, violated Section 3 of that act, Gen.Laws 1937, Act 3796, by selling one pint of whisky, without a license, to passengers riding in the machine. It is conceded the driver of the taxicab was guilty of a misdemeanor in selling the liquor without a license. The owner of the automobile contends that the taxicab was illegally forfeited since it was in actual use as a common carrier at the time of the sale of liquor, and that all common carriers are specifically exempted from application of the statute by the provisions of Section 52(i) thereof. In no case relied upon by the respondent in support of the forfeiture does it appear that a similar exemption of "common carriers" was involved.

Mrs. Marie Littlefield has owned and operated a taxicab business in Sacramento for sixteen years under the name of Union Taxicab Company. The taxicab in question is one of a fleet of twenty automobiles used by her in that business. She employs 46 drivers of machines, among whom was Leslie L. Bruce who operated the condemned car at the time of the sale of the liquor. Before employing her drivers Mrs. Littlefield was required by ordinance to, and she did, obtain certificates of approval of each driver from the Chief of Police. The drivers were paid fixed salaries.

The evidence is undisputed that the owner had no knowledge or reason to believe that Bruce or any other driver was selling alcoholic liquor or concealing or transporting it in her taxicabs. On the contrary, she testified that the drivers had "strict orders against that" handling of liquor. Bruce had been employed as a driver for about two years. He worked from 5 o'clock P. M. until 4 o'clock A. M. of each day. On the night of his arrest he had been paid $17.95 for earned taxicab fares. The headquarters, or chief dispatching office, of the taxicab company was at the Greyhound Bus Station at Seventh and L Streets.

At 11:30 P. M. of April 16, 1943, Sergeant Edwin B. Woltkamp, a Military Police Investigator, Private David K. Knight, V. G. Clock and Mr. Gearing, the last named two being officers of the State Board of Equalization, hired the Buick taxicab operated by Leslie L. Bruce, to convey them to the Bridge Cafe on the Yolo side of the Sacramento River. Before entering the cafe, the passengers requested the driver to remain there until they returned. After leaving the Bridge Cafe, on their way back to Sacramento, one of the passengers asked the driver, Bruce, if he could get them some whisky. He replied that he could get "none right now", but said that he might be able to obtain some later. He stopped at the Star Hotel at Fourth and I Streets to telephone. Returning to the car he reported that "he couldn't do us any good at the present. He said the old lady was still there." His reference to the "old lady" evidently meant Mrs. Littlefield, his employer. That statement infers that the driver of the taxicab knew that his employer would object to his furnishing liquor to the passengers. The men were then driven to the Rio Dance Hall, where they arrived at 12:30 A. M. They paid the driver seventy-five cents for the hire of the taxicab, which was then driven away. About 2 o'clock that morning, at the request of Mr. Gearing, Private David K. Knight went to the Greyhound Bus Station and secured Mr. Bruce who returned with his taxicab to the dance hall and conveyed the same passengers to the California Hotel located at Eighth and I Streets. Gearing sat with the driver in the front seat. The other gentlemen sat in the rear seat. Just before they arrived at the hotel, Bruce reached into the glove compartment of his machine and took from it a pint bottle of whisky which he handed to Mr. Gearing, who passed it back to Sergeant Woltkamp. The Sergeant took the bottle and gave Bruce a five dollar bill from which to pay for the whisky. Bruce returned $1.50 of that amount. When the driver walked around to open the door for the exit of his passengers he was arrested by Mr. Clock. The Buick taxicab was driven into the State Garage and impounded pending proceedings, which were subsequently commenced, to forfeit the car. Notice of forfeiture was duly served on Mrs. Littlefield. She answered the petition, denying her knowledge of the unlawful sale of alcoholic liquor by her driver, and claiming exemption from forfeiture of the taxicab under the express provisions of Section 52(i) of the act on the ground that the machine at the time of the offense was in actual use in her taxicab business which was being operated as a common carrier.

The trial court rendered judgment for the State, forfeiting the taxicab. From that judgment this appeal was perfected.

For the purposes of this proceeding we must assume that the liquor was illegally sold by the driver of the taxicab without the knowledge or consent of the owner of the machine, and that the taxicab was then in actual use in conveying passengers in the business of a common carrier. The evidence is uncontradicted in that regard.

The theory of the State is that, since the vehicle was then also being used in violating the statute, the unlawful act precludes the innocent owner from asserting that the taxicab was in use as a common carrier.

[1] It has been definitely established that a taxicab business of carrying passengers for hire constitutes a common carrier. Sec. 2168, Civil Code; Bezera v. Associated Oil Co., 117 Cal.App. 139, 3 P.2d 622; Ex parte Martinez, 22 Cal.2d 259, 138 P.2d 10; 96 A.L.R. 755, note; 45 A.L.R. 300, note; 8 Words and Phrases, Perm.Ed., 35. It is true that when a private owner of an automobile consents to its lawful use by another person who illegally operates it to transport narcotics contrary to the statute, the owner may not defeat a procedure to forfeit the car on the ground that he had no knowledge of the violation of the statute. People v. One 1933 Plymouth Sedan, 13 Cal.2d 565, 90 P.2d 799; People v. One 1937 Plymouth 6, 4-Door Sedan, 37 Cal.App.2d 65, 98 P.2d 750; People v. One

1939 La Salle 8 Touring Sedan, 45 Cal. App.2d 709, 115 P.2d 39; Van Oster v. State of Kansas, 272 U.S. 465, 47 S.Ct. 133, 71 L.Ed. 354, 47 A.L.R. 1044. But it will be observed that in none of the preceding cases, and in none which have been cited by the respondent, was the question involved as to whether a similar statute specifically exempting common carriers from the application of its provisions would deprive an innocent owner of a taxicab from defending a proceeding to forfeit the machine on the ground that he had no actual or constructive notice of the illegal use of the vehicle or that it was exempt because it was being used in the business of a common carrier.

Section 2168 of the Civil Code defines a common carrier as:

"*Everyone* who offers to the public to carry persons, property, or messages, * * * *is a common carrier* of whatever he thus offers to carry."

[2] It is the owner of the taxicab business, and not the vehicles used for that purpose, who becomes the common carrier. In the present case the owner expressly prohibited the use of her taxicabs for transporting liquor. The taxicabs were reserved for exclusive use in her business as a common carrier. If under such circumstances an automobile could be forfeited then the owner might lose his car even though a thief had stolen the vehicle from his garage and used it to conceal or transport liquor. Likewise a Pullman car or a steamboat would be subject to forfeiture under similar circumstances. That procedure would be abhorrent to law. The law does not favor forfeiture. A statute which authorizes it should be strictly construed in favor of the owner. Santos v. Dondero, 11 Cal.App.2d 720, 54 P.2d 764; 37 C.J.S., Forfeitures, p. 8, § 4, subd. b. While it is true that it has been held an action to forfeit property for the violation of statutes is a proceeding in rem (J. W. Goldsmith, etc., v. United States, 254 U.S. 505, 41 S. Ct. 189, 65 L.Ed. 376), such cases are founded on violations imputed to the owners. An inanimate object cannot violate a statute without the aid of some individual. In none of those cases was there involved an express exemption, as there is in the present proceeding, of all common carriers.

Section 3 of the Alcoholic Beverage Control Act, which is involved in this case, provides in part that, "Any *person* violating any provision of this section shall be guilty of a misdemeanor." And Section 51g of the same act provides that:

"It shall be unlawful for any person to use any automobile or other vehicle to conceal, convey, carry, or transport any alcoholic beverages, * * * with the design to evade the excise taxes or license fees imposed by this act; * * *.

"Any automobile or other vehicle used to conceal, convey, carry or transport alcoholic beverages, still, materials or supplies in violation of this section shall be forfeited to the State of California."

But Section 52(i) of that act specifically exempts common carriers from the provisions of the law in the following language:

"Nothing contained herein shall apply to common carriers or to an employee acting within the scope of his employment under this act."

That exemption clause applies to two classes of persons, first to "common carriers", and second to "any employee acting within the scope of his employment." In the present case the driver of the taxicab was not acting within the scope of his employment when he sold alcoholic liquor to a passenger, and he therefore may not be excused from liability. He was guilty of a misdemeanor. The exception specifically declares that "nothing contained herein shall apply to common carriers."

[3] In the present case the taxicab was being actually used as a common carrier when the liquor was unlawfully sold to one of the passengers. It was then actually conveying passengers. If the legislature had intended to render a vehicle used as a common carrier liable to confiscation if it was also being used by the driver to conceal, convey or transport liquor contrary to law, it would have been easy to have so stated by including in the exemption clause the language "nothing contained herein shall apply to common carriers *while the vehicle is being used for the exclusive purpose of conducting its business.*" The respondent relies upon the theory that the preceding underscored language must be inferred. In construing a statute, courts must interpret the meaning from the language employed. Courts are powerless to insert into a statute qualifying provisions not contained in the language used, to carry out an assumed legislative intent. Seaboard Acceptance Corporation v. Shay, 214 Cal. 361, 366, 5 P.2d 882; Santos v. Don-

dero, supra. In the case last cited it is said at page 724 of 11 Cal.App.2d, 54 P.2d at page 766:

> "An intention to confiscate property will not be indulged in by the aid of the constrained construction asserted by respondent, where the purpose of the Legislature appears clearly otherwise."

The forfeiture of valuable property belonging to an innocent person is a harsh penalty, and it should not be countenanced in the absence of a statute clearly so providing.

[4] Independently of the common carrier exclusion clause, this statute does not contemplate that the owners of automobiles which are illegally used without the knowledge or consent of the owners shall become liable to forfeitures under all circumstances.

Section 52 of the act, in providing the procedure which must be followed in confiscating the property, specifically authorizes the owner to file an answer thereto, and indicates the evidence which may be adduced as a complete defense to that action. Section 52(f) declares in that regard:

> "At the time set for the hearing any of the owners who have verified answers on file may show by competent evidence that the alcoholic beverages *or other property* were not in fact used contrary to the provisions of this act. The claimant of any right, title or interest in said alcoholic beverages or other property under a lien, mortgage or conditional sales contract which is officially of record may prove that such lien, mortgage or conditional sales contract is bona fide and was created after a reasonable investigation of the moral responsibility, character and reputation of the lienor, mortgagor or vendee *and without any knowledge that such alcoholic beverages or other property was being, or was to be, used contrary to the provisions of this act.*" (Italics added.)

The foregoing provision recognizes the right of certain claimants of specified interests in the property to allege and prove as a complete defense to a proceeding for forfeiture that they were not negligent in acquiring their title or that they had no actual or implied knowledge that it was being used, or was likely to be used, to conceal, convey or transport alcoholic beverages contrary to the act.

[5] We conclude that the taxicab which is involved in this proceeding was wrongfully forfeited, because the car was actually being used in the business of a common carrier at the time of the alleged offense.

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.

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63 Cal.App.2d 711

BATEMAN v. DOUGHNUT CORPORATION OF AMERICA et al.

Civ. 12588.

District Court of Appeal, First District, Division 2, California.

April 6, 1944.

Rehearing Denied May 6, 1944.

Hearing Denied June 1, 1944.

1. Master and servant 🔑117
Negligence 🔑45
Statutes 🔑231

The entire chapter of Labor Code regarding elevators was designed to prevent unnecessary occupational hazards and must be viewed as a whole. St.1937, p. 321, §§ 7301, 7302.

2. Master and servant 🔑228(3)
Negligence 🔑80

Statute prohibiting operation of elevator in any place of employment unless permit for operation thereof is issued by Industrial Accident Commission is designed to protect employees and violation of statute by employee does not preclude him from recovering for negligence of his employer or a third person. St.1937, p. 321, § 7301.

3. Negligence 🔑6

The violation of a statute or ordinance is negligence per se as to person for whose benefit or protection it was enacted.

4. Negligence 🔑80

In employee's action for injuries sustained while operating defective freight elevator against employer and contractor who installed elevator in employer's plant, contractor's requested instructions based on theory that employee's violation of statute prohibiting operation of elevator in place of employment unless permit for operation thereof is issued by Industrial Accident Commission would preclude recovery were properly refused. St. 1937, p. 321, §§ 7301, 7302.

5. Trial ⟹260(8)

In employee's action for injuries sustained while operating defective freight elevator against employer and contractor who installed elevator in employer's plant, question whether employee's use of elevator in violation of statute prohibiting use of elevator in place of employment unless permit for operation thereof is issued by Industrial Accident Commission was proximate cause of injury was sufficiently covered by instructions given. St.1937, p. 321, § 7301.

6. Negligence ⟹32(2), 138(3)

Where contractor, who had installed freight elevator in employer's plant but who had not complied with contractual provision requiring him to arrange for inspection of elevator by Industrial Accident Commission, had informed employer that elevator was in condition to be operated by employee and knew that elevator was being so operated, employee injured while using elevator in way and for means for which contractor had fashioned it was if anything, not a "licensee" but was an "invitee", and instructions requested by the contractor on theory that employee was a licensee were properly refused. St. 1937, p. 321, §§ 7301, 7302.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee" and "Licensee".

7. Negligence ⟹27

The manufacturer of an article inherently dangerous, such as freight elevators, is responsible to the user and is chargeable with negligence if defective condition was apparent or could have been disclosed by reasonable inspection or test.

8. Appeal and error ⟹1050(1)

In employee's action for injuries sustained while operating defective elevator against employer and contractor who installed elevator in employer's plant, admission in evidence of photograph of elevator taken after changes had been made following accident was not prejudicial where photograph was introduced solely for purpose of enabling jury to understand operation of elevator and not for purpose of showing precautionary steps taken after accident. St.1937, p. 321, §§ 7301, 7302.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Personal injury action by Wayne Bateman against the Doughnut Corporation of America and against Victor Uphoff, individually and doing business as Liberty Elevator Maintenance Company. From a judgment for plaintiff and from an order denying a judgment notwithstanding the verdict, Victor Uphoff, individually and doing business as Liberty Elevator Maintenance Company, appeals.

Affirmed.

Brown, Rosson & Gillis, Myron Harris, and Wm. H. Older, all of Oakland, for appellant.

Charles A. Christin, Robert G. Partridge, and William A. White, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment in favor of plaintiff in the sum of $25,000 and from an order denying a judgment notwithstanding the verdict. Appellant directs his appeal solely to the fact that certain requested instructions were not given and that error was committed in receiving in evidence a photograph of the scene of the accident, taken after certain changes were made.

The facts of the case may be summarized as follows: Uphoff entered into a contract on January 21, 1941, with the Doughnut Corporation of America, respondent's employer, to install a hydroelectric freight elevator in the plant of the corporation. The elevator was operated by means of a rope which extended inside the shaft and was pulled up or down to make the elevator rise or descend. When the elevator went from the ground floor to the mezzanine, the lower gate on the mezzanine would rise until it was opposite the upper gate, at which time both gates would rise. Each of the two gates covered one-half of the door opening. In the upper gate there was an opening approximately 5 inches by 30 inches, through which a man could place his arm to manipulate the rope operating the elevator. At the time of the accident there was a board at the top of the upper gate used as a fastening for the wire mesh which covered the gate. This board also ran across the top of the opening.

Respondent was an employee of the Doughnut Corporation and on the day of the accident was engaged in weighing out the ingredients from which the doughnuts were made and placing them in large cans. The cans weighed approximately 30 or 40 pounds when empty. Respondent would then load the cans on a dolly, pull the rope and send the elevator to the mezzanine, where another employee would unload the dolly and return it to the respondent. This was the only elevator on the premises and had been used for this purpose for about a month before the accident. Respondent, however, had been engaged in other duties on the premises and had never used the new elevator before the day in question, although he had performed this type of work previously using the elevator which was formerly there.

Respondent was apparently working faster than the man unloading ingredients on the mezzanine and when the elevator and dolly did not return, respondent walked upstairs. He saw some empty containers ready to be sent downstairs and approached the elevator intending to send the containers below. The elevator meanwhile had drifted so that it was between the floor levels. Respondent placed his arm through the slot provided for that purpose to raise the elevator to floor level. As he pulled the cable his arm was caught and pinned between the lower gate and the board across the top of the upper gate, raising him off his feet and causing certain serious injuries.

Previous to the accident, complaints had been made by the manager of the Doughnut Corporation to the appellant that the elevator drifted, and he was told by appellant to go ahead and use the elevator, because use would cause the valves to swell and the drifting would cease. Appellant does not deny that he consented to the use of the elevator. There appears no question but that the mechanism of the elevator was defective and that the board across the top of the slot was an unnecessary hazard.

Appellant points out that the contract of construction provided that he would arrange for the inspection of the elevator by the Industrial Accident Commission and that he had not secured such an inspection. He contends therefore that the operation was in violation of Labor Code, section 7301, St.1937, p. 321.

Appellant requested instructions based on section 7301 of the Labor Code which reads as follows: "No elevator shall be operated in any place of employment in this State unless a permit for the operation thereof is issued by the commission, and unless such permit remains in effect and is kept posted conspicuously in the elevator car."

Appellant's proposed instructions based on this section were as follows: The first instruction was merely a statement of the law contained in Labor Code, sec. 7301. The remaining instructions are:

1. "A violation of the section of the Labor Code just read to you on the part of Plaintiff would constitute negligence on his part, and if you believe that such negligence proximately contributed to the alleged injuries, if any, even in a slight degree, then the plaintiff cannot recover."

2. "I instruct you that Defendant Victor Uphoff could not waive the provisions of Section 7301 of the Labor Code of California, even by granting the Manager of the Doughnut Corporation permission to use the elevator before the inspection by the Industrial Accident Commission of the State of California."

3. "It is part of the law of the State of California that no elevator which is being installed can be used by the employees of the company for whom it is being installed until and unless it has been inspected by the Industrial Accident Commission and a certificate issued and posted in said elevator to that effect.

"This law was applicable to the employees of the Doughnut Corporation, and if plaintiff, as an employee of the Doughnut Corporation, used said elevator in violation of this law, then plaintiff is guilty of negligence as a matter of law, and if such negligence proximately contributed in any way to his injuries, then he cannot recover, and your verdict should be for the Defendant Victor Uphoff."

4. "Ignorance of the law will not excuse anyone, and if you find from the evidence that plaintiff did not know of Section 7301 of the Labor Code, and used the elevator in violation thereof, this is no excuse on his part, and he would be guilty of negligence by reason thereof, and if such negligence proximately contributed

in any way to the injuries he received, if any, then he cannot recover, and your verdict must be for the defendant."

[1] He contends that failure to give the requested instructions was prejudicial error. However, the entire chapter of the Labor Code must be viewed as a whole. Section 7302, St.1937, p. 321, provides: "The operation of an elevator by any person owning or having the custody, management, or operation thereof without a permit is a misdemeanor, and each day of operation without a permit is a separate offense." The entire chapter is designed to prevent unnecessary occupational hazards.

[2] Since section 7301 was designated to protect employees, it would be contrary to what we deem to be the intention of the legislature to deny an employee the ability to recover for the negligence of his employer or a third person because of the latter's violation of the section.

In McKeon v. Lissner, 193 Cal. 297, 303, 223 P. 965, 967, in discussing the law upon which the above sections of the Labor Code are based, the court said:

"An examination of the statute discloses, as expressed in the first clause of its title, that it is 'an act for the periodical inspection of elevators operated in places of employment in this state,' etc. Sections 1 and 2 of the act seem designed to protect employees in the place where the elevator is maintained. * * *

"We cannot conceive that it was the intention and purpose of the Legislature, in the passage of said act, to 'revolutionize' the law relating to the responsibility of owners and operators of elevators. We think that the act was intended merely for the purpose of providing additional safeguards in the type of elevators used and in the mechanism employed in their operation; and that the periodical inspection of the same was provided for to the end that the public generally, as well as employees in the building where elevators are used, might have additional protection against injury or loss of life. The legislation was probably inspired through an enlightened appreciation of the value of human life, rather than for the purpose of relieving the owners and operators of all responsibility."

[3, 4] Appellant cites a number of cases holding that violation of a statute or ordinance is negligence per se. Bay Shore Laundry Co. v. Industrial Accident Comm., 36 Cal.App. 547, 172 P. 1128; King v. San Diego Electric R. Co., 176 Cal. 266, 168 P. 131; Alechoff v. Los Angeles G. & E. Corp., 84 Cal.App. 33, 257 P. 569; Johnston v. Brewer, 40 Cal.App.2d 583, 105 P.2d 365. This doctrine is undoubtedly the law in California and there are innumerable cases so holding. However, in each of the cases cited by appellant the party seeking to make use of the statute was of the class of persons designed to be benefited by it.

That limitation has been expressed in the case of Figone v. Guisti, 43 Cal.App. 606, 608–610, 185 P. 694, 695:

"It has been held by the Supreme Court of this state that where a defendant violates the express provisions of a statute, that violation itself, when proven, establishes his negligence per se. (Citing numerous authorities) In all of the foregoing cases, however, and in all others which we have been able to find, the violation of a statute has been held to establish negligence per se only in favor of one sought to be benefited by the violated statute. In other words, under the statute, a duty is owing to the persons coming within its protection, and as to such persons a violation thereof is negligence per se. The statute being considered here is plainly for the protection and benefit of the minor employe. It is a statute similar to those prohibiting the employment of children in certain dangerous occupations or for more than a stated number of hours each day. Such laws are enacted in the exercise of the police power for the protection and well-being of minors. Williams v. Southern Pac. Co., supra, 173 Cal. [525], at page 538, 160 P. 660. 'It is a well-established principle that the violation of a statutory duty is the foundation of an action in favor of such persons only as belong to the class intended by the Legislature to be protected by such statute.' Lepard v. Michigan Cent. R. Co., 166 Mich. 373, 130 N.W. 668, 40 L.R.A.,N.S., 1105. * * *

"It may be said that there is practically no dissent from the proposition that the violation of a statute or municipal ordinance is actionable negligence only as to a person for whose benefit or protection it was enacted, and that where the plaintiff does not belong to the class that the law was designed to protect, it follows that it will not avail to supply the element of duty owing. Indiana, etc., Coal Co. v. Neal, 166 Ind. 458, 77 N.E. 850, 9 Ann.Cas. 424 and note. 'In an action based upon a neglect of duty it is not enough for the plaintiff to show that the defendant neglected to perform a duty imposed by statute for the benefit of a third person, and that he would not have been injured if the duty had been performed; he must show that the duty was imposed for his benefit, and was one which the defendant owed to him for his protection.' (Citing authorities)" Routh v. Quinn, 20 Cal.2d 488, 491, 127 P.2d 1; King v. San Diego Electric R. Co., supra, 176 Cal. 270, 168 P. 131; Corbett v. Spanos, 37 Cal.App. 200, 204, 173 P. 769.

The court properly refused the instructions offered by appellant and set forth above.

[5] Appellant further contends that, even assuming the above instructions were not proper, the lower court should have left to the jury the question of whether respondent's use of the elevator in violation of the statute was the proximate cause of the injury. Appellant does not however indicate what instructions were offered and refused and what instructions were given on this subject. The court did inform the jury that contributory negligence had been pleaded and it explained to the jury the doctrine of proximate cause and its duty to make application of that doctrine. With reference to this question, the jury appears to have been fully informed and no claim of error can be predicated on this basis.

[6] A number of other instructions were offered by appellant and refused by the court. These instructions were based on the assumption that respondent was a licensee. Appellant admitted, however, that he had informed respondent's employer that the elevator was in condition to be operated by his employees, and that he, in fact, knew it was being so operated and urged its continued operation though certain defects had been pointed out to him. It follows that respondent using the elevator in the way and for the means for which appellant had fashioned it, was, if anything, not a licensee but was an invitee. Actually, however, in order to make the doctrine of licensee applicable, appellant has had to assume that he was still in possession of the elevator. This assumption is not borne out by the facts. It is true that appellant was still bound by the contract to arrange for an inspection by the Industrial Accident Commission, but the elevator was a part of the premises; appellant was no longer working upon it, and he indicated that it could be, and in fact knew, that it was being used for the purposes of the business.

[7] Actually appellant was not a proprietor or owner of the premises but was the manufacturer of an article inherently dangerous. As such he was responsible to the user and is chargeable with negligence if the defective condition was apparent or could have been disclosed by reasonable inspections or tests. Sheward v. Virtue, 20 Cal.2d 410, 126 P.2d 345; Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P.2d 481; O'Rourke v. Day & Night Water Heater Co., 31 Cal.App.2d 364, 88 P.2d 191. The instructions were properly refused.

[8] The remaining ground of error specified by appellant is that the court admitted in evidence a photograph of the elevator taken after the board across the top of the slot had been removed. He argues that it is inadmissible as an attempt to show precautionary steps taken after an accident. Had it been admitted for such purpose or had such testimony been taken, the evidence would have been inadmissible. Sappenfield v. Main St. & A. P. R. Co., 91 Cal. 48, 27 P. 590; Helling v. Schindler, 145 Cal. 303, 78 P. 710. The photograph in question was introduced solely for the purpose of enabling the jury to understand the operation of the elevator. Its condition at the time of the accident was fully explained. There was no testimony that the removal of the board was taken as a precaution or that it rendered the elevator safer for use. Had the jury viewed the premises at the time of trial, they would have seen the elevator in the condition portrayed. Although the introduction of the photograph may appear to be questionable, it cannot be held to be prejudicial. Hayes v. Emerson, 110 Cal.App. 470, 294 P. 765.

The judgment and order appealed from are affirmed.

STURTEVANT and SPENCE, JJ., concur.

63 Cal.App.2d 677

In re ARMS' ESTATE AND GUARDIANSHIP.

ARMS v. ARMS.

Civ. 14332.

District Court of Appeal, Second District, Division 3, California.

April 4, 1944.

Insane persons ⚷2

Evidence, in proceeding for appointment of guardian for aged person, failing to show inability to take care of self and property or that he was likely to be deceived or imposed upon, but showing at most that respondent was a somewhat querulous and reminiscent old gentleman, was insufficient to sustain order appointing guardian.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Proceedings in the matter of the estate and guardianship of Walter F. Arms, wherein Walter F. Arms, Jr., filed a petition for the appointment of a guardian for the person and estate of Walter F. Arms. From an order appointing a guardian, respondent appeals.

Reversed.

Stewart & Stewart, of Los Angeles, for appellant.

William Dellamore, of Los Angeles, for petitioner and respondent.

SHINN, Justice.

The appeal presents the sole question whether the evidence was sufficient to justify a finding that appellant, Walter F. Arms, Sr., was incompetent and incapable of taking care of himself and managing his property, by reason of which finding the court appointed Jefferson G. Wingert guardian of his person and estate.

A hearing was had upon the petition of a son of appellant, and the latter's answer thereto. The following facts appear from the petition: That the only property of appellant was a $2500 interest in improved real estate and a $1,000 interest in a note secured by deed of trust, and that the annual income amounted to about $200. The real property is a 6-room house in which appellant lives with his wife, two daughters, a granddaughter, Walter Arms, Jr., a son, and Avis Arms. On the day set for the hearing the petitioner and appellant appeared with their attorneys. An informal hearing was held, during which the attorneys stated to the court that Mr. Wingert was a practicing attorney and would be a suitable guardian. The record shows that a stipulation for the appointment of a guardian was offered by the attorney for petitioner but that the attorney for appellant refused to enter into such stipulation. Appellant was then sworn as a witness and questioned by the court. From his testimony the following facts appeared: That he was pleased to meet the judge after having heard about him; that he was born in Athens County, Ohio, in 1856 and had lived in California 33 or 35 years; that he did not want to go to a hospital but wanted to "die with my boots on" and he didn't want a guardian; that Mr. Wingert had been his friend for 60 years; that his family wanted to put him out of the home; that he wanted to go to Portland to see a friend who was an expert chiropractor and have his neck straightened out after an operation which he had had; that he got the title "Captain" from Abraham Lincoln when his father took him, at the age of 6, to see Lincoln, who held him on his knee; that he "snuck" across the bridge in Washington into the Rebel lines to sell ———, and that he would like to tell the judge one or two stories when the judge was through.

It is apparent from the record that the attorney who then represented appellant considered the appointment of a guardian to be in the interests of appellant, for after stating that he had no authority to stipulate to the appointment of a guardian he stated further, "But we are willing to stipulate as far as the law will permit us anyway." After the order was made, appellant changed attorneys and we are presented with an appeal.

No doubt the appearance and manner of appellant as a witness went a good way toward persuading the trial judge that the appointment of a guardian was advisable, and we do not underestimate the importance of that fact, but we do not feel we should go so far as to hold in this case that the observations of the judge, taken with the meager testimony, constituted evidence warranting the appointment of a guardian. Appellant was not shown to be unable to take care of himself and his property and likely to be deceived or imposed upon.

The evidence showed at most that he is a somewhat querulous and reminiscent old gentleman. For the court's own protection against the possible charge that appellant was not accorded a fair hearing, as well as in the interests of the parties involved, the facts of the case should have been gone into more fully, as they no doubt would have been had the attorney who first represented appellant shown a disposition to join with him in opposing the motion. The order must be reversed because of insufficiency of evidence, but the reversal will carry no implication that a further hearing may not call for a new order of appointment.

The order is reversed, without costs on appeal.

DESMOND, P. J., and PARKER WOOD, J., concur.

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63 Cal.App.2d 511

LENNING et al. v. CHIOLO.

Civ. 12524.

District Court of Appeal, First District, Division 2, California.

March 28, 1944.

1. Judgment 🔑199(3)

In action arising out of automobile collision brought by driver and two occupants of one of automobiles against driver of other automobile, after return of verdict that plaintiffs should take nothing, motion of one of occupants for judgment notwithstanding verdict on ground that negligence of driver of automobile in which she was riding was not imputable to her was properly refused.

2. Appeal and error 🔑930(4)

In action arising out of automobile collision brought by driver and two occupants of one automobile against driver of other automobile, wherein driver of other automobile filed a counterclaim, it would not be presumed that jury, by returning a verdict that plaintiffs and defendant take nothing, found that driver of each automobile was guilty of negligence which contributed to happening of the accident.

3. Appeal and error 🔑925(1)

It must be presumed that proceedings during trial were regular and free from error until contrary is shown by the record.

4. Trial 🔑345

Plaintiffs must call court's attention to defects in verdict before jury is discharged, and failure to do so constitutes waiver of defects.

5. Automobiles 🔑245(14)

Evidence presented question for jury as to whether defendant motorist who was involved in intersectional collision was negligent in failing to see plaintiffs' automobile sooner than he did, though there was proof that there was no building obscuring defendant's view, where there was evidence that there were many automobiles at intersection approaching or leaving which might have obstructed defendant's view, and there was no evidence that defendant did not exercise due care in looking to see conditions as they existed.

6. Automobiles 🔑246(20)

In action arising out of intersectional collision, an instruction that in order for defendant to avoid charge of negligence, it was his duty to keep a reasonably prudent lookout for others using public highways and to keep his automobile under such control as would enable him to avoid collision with persons using due care was not erroneous on ground that it had a meaning as though last phrase were worded "only those" persons using due care and caution. Code Civ.Proc. § 1858.

7. Trial 🔑285

In construing language of an instruction, District Court of Appeal is bound to ascertain its meaning, and not to leave out any words therein nor to add any words thereto. Code Civ.Proc. § 1858.

8. Appeal and error 🔑882(12)

Plaintiffs could not complain of erroneous instruction given at their request.

9. Trial 🔑243

In action arising out of intersectional collision, instructions relative to duties of drivers of the vehicles were not conflicting.

10. Appeal and error 🔑909(1)

In action arising out of intersectional collision, where plaintiffs' exhibit showed that highway involved had signposts in place and nothing to the contrary appeared in record, District Court of Appeal would presume that the signposts were legally installed.

11. Automobiles ⚿246(47)

In action arising out of intersectional collision, giving of instructions on many turns, angles, and courses and duties of drivers using such highways was warranted, in view of diagram of intersection at which the collision occurred. Vehicle Code, §§ 544, 551, St.1935, pp. 185, 186; § 550(b, c), St.1937, p. 619; § 577, St.1939, p. 1608.

12. Automobiles ⚿208

In action arising out of intersectional collision, an instruction that driver of an automobile on highway was obligated to use ordinary care to anticipate presence of and to see automobiles and their movements on highway at all times was not objectionable on ground that it imposed too much of a burden on plaintiffs.

13. Trial ⚿145

In action arising out of intersectional collision, an instruction that case was one between plaintiffs on the one hand and defendants on the other and that no insurance company was a party to or "interested in the action" was not objectionable on ground that quoted words were not supported by the record.

◆

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by J. M. Lenning and others against Edward Chiolo for injuries arising out of an automobile collision, wherein the defendant filed a counterclaim. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Phillips & Munck, of Oakland, for appellants.

Charles V. Barfield, of San Francisco, for respondents.

STURTEVANT, Justice.

At about 6 p. m. on Sunday, June 28, 1942, the plaintiff, his wife and his mother were driving southeasterly on 23rd Street in Richmond, Contra Costa County. They intended to turn left into Pullman Avenue. 23rd Street intersects with Pullman Avenue. Broadway heads in the intersection and runs northeasterly. The defendant was driving north on 23rd Street. He intended to cross 23rd Street into Broadway and go northeasterly. In the intersection the two cars collided. Lenning, his wife and his mother commenced an action against Chiolo to recover damages. They filed one complaint. It contained three counts—one count in favor of each plaintiff. The complaint contained a prayer seeking relief separately in favor of each plaintiff in the amount of his injury. The defendant filed an answer denying all of the material allegations set forth in the plaintiffs' complaint and alleged that the accident was caused by the contributory negligence of the plaintiffs and each of them. He also included a pleading branded a counterclaim seeking to recover damages for the injury caused to his automobile. Treating the counterclaim as a cross-complaint the plaintiffs answered it and pleaded the contributory negligence of the defendant. The plaintiff's mother, Mrs. Miner, in her pleading claimed to be the guest of Lenning. On all of the issues so framed the action was tried before the trial court sitting with a jury. The jury returned a verdict that the plaintiffs take nothing and that the defendant take nothing. The plaintiffs made a motion for a new trial. The motion was denied and the plaintiffs have appealed.

[1] The plaintiffs say the trial court erred because Laura Miner was a guest and the negligence of the driver of the automobile she was riding in is not imputable to her. The point was not in any manner presented to the trial court except in the form of an instruction: "I instruct you that J. M. Lenning's negligence, if any, may not be imputed to said Laura Miner, and that therefore you should find that there was no contributory negligence on the part of the plaintiff Laura Miner, unless you find that there was personal negligence on her part which contributed as a proximate cause to her injury." That instruction was given. No claim is made that it was incorrect. No motion as authorized by section 378, Code Civ.Proc., was made and no request for a special verdict was made. Sec. 625, Code Civ. Proc.

The day before the cause was submitted to the jury a conference was held by the trial court and the respective attorneys and four forms of verdicts were agreed on and later they were given.

After the jury returned its verdict and after the jury had been discharged, counsel for the plaintiffs made a motion for judgment in favor of Mrs. Miner notwithstanding the verdict. The motion was denied. There was no error in that ruling. 14 Cal.Jur. 979. In denying the motion the trial court stated that the question could be more properly presented on a motion for a new trial. That motion was subsequently made jointly by all of the plaintiffs and it was denied. The motion in no manner presented the contention Mrs. Miner now makes.

[2-4] Closely allied to the point just stated the plaintiffs assert that: "By its verdict the jury found that the driver of each car was guilty of negligence which contributed to the happening of the accident." But the jury brought in no verdict that either driver was negligent. The plaintiffs' assertion is based wholly on inference. However, bearing in mind that it must be presumed the proceedings were regular and free from error until the contrary is shown by the record (2 Cal.Jur. 852), we must presume the jury made no such finding. It follows that we must infer the jury found neither driver was negligent. In the case of Mitchell v. Stringer, 133 Cal.App. 207, 23 P.2d 765, the court had before it a record which was quite similar in its facts. The plaintiffs made the same contention. On page 208 of 133 Cal.App., on page 765 of 23 P.2d, the court said: "The one point urged for a reversal in the cases of Mitchell and Booth is that the verdicts of the jury are inconsistent in this: that while the verdict of the jury in the Wissig case was in favor of respondent, by said verdict it also found for Wissig on respondent's cross-complaint. In other words, that while the jury found respondent was not guilty of negligence in the Wissig case, it did find him guilty of negligence on his cross-complaint, and for that reason returned a verdict against him; that therefore Mitchell and Booth, occupying the positions merely as guests of Wissig, were entitled to recover from respondent for the injuries sustained by them. The fault in this contention is that it cannot be said with certainty that the jury, in returning the verdict on the cross-complaint, did so upon the theory that respondent was negligent. Under the instructions the jury, in view of the conflict in the evidence, might well have found that neither Wissig nor respondent was guilty of negligence and this is borne out by the verdict in all three of the actions, where the jury found that respondent was not negligent and where by the verdict on the cross-complaint it found that Wissig was not guilty of negligence. If the verdict was defective, it was the duty of appellants to call the attention of the court to such defects before the jury was discharged in order that it might retire and correct its verdict. By their failure to do this they waived the defects if any existed."

[5] Again the plaintiffs assert the defendant was negligent as a matter of law in failing to see plaintiffs' automobile sooner than he did. We think not. There was an omission of proof on the point. Excerpts quoted from the record show that the defendant testified he did not see the other car until the time of the collision. There was proof that there were no buildings obscuring the defendant's view. But there was evidence that there were many cars at the intersection approaching or leaving. There was no evidence whether such cars obstructed the defendant's view or did not. There was no evidence that the defendant did not exercise due care in looking to see conditions as they existed at the particular time and place. Whether he did or did not exercise due care was a question of fact. How the jury answered that question is not shown by the record. As stated above, in support of the judgment we may not infer the defendant was negligent. Prato v. Snyder, 12 Cal.App.2d 88, 55 P.2d 255; Hontou v. Orvis, 42 Cal.App.2d 585, 588, 109 P.2d 395.

[6-9] In the next point made by the plaintiffs they state the court erred in instructing the jury that they could return a verdict against plaintiff guest Laura Miner. The record does not support the contention. No ruling was asked or made defining the rights of Mrs. Miner. In this connection it should be stated that the trial court gave an instruction which we have quoted in full above and which states that the negligence, if any, of J. M. Lenning may not be imputed to said Laura Miner. The plaintiffs do not even contend said instruction was an incorrect statement of the law.

At the request of the plaintiff the court instructed the jury as follows: (a) "You are instructed that in order for the defendant Edward Chiolo to avoid a charge of negligence, it was his duty to keep a reasonably prudent lookout for others using the public highways, and to keep his automobile under such control as would enable him to avoid collision with persons using due care and caution." At the request of the defendant the court instructed the jury as to the duty of driver J. M. Lenning as follows: (b) "I instruct you that J. M. Lenning, the driver of the automobile in which the plaintiffs were riding at the time of the accident, was under the legal duty at all times to use ordinary care in driving and operating said vehicle to the end that said automobile should at all times be kept under control to enable him to avoid colliding with other vehicles on the highway." The trial court also instructed the jury as follows: (c) "I instruct you that the driver of an automobile on the highway, is obligated, under the law, to use ordinary care to anticipate the presence of, and to see automobiles and their movements on the highway at all times." We have for reference lettered the instructions (a), (b) and (c). The plaintiffs contend the instruction which we have marked (a) had a meaning as though the last phrase were worded "only those persons using due care and caution." It had no such meaning. The words italicized were not written therein. In construing the language this court is bound to ascertain its meaning—not to leave out any words therein nor to add any words thereto. Code Civ.Proc. § 1858. Assuming solely for the purposes of this case that it had the meaning contended for, the plaintiffs may not complain. They were the authors and asked that the instruction be given. Again they assert, addressing themselves to instructions (a) and (b) as lettered by us, that they were conflicting. That assertion is not well founded. Instruction (a) was correct as to those lawfully using the highway. It was silent as to those using the highway unlawfully. Instruction (b) was so broad as to apply to both of said classes. Instruction (c) was directly in point and applied to both classes. Such facts do not show a conflict.

[10] The plaintiffs also contend that there was no evidence the highway involved had been sign posted "as provided by law." Their Exhibit One shows it had sign posts in place. Nothing to the contrary appearing in the record, we must presume the sign posts were legally installed. Lindenbaum v. Barbour, 213 Cal. 277, 285, 2 P.2d 161; Bender v. Perry, 37 Cal.App.2d 206, 212, 99 P.2d 319.

[11] The trial court gave instructions based on the provisions of sections 551, 544, 577, 550(b) and 550(c) of the Vehicle Code, St.1935, pp. 185, 186, St.1939, p. 1608, St.1937, p. 619. The plaintiffs assert: "The court simply gave the jury every rule in the book on right of ways of intersections regardless of whether it might be right-angle unprotected intersections, left-hand turns at intersections or stopping for and entering through highways." But if one picks up the diagram of the intersection inserted in the transcript it will appear at once that the intersection involved warranted the giving of instruction on many turns, angles and courses and the duties of drivers using such highways. No specific instruction is challenged.

[12] Again the plaintiffs quote a part of an instruction as follows: "I instruct you that the driver of an automobile on the highway, is obligated under the law, to use ordinary care to anticipate the presence of, and to see automobiles and their movements on the highway at all times." They claim it cast too much of a burden on them. Lee v. Stephens, 8 Cal.App.2d 650, 47 P.2d 1105. We see no objection to the instruction. It did not impose the duty "of seeing" but it did impose the duty of "looking with ordinary care."

[13] Finally the plaintiffs claim the trial court erred in giving an instruction worded as follows: "In your examination, for the purpose of determining your fitness to act as jurors in this case, some of you were questioned concerning your interest in any casualty insurance company. This was merely for the purpose of determining your frame of mind. I instructed you that this is a case between the plaintiffs on the one hand and the defendant on the other, no insurance company is a party to or interested in this action." The plaintiffs contend the words "interested in this action" were not supported by the record before us. Elmore v. County of Lassen, 10 Cal.App.2d 229, 51 P.2d 481. While the trial court might have stricken said clause without danger of error, we think there was no reversible error in not doing so. The plaintiffs had no right to demand that the jury should assume insurance was outstanding and to take such as-

sumption in mind in framing its verdict. Brown v. Yocum, 113 Cal.App. 621, 298 P. 845; Miller v. Cranston, 41 Cal.App.2d 470, 476, 106 P.2d 963; Roselle v. Beach, 51 Cal.App.2d 579, 585, 125 P.2d 77.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

63 Cal.App.2d 719

HART v. ERICKSON.

Civ. 14216.

District Court of Appeal, Second District, Division 3, California.

April 6, 1944.

As Modified on Denial of Rehearing April 19, 1944.

Hearing Denied June 1, 1944.

1. **Specific performance** 🔑43

Where purchaser under oral contract of purchase enters into possession of realty, pays part or all of consideration, makes valuable improvements, and performs all of his obligations with design to carry contract into execution, a court of equity will decree performance by vendor under doctrine of estoppel.

2. **Husband and wife** 🔑46

Where husband in good faith fully executed his part of agreement whereby wife agreed to convey to him two-fifths undivided interest in property, husband's performance constituted adequate consideration for interest which he was to receive, so that husband had right to receive such conveyance.

3. **Appeal and error** 🔑209(1)

Facts found by trial court will be deemed to have been supported by evidence where sufficiency of evidence to support them was not challenged by appellants.

4. **Vendor and purchaser** 🔑212

One who is in possession of realty under valid agreement by which he is acquiring land or an interest therein and who fulfills his agreement, cannot be defeated of his right by subsequent conveyance of land to third person unless the latter be a purchaser in good faith and for value paid or rendered without knowledge of earlier equity of the one in possession.

5. **Vendor and purchaser** 🔑235

Want of knowledge of outstanding enforceable prior right in realty would be of no avail to grantee who took title under deed of gift.

6. **Trial** 🔑105(1)

Where evidence upon which material findings were based came in without objection, no question could be raised as to sufficiency of pleadings to admit it.

7. **Pleading** 🔑406(9)

Any omission to allege all of facts necessary to justify decree of specific performance in favor of plaintiff was waived where defendant failed to object to evidence tending to show that contract under which plaintiff claimed an interest was just and reasonable, and consideration adequate, and such elements were fully established by the proof.

8. **Specific performance** 🔑128(3)

Husband could not receive from wife's donee a greater compensation for breach of wife's agreement to convey to husband an undivided interest in land conveyed to donee than husband would have received had agreement been fully performed by his wife.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by John B. Hart against Andrew Erickson to quiet title to land and to cancel a deed, wherein defendant filed a cross-complaint by which he sought to have his title confirmed, to recover possession of the property, and for other relief. From a judgment, defendant appeals.

Reversed with directions.

Barry Sullivan, of Los Angeles, for appellant.

B. Dean Clanton and Sidney N. Bachtell, both of Los Angeles, for respondent.

SHINN, Justice.

In 1926 Ella Horner was the owner of a small home in Los Angeles. She and John B. Hart (plaintiff) entered into an agreement, by the terms of which they agreed to intermarry, John agreed to pay off a certain mortgage on the home, to make all necessary repairs and improvements thereon, to pay all city and county taxes assessed against it, and to care for and provide for Ella, and she agreed to convey to him an undivided two-fifths interest in the home.

They married May 11, 1926, and lived together until Ella's death in August, 1941. John paid off the mortgage and in all respects kept his part of the agreement. On September 3, 1926, Ella and John went before a notary and Ella signed and acknowledged a deed which in terms conveyed to John an undivided two-fifths interest in the home property. She did not deliver this deed to him or record it and no one appeared to have known what became of it. The court found that Ella did not intend that the deed should then convey to John an interest in the property but that John then and at all times thereafter believed that she had done so and that he owned a two-fifths interest in the property, and that he fulfilled the agreement on his part in the belief that Ella had conveyed or would convey to him the interest as agreed. There was evidence as to a written agreement between them at that time which we shall mention later. However, in January 1935 Ella again went to a notary and signed and acknowledged a deed of gift of the property in favor of her nephew defendant Andrew Erickson. She left this deed in the possession of the notary, with instructions to record the same upon her death, which was done according to instructions. John knew nothing of this deed until after his wife's death.

John had himself appointed administrator of his wife's estate and brought suit as administrator and also individually against Erickson to quiet title and to cancel the deed to Erickson. He sought to recover a two-fifths interest in the property for himself and a three-fifths interest for the estate. Erickson filed a cross-complaint by which he sought to have his title confirmed, to recover possession of the property, and certain other relief to be hereinafter mentioned. The court found the facts as we have stated them, although much more fully, adjudged title to be in Erickson and declared a lien in favor of John B. Hart for the sums he had expended in improvement of the property and for taxes, in the amount of $3,054.61, less certain deductions, and ordered that the property be sold to satisfy the lien if the sum of $2,452.61 should not be paid within 90 days after entry of judgment. Erickson appeals.

In appellant's opening brief 19 separate points are listed; 12 are listed in respondent's brief, but these cannot be identified with the ones in appellant's opening brief, and neither brief makes mention of the point which is decisive of the appeal. On the findings the court should have given judgment in favor of plaintiff, John B. Hart, declaring him to be the equitable owner of a two-fifths interest in the property. Perhaps counsel have failed to see that this would have been a proper judgment because of the extreme demands of their respective clients, neither of whom admits that the other has any interest in the property.

[1] Where a vendee under an oral contract of purchase enters into possession of real property, pays part or all of the consideration, makes valuable improvements and performs all of his obligations under the contract with a design to carry the same into execution, a court of equity will decree performance by the vendor under the doctrine of estoppel. See cases listed 25 Cal. Jur., p. 479.

The findings establish the following as facts: John and Ella entered into an agreement under which John was to receive a two-fifths interest in the property; as will appear later, the consideration to be paid by John was adequate; he in good faith fully performed the agreement on his part; in so doing he believed and relied upon Ella's promise to convey him the agreed interest; and at all times after his marriage he in good faith claimed to own a two-fifths interest in the property adverse to all the world; he continuously lived on the property until his wife's death and was living there at the time of trial, and, as stated in the findings, "Andrew Erickson has at all times had knowledge of plaintiff's claim of interest and adverse possession and occupancy and knowledge of the improvements, repairs and taxes made and paid by plaintiff during the marriage and his reliance upon the aforesaid agreement between plaintiff and deceased; the court further finds that no consideration whatsoever was paid by said Andrew Erickson for said deed but that said defendant is a nephew of deceased." The conveyance to the latter was found to be subject to a life estate in Ella.

[2, 3] The case in its legal aspects is the following: John had a right to receive from his wife a conveyance of a two-fifths undivided interest in the property by virtue of the agreement between them, because it was fully executed in good faith on his part and his performance constituted an adequate consideration for the interest which he was to receive; defendant Erickson was a volunteer, with actual knowledge of John's possession, his claim of interest and his

expenditures of money on the faith of his agreement with his wife. All of these facts must be deemed to have been supported by the evidence, for the reason that the sufficiency of the evidence to support them is not challenged by appellants. It is true that reference is made to the testimony of plaintiff under a specification headed, "The Evidence is Insufficient to Support the Judgment for any Interest in said Land in Favor of John B. Hart," but the exceedingly brief quotations give excerpts from plaintiff's testimony that are entirely favorable to him and no other testimony is referred to or quoted.

Incidentally, it may be noted that upon cross-examination of plaintiff, testimony was developed to the effect that the agreement between John and Ella was in writing and was duly executed, although Ella kept both copies. While it makes no difference whether it was oral or in writing, in view of its having been executed on the part of plaintiff, in the light of the uncontradicted testimony the finding that the agreement was made might fairly be construed as a finding that it was a written agreement.

[4, 5] Upon the findings the judgment should have awarded plaintiff John B. Hart an undivided two-fifths interest in the land. One who is in possession of real property under a valid enforcible agreement by which he is acquiring the land or an interest in it, and who fulfills his agreement, cannot be defeated of his right by a subsequent conveyance of the land to a third person, unless the latter be a purchaser in good faith and for value, paid or rendered without notice or knowledge of the earlier equity of the one in possession. Whether the occupancy of the property by John jointly with his wife was constructive notice of his rights is immaterial in view of the finding of actual knowledge, but even without this finding, want of notice or knowledge of an outstanding enforcible prior right would be of no avail to Erickson, who took title under a deed of gift. Verification of these statements will be found in the cases and texts on the law of vendor and purchaser.

[6, 7] The evidence upon which the material findings were based came in without objection and therefore no question can be raised as to the sufficiency of the pleadings to admit it. Any omission to allege all of the facts necessary to justify a decree of specific performance in favor of plaintiff was waived by failure to object to evidence tending to show that the contract was just and reasonable and the consideration adequate, and these elements were fully established by the proof.

[8] The judgment awarded plaintiff a lien in the gross amount of $3,054.61. This amount was reduced to $2,452.61 by charges against plaintiff for use of a portion of the property, and for rentals collected, subsequent to the death of his wife. The property is worth only $3500. Defendant states this to be a fact, plaintiff does not question it, and we find that it is supported by the testimony of plaintiff which defendant in his brief adopts as true. Plaintiff's two-fifths interest in the land was therefore worth $1400. The gross lien awarded in his favor amounted to six-sevenths of the value of the property. In no event should plaintiff receive greater compensation for breach of the agreement than he would have received had it been fully performed by his wife. The judgment must therefore be reversed.

We note from the supplemental clerk's transcript that defendant has been placed in possession of the property under a writ of possession as of January 20, 1943.

Upon a retrial of the case the only issues to be tried will be those pertaining to the rights of tenants in common under the facts established. The findings do not determine these questions and we do not undertake to say what the rights of the parties may be. In view of the foregoing disposition of the case it is unnecessary to consider the matters discussed in the briefs of the parties.

The judgment is reversed with directions to the court to enter judgment decreeing plaintiff, John B. Hart, to be the equitable owner of an undivided two-fifths interest in the property, that the same be conveyed to him by Erickson; that Erickson is the owner of an undivided three-fifths interest, and for such further proceedings as may be appropriate to settle the claims of the parties arising out of the use and occupation of the property, the collection of rentals, and related matters. Appellant to recover costs of appeal.

DESMOND, P. J., and PARKER WOOD, J., concur.

63 Cal.App.2d 671

BROOKS v. BROOKS.

Civ. 14107.

District Court of Appeal, Second District,
Division 3, California.

April 3, 1944.

Hearing Denied June 1, 1944.

1. Husband and wife 🔑232(3)

In action to recover money paid to defendant under a contract allegedly void because providing for payment for domestic services performed for plaintiff by defendant as plaintiff's wife, evidence sustained finding that plaintiff failed to sustain allegations of petition that such contract had been entered into, or that he had only promised to marry defendant and make such payments because of her threat to leave his employ as a nurse.

2. Trial 🔑391

Since the burden of proving his allegations was on plaintiff, it was proper to find "not true" any allegation he failed to establish as the truth.

3. Appeal and error 🔑1011(1)

In action to recover money paid to defendant under a contract allegedly void because providing for payment for domestic services performed for plaintiff by defendant as plaintiff's wife, where testimony of both parties conflicted with verified pleadings filed in previous divorce action between the parties, nothing more than a conflict in the evidence was presented which it was the duty of the trial court to resolve.

4. Husband and wife 🔑232(3)

In action to recover money paid to defendant under a contract allegedly void because providing for payment for services rendered to plaintiff by defendant as plaintiff's wife, evidence supported finding that defendant had no knowledge that her verified cross-complaint in divorce action previously brought by plaintiff contained statement that such contract had been entered into.

5. Trial 🔑395(5)

Findings that control are those on the ultimate facts, not those covering matters only of probative value.

6. Evidence 🔑208(2)
Pleading 🔑36(1)
Witnesses 🔑379(7)

A party is bound by his pleadings in that case, and such pleadings may be received in other actions to impeach him as a witness or as admissions against interest.

7. Estoppel 🔑68(4)

A wife's statement in divorce action that husband had orally contracted to pay her a monthly wage for services rendered to him did not estop her to assert, in husband's subsequent action to recover money so paid, that the money received was not pursuant to contract void because contrary to public policy, but as husband's contribution to her welfare.

8. Contracts 🔑138(1)

Ordinarily, the parties to a contract, void because contrary to public policy will be left where they are, when they come to the court for relief.

9. Contracts 🔑138(3)

Where it appeared that plaintiff was the one who proposed marriage to defendant, by entering into alleged contract to pay defendant for services rendered by her as plaintiff's wife, plaintiff was at least as guilty as defendant and was not entitled to the aid of the courts in recovering the sums paid to her under contract on ground that the contract was void as against public policy.

10. Appeal and error 🔑1046(1)

That trial judge decided case without reading depositions after they were received in evidence, but that he read them before they were received in evidence, if error, was not prejudicial.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by James Robert Brooks against Bessie Marie Brooks to recover money paid to defendant pursuant to an alleged void contract. From a judgment for defendant, plaintiff appeals.

Affirmed.

See also 53 Cal.App.2d 95, 127 P.2d 296; 53 Cal.App.2d 93, 127 P.2d 298.

Newby & Newby, of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The plaintiff has appealed from the judgment which denied him any portion of the $3630 he sought to recover from his wife, the defendant. The theory of plaintiff's complaint was that the money had been paid under a contract void because against public policy, the contract being that the parties would get married, the defendant would continue to render to the plaintiff the domestic and nursing services she had been rendering as his housekeeper and practical nurse, and the plaintiff would continue to pay her the eighty dollars a month he had been paying her for those services. The marriage and the agreement to pay defendant $80 per month, according to the complaint, were not plaintiff's proposals but came about by a threat on the defendant's part that she would leave him unless he married her, and that when she left he would be helpless because he could not get another nurse. He "reluctantly" yielded to the solicitations of the defendant. Division Two of this court had this complaint under review in Brooks v. Brooks, 1941, 48 Cal.App.2d 347, 119 P.2d 970, and found that its allegations stated facts sufficient to constitute a cause of action.

[1] The evidence amply sustains the trial court's determination that the allegations of the complaint were not true. Plaintiff's testimony was in harmony with the allegations of his complaint, with the exception that his inability to secure another nurse to perform the menial tasks that had been defendant's daily lot, became known to the plaintiff as a result of his own investigation; it was not a part of the pressure he claimed that the defendant had brought to bear upon him. Possibly the trial court wondered if maybe the plaintiff had sworn to something other than the truth, in verifying his complaint. Such a suspicion may well have grown into a conviction when the defendant took the stand and testified that the plaintiff and not she had proposed marriage and that positively nothing was said to the effect that he was to pay her eighty dollars per month. The trial court may well have doubted, also, the truth of plaintiff's "reluctance" to marry the defendant, in view of the numerous notes from "Dimmy," the plaintiff, to "Cuddle," the defendant.

Two of plaintiff's positions, on this appeal, have a common foundation. He contends, first, that the testimony of the defendant, to the effect that there had been no agreement that she was to receive eighty dollars a month, is incredible. Not only is it incredible for her to so testify, plaintiff argues, but there has been "raised a conclusive presumption of the existence of said oral agreement, which she cannot deny in this action." The ground upon which these two contentions are based is found in the pleadings in an earlier case brought by the plaintiff in this action to obtain a divorce from the defendant. In the divorce action the defendant, in filling out the formal affidavit for order to show cause in re alimony pendente lite, etc., after stating that she had been employed, gave the following response to the form's request to "state the dates, occupations, and salaries received": "Eight years ago I took position as nurse for plaintiff. $80.00 per mo. In 1936, we were married. He promised to pay the same to me as before marriage." In his amended complaint, in the divorce action, the plaintiff alleged that "it was orally agreed" that if they married he would continue to pay her $80 per month. This allegation the defendant did not deny when she answered. Furthermore, as the plaintiff points out, the defendant filed a cross-complaint in the divorce action in which she alleged that "plaintiff, at the time of his proposal of marraige [sic] to this defendant, promised and agreed that plaintiff would provide room and board for this defendant and her said son, and would in addition thereto, pay to defendant the sum of $80.00 per month, said sums to be her own separate property."

[2, 3] Proof of these statements made by the defendant in the course of the divorce action and before the decision in Brooks v. Brooks, supra, 48 Cal.App.2d 347, 119 P.2d 970, became known, both impeached the defendant as a witness and furnished admissions against her interest tending to establish the fact that the oral agreement claimed by the defendant had been entered into. It does not follow, however, that the trial court was without warrant in finding that plaintiff's allegations were untrue. As the burden of proving his allegations was on the plaintiff, it was proper to find "not true" any allegation which he failed to establish as the truth. Dieterle v. Bekin, 1904, 143 Cal. 683, 688, 77 P. 664, 666. The argument that a party is not to be believed because he has sworn falsely cuts both ways in this case. Plaintiff's testimony, as we have seen, did not agree with his sworn statement that the defendant had told him that if she left he could not get another nurse. But this is not all. The very allegation

of the cross-complaint quoted above, to which the plaintiff points as being contrary to the defendant's present testimony, the plaintiff denied under oath in his answer. The confusion, created by conflicts between the sworn statements in the pleadings and proceedings and the sworn statements of the witnesses, produced nothing more startling than a conflict in the evidence, which it became the duty of the trial court and not of an appellate court to resolve. Ruth v. Krone, 1909, 10 Cal.App. 770, 780, 103 P. 960, 964.

[4, 5] A finding was made "that it is true that defendant executed verified statements in the divorce action * * * in which it was stated that at the time of his proposal of marriage to defendant, plaintiff promised and agreed to pay defendant $80.00 per month * * * but the Court finds that defendant did not know that said statements were in the said verified statements, and that she signed said statements without knowledge that said statements were contained therein." Contrary to plaintiff's claim, the evidence does support this finding, for such statements were contained only in the cross-complaint, and when confronted with them the defendant answered: "If there was anything said at that time, I have no memory of it and it may be I didn't read this thoroughly. I don't understand, but I will state now that at the time of the marriage, of the proposal, that there was no $80.00 a month mentioned, just as I said yesterday and today." Moreover, the findings that control, in such a situation as this, are those on the ultimate facts, not those covering matters only of probative value. White v. Rosenstein, 1933, 134 Cal.App. 576, 578, 25 P.2d 884, 885; Fitzpatrick v. Underwood, 1941, 17 Cal.2d 722, 727, 112 P.2d 3, 6.

[6, 7] Plaintiff's second contention based on the pleadings in the divorce action, is variously expressed but its first appearance is typical. "The respondent is conclusively bound by her affidavit and pleadings filed in the divorce action." Why the defendant should be bound by her pleadings but the plaintiff be free to depart from his denial thereof, is not developed. Insofar as plaintiff's cases touch at all on the problem, they are limited to the proposition that a party is bound in any case by his pleadings in that case, and that they may be received in other actions to impeach him as a witness or as admissions against interest. We think it clear that under the circumstances of this action, the defendant does not appear to be estopped, by her statements in the divorce action, to take the position that the money she received from her husband during the term of their married life was received as his contribution to his wife's welfare and not pursuant to a contract void because contrary to public policy.

[8, 9] Should it be granted that by her pleadings in the divorce action the defendant is somehow estopped in this action from denying that she and the plaintiff did enter into a contract whereby he was to pay her $80 per month after their marriage, the judgment denying the plaintiff relief would still be supported. This is so because of the finding, not contradicted by defendant's pleadings, that it was the plaintiff and not the defendant who proposed. Ordinarily the parties to a contract, void because contrary to public policy, will be left where they are, when they come to the court for relief. Martin v. Wade, 1869, 37 Cal. 168, 174, 175; Bank of Orland v. Harlan, 1922, 188 Cal. 413, 421, 206 P. 75; Haruko Takeuchi v. Schmuck, 1929, 206 Cal. 782, 788, 276 P. 345; Schmitt v. Gibson, 1910, 12 Cal.App. 407, 107 P. 571. In Brooks v. Brooks, supra, 48 Cal.App.2d 347, 119 P.2d 970, it was held that the plaintiff could recover, because the parties were not in pari delicto. But this ruling, based on the allegations of the complaint, ceased to be the law of the case when it appeared that the allegation that the defendant was the moving spirit was not true. The plaintiff now appearing as the one who proposed the marriage and, for this point only we are assuming, the agreement to continue to pay $80 per month, he appeared at least as guilty as the defendant for entering into the contract, and is not now entitled to receive the aid of the courts in recovering the sums he has paid his wife under the contract he now characterizes as iniquitous.

[10] Plaintiff makes arguments under various headings which, upon examination, are found to fall under, and with, those we have discussed. This is not true of one point, made for the first time in plaintiff's reply brief. He complains that the trial judge decided the case without reading the

depositions after they were received in evidence, but that he had read them before they were received in evidence. We are not sure which action is claimed to be error, but it is clear that no prejudice exists if error does.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

LA PRADE v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al. *

Civ. No. 14095.

District Court of Appeal, Second District, Division 3, California.

April 3, 1944.

Hearing Granted May 1, 1944.

1. Mandamus ⚷71

"Mandamus" has traditionally been merely a proceeding to compel performance of ministerial duties and has not been widely used as a method for reviewing decisions of administrative agencies.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandamus".

2. Mandamus ⚷3(1), 63

"Mandamus" is the remedial writ used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided.

3. Mandamus ⚷1

A writ of "mandamus" is used, not only to compel administrative action which is refused in violation of law, but also to annul or restrain administrative action already taken in violation of law.

4. Mandamus ⚷70

The writ of "mandamus" may be used, not only to compel performance of a ministerial act, but also, in a proper case, for purpose of reviewing final acts and decisions of state-wide administrative agencies which do not exercise judicial power.

5. Certiorari ⚷22
Mandamus ⚷72

Either certiorari or mandamus is an appropriate remedy to test proper exercise of discretion vested in a local board.

6. Constitutional law ⚷79

Rulings of an administrative board on questions of law cannot be accorded finality, and such questions may be determined conclusively only by a court exercising constitutional judicial power.

7. Officers ⚷103

A determination by court of correctness of ruling of an administrative board on questions of law includes inquiry as to whether board acted arbitrarily, and whether there was substantial evidence to support its determination of fact.

8. Mandamus ⚷167

The rule that it must be alleged and proved in mandamus proceeding attacking action of local board having fact-finding powers that board acted arbitrarily or in abuse of discretion is satisfied by allegation and proof of facts showing such arbitrary action or abuse of discretion, notwithstanding that petition did not include words "acted arbitrarily" or "abuse of discretion."

9. Mandamus ⚷154(5)

Mandamus petition alleging that Los Angeles Board of Civil Service Commissioners discharged petitioner without hearing or investigation and without taking evidence or testimony, and refused to grant a hearing or investigation to petitioner, contained allegations of fact tantamount to an allegation that Commission acted arbitrarily and in abuse of discretion.

10. Mandamus ⚷167

Where mandamus petition alleged that Los Angeles Board of Civil Service Commissioners sustained petitioner's discharge without an investigation and proof established that an investigation was made but was wholly favorable to petitioner, and that notwithstanding favorable investigation report, Commission sustained the discharge, charge that Commission acted arbitrarily and in abuse of discretion was proved even though particular specification that no investigation was made was not proved, and variance was not material.

11. Mandamus ⚷168(3), 176

The mere fact that Los Angeles Board of Civil Service Commissioners caused an investigation to be made in connection with petitioner's discharge did not preclude court, in mandamus proceeding, from inquiring into arbitrariness of action of commission in sustaining discharge irrespective of whether investigation was favorable to petitioner, and court properly admitted investigation report.

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* Subsequent opinion 162 P.2d 13.

◆

On petition for rehearing.

Petition denied.

For former opinion, see 146 P.2d 487.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for appellants.

David Sokol, of Los Angeles, for respondent.

PER CURIAM.

On denial of rehearing after decision, 146 P.2d 487.

[1-5] Appellants assert, in their petition for a rehearing, that the matters considered by the trial court and this court were not proper matters for consideration in a mandamus proceeding. In Bodinson Mfg. Co. v. California E. Comm., 1941, 17 Cal.2d 321, at page 329, 109 P.2d 935, at page 940 it was said: "Mandamus has traditionally been merely a proceeding to compel the performance of ministerial duties and has not been widely used as a method of reviewing the decisions of administrative agencies. * * * In this state, however, the law is now established that mandamus is the remedial writ which will be used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided. * * * Our late decisions have recognized that the use of mandamus to review acts of administrative agencies is a departure from the traditional purpose of the writ, and that many historical theories concerning mandamus (as, for example, the technicalities of the rule that discretion in the inferior officer will bar the issuance of the writ) will not always be applicable where the writ is used to review the acts of administrative bodies. * * * The writ of mandamus may therefore be used in this state, not only to compel the performance of a ministerial act, but also in a proper case for the purpose of reviewing the final acts and decisions of statewide administrative agencies which do not exercise judicial power." In a later case involving a local board, Walker v. City of San Gabriel, 1942, 20 Cal.2d 879, at page 881, 129 P.2d 349, 350, 142 A.L.R. 1385, it was said: "Either certiorari or mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board."

[6, 7] Rulings of an administrative board on questions of law cannot be accorded finality. Such questions may be determined conclusively only by a court exercising constitutional judicial power. Bodinson Mfg. Co. v. California E. Comm., supra, 17 Cal.2d page 326, 109 P.2d 935. Such questions of law would include inquiry as to whether the board acted arbitrarily and whether there was substantial evidence to support its determination of fact.

[8-10] The case of Dierssen v. Civil Service Commission, 1941, 43 Cal.App.2d 53, 110 P.2d 513, cited in Walker v. City of San Gabriel, supra, and relied upon by appellants herein, held (pages 59 and 63 of 43 Cal.App.2d, at pages 517, 519 of 110 P.2d) that where fact-finding powers have been conferred on a local board it must be alleged and proved in a mandamus proceeding attacking its action that it acted arbitrarily or in abuse of discretion. The petition herein did not include the words "acted arbitrarily" or "abuse of discretion," but it did allege: "[T]he Board of Civil Service Commissioners failed to make an investigation into the discharge of the petitioner and failed to make findings in writing thereon"; that "said Board of Civil Service Commissioners conducted no hearings or investigation with respect to the discharge of petitioner and took and received no evidence or testimony pertaining thereto, and refused to grant a hearing or investigation to petitioner"; and that petitioner was discharged. If those allegations were true the civil service commission did act arbitrarily and in abuse of discretion. Appellants concede that the petition stated a cause of action. Those allegations were tantamount to an allegation that the commission acted arbitrarily and in abuse of discretion. The gist of the charge was that the commission acted arbitrarily and in abuse of discretion, and the particular specification of arbitrariness and abuse of discretion alleged was that no investigation had been made. The proof was that an investigation had been made but it was wholly favorable to petitioner, and that notwithstanding such favorable investigation report, recommending against discharge, the commission "sustained the discharge." The charge of acting arbitrarily and in abuse of discretion

was proved even though the particular specification, that no investigation was made, was not proved. The proof as to arbitrariness and abuse of discretion related directly to the subject matter of the specification alleged, that is, to the matter of investigation. The variance between the particular specification of arbitrariness alleged and the one proved was only as to the degree of arbitrariness in connection with the same subject matter, and was not a material variance. It is difficult to determine which would be the more arbitrary—to "sustain the discharge" when no investigation had been made, or to "sustain the discharge" notwithstanding an investigation that had been made, which was wholly favorable to petitioner.

[11] In the petition for a rehearing counsel, representing appellants, argues that the investigation report should not have been received in evidence for the reason "petitioner's own testimony had shown an investigation." Apparently his theory is that when it was shown there had been compliance merely with the letter of the law that an investigation should be made, then, even though the investigation showed that the employee should not be discharged, the inquiry in a court concerning a matter of law, as to arbitrary action and abuse of discretion, was ended. Appellants presented no evidence. There was no showing that there was any other investigation or information upon which the commission acted. Counsel, however, in the petition for a rehearing, created an implication that the commission had acted upon other information, by asking the court certain questions—such as, "Does this court know what the civil service commissioners found out, bad or good?" In refutation of such implication, the letter of September 28th from the commission notifying petitioner that he was discharged identified the investigation report of September 1st (the one received in evidence) as the one upon which it acted. That letter stated: "* * * on the 22nd" the commission "took under consideration the matter of your discharge August 28, 1942 * * * and staff report of September 1st covering investigation made at your request. I am instructed to inform you that, in considering the case the Civil Service Commission as a result of its investigation is of the belief. * * * [This letter was set out in the opinion.]" The case was tried upon the theory that arbitrary action and abuse of discretion were involved. Counsel for appellants apparently considered that the issue was met by the mere showing that an investigation had been made, irrespective of whether the investigation was favorable to petitioner.

The petition for a rehearing is denied.

DESMOND, P. J., and SHINN and PARKER WOOD, JJ., concur.

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63 Cal.App.2d 616

PEOPLE v. O'MALLEY.

Cr. No. 2292.

District Court of Appeal, First District,
Division 2, California.
March 31, 1944.

1. Criminal law 🔑997, 998

Petition for writ of error coram nobis and motion to vacate judgment of conviction was proper procedure where defendant claimed he had entered plea of guilty because of threats, misstatements and intimidation and had been deprived of right to trial by jury, but such relief could be had only upon strong and convincing showing of deprivation of legal rights by extrinsic causes.

2. Criminal law 🔑997, 998

Defendant alleging he was induced to change plea of not guilty to guilty because of threats, misstatements and intimidations, but making obvious inconsistent statements in affidavit, failed to make convincing showing required to vacate judgment of conviction, where he had failed to make such claims to public defender representing him on trial or in letter to assistant district attorney almost a year after conviction. Pen.Code, §§ 487, 488.

◆

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Marvin O'Malley was convicted of grand theft, and from an order denying his petition for writ of error coram nobis and denying his motion to vacate the judgment of conviction, he appeals.

Affirmed.

Sol A. Abrams, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

This is an appeal by defendant from an order denying his petition for a writ of error coram nobis and denying his motion to vacate the judgment of conviction.

On March 30, 1942, defendant was sentenced to imprisonment in San Quentin upon his plea of guilty to the charge of grand theft. His above-mentioned petition and motion were not filed until September, 1943. Affidavits of defendant and others were filed therewith. Defendant claimed among other things that he had entered his plea of guilty by reason of "threats, coercion, misstatements, misrepresentations, wrongful persuasion, duress and intimidations of Inspector John Cannon and Assistant District Attorney Harmon Skillin" and that defendant had thereby been deprived of his right to a trial by jury. The trial court held a hearing at which both the inspector and the assistant district attorney were sworn and examined. The trial court denied defendant's petition and motion, whereupon defendant took this appeal.

[1] Defendant states his contentions on this appeal as follows, first, "Writ of corum nobis is proper procedure in this case", and second, "Petition uncontroverted—insufficient counter showing". In support of his first contention, defendant cites and relies upon People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Butterfield, 37 Cal.App.2d 140, 99 P.2d 310; In re Sargen, 135 Cal.App. 402, 27 P.2d 407, and other authorities dealing with the nature of the writ of error coram nobis and the relationship of a petition for such writ to a motion to vacate a judgment of conviction. Respondent does not question the right of a defendant to obtain relief through such proceedings upon a proper showing, but respondent points out that such relief may be had "only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes." People v. Schwarz, 201 Cal. 309, 315, 257 P. 71, 73; see also People v. Gourdin, 26 Cal.App.2d 494, 496, 79 P.2d 782. Respondent contends that no such showing was made by defendant and that all the material allegations made in connection with petition and motion were controverted by the showing made by respondent. We believe respondent's last-mentioned contention is fully sustained by the record before us and we will briefly outline the situation as presented to the trial court.

It appears that defendant is a college graduate who is not unfamiliar with legal procedure. He had previously entered a plea of guilty in 1936 to a felony charge and he testified upon his sentence in the present case that he had been released from San Quentin in 1940 "on parole to the Washington authorities" and was wanted by them at the time. He further testified at the time of sentence that he had used the name of Miller for the purpose of concealing his identity.

In the present case, Miss Caroline E. Kurlbaum, an elderly woman, filed a complaint against defendant in February 1942, charging him under the name of E. R. Miller. It was alleged therein that defendant had committed the crime of grand theft in that on or about January 29, 1941, defendant had unlawfully taken certain of her personal property consisting of two bonds, therein described, of the value of $875. Defendant was represented by the public defender throughout the proceedings in the municipal and superior courts of San Francisco. In the municipal court, defendant waived preliminary examination and he was held to answer to the superior court on the charge of grand theft. An information charging that offense was filed by the district attorney and, upon arraignment, defendant entered a plea of not guilty. On March 30, 1942, defendant asked permission to withdraw his plea of not guilty and to enter a plea of guilty. This permission was granted, and, after defendant entered his plea of guilty, his counsel waived time for sentence and stated that there was no legal cause why sentence should not be pronounced. Inspector Cannon then testified concerning the offense which consisted of taking the bonds from Miss Kurlbaum upon the representation that he would get her $875 for them and thereafter selling the bonds and failing to turn over any money to her. After sentence had been pronounced, defendant answered the customary questions asked of persons sentenced to imprisonment in the state prison. On January 16, 1943 defendant wrote to the assistant district attorney. He stated in his letter that he would soon appear before the parole board and that he "would appreciate what help you may feel free to give me". Defendant asked for a recommendation from the assistant district attorney to the parole board that he "be released to the Washington authorities at the expiration of my minimum" and also asked that the matter be called to the attention of the trial judge for his consideration. He further wrote that upon entering the state prison, he had stated that the bonds in question had a value of $256.50, "this being the market value and the price for which I sold them;" that he had been informed that the records showed a value of $875; that "This is an error, and so that my statement does not go against me as a falsehood or an attempt to mislead the board, I would appreciate it if you could write the clerk of the board, Mr. Noon, and state the actual value of these securities." In this letter, written almost a year after sentence, no mention was made by defendant of the claims subsequently made in support of his petition and motion.

The petition and motion, together with the several supporting affidavits, present a variety of claims. Preliminarily it may be stated that it subsequently appeared upon the hearing that the offense had been committed on or about January 29, 1942, and not on January 29, 1941, as set forth in the information. In support of his claims, defendant filed his affidavit and the affidavits of others attempting to establish an alibi and his innocence of any offense. He and his witnesses swore that defendant had not been in San Francisco on January 29, 1941. Defendant swore that he had been in Seattle during the entire year of 1941; that he had never at any time taken any property from Miss Kurlbaum; that he had never met her; that he had never been in her presence; that he had never entered into any transaction of any kind with her; and that he had never been known by or used the name of E. R. Miller at any time.

[2] In other portions of defendant's lengthy affidavit, he made entirely inconsistent claims in swearing to what he termed the "true facts, namely, that affiant had taken a single bond on two different occasions, each bond being of the value of $126.75". Upon the basis of these alleged facts supported only by defendant's affidavit, defendant claimed that he had not committed the offense of grand theft as charged but only petty theft, see Penal Code, sections 487 and 488, and that when he pleaded guilty he "believed he was being charged with an entirely different offense which involved the theft of property under the value of $200, which constituted the crime of petty theft".

In addition to the foregoing claims defendant alleged in his petition that he "was forced into and induced to change his plea of not guilty to a plea of guilty solely because and by reason and as a result of threats, coercion, misstatements, misrepresentations, wrongful persuasions, duress and intimidations of Police Inspector John Cannon and Assistant District Attorney Harmon Skillin". While defendant sought to support this claim by the facts alleged in his affidavit, all material facts so alleged were controverted by the testimony produced by respondent. Defendant's contention to the contrary is not sustained by the record. Furthermore, there were other considerations which cast serious doubt upon all the claims made by defendant. We have mentioned above the obvious inconsistency found in the various claims made in the same affidavit. We might further mention defendant's failure to discuss any of said claims with the public defender and his failure to mention any of said claims in his letter written to the assistant district attorney almost a year after his conviction. As there was a conflict in the evidence before the trial court, we conclude that the trial court was entirely justified in resolving that conflict against defendant and in determining that defendant had wholly failed to make the "strong and convincing showing" which was required.

The order denying defendant's petition for a writ of error coram nobis and denying defendant's motion to vacate the judgment of conviction is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

24 Cal.2d 70

ESCHWIG v. STATE BAR OF CALIFORNIA.

S. F. No. 16941.

Supreme Court of California.
April 3, 1944.

Attorney and client ⚿58

Evidence as to attorney's neglect in handling client's business warranted a reprimand rather than a suspension from practice for period of six months. St.1939, p. 357, § 6103.

EDMONDS, J., dissenting.

In Bank.

Proceedings by Constantine Fitzgerald Eschwig against the State Bar of California to review the recommendation of the Board of Governors of the State Bar that petitioner be suspended from the practice of law for a period of six months.

Petitioner reprimanded.

John A. Foley, of San Francisco, for petitioner.

Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the Board of Governors of The State Bar that petitioner be suspended from the practice of the law for a period of six months.

Petitioner was charged with having violated his oath and duties as an attorney at law within the meaning of section 6103 of the State Bar Act, Business and Professions Code, St.1939, p. 357, in that he grossly neglected the interests of a client. Petitioner denied the charge and the matter proceeded to hearing before a local committee. It appears that in September, 1941, petitioner, then practicing at Tule Lake, was retained by the client to recover possession of a harvester which the conditional vendor had repossessed. At the time, the client delivered to petitioner two documents or orders representing the contract for purchase of the harvester. Approximately one month later, petitioner moved his office to San Francisco. In February, 1942, petitioner filed an action in Siskiyou County on behalf of his client—explaining herein that he could not do so earlier because he had to await the furnishing of certain information which he received in San Francisco in a letter from his client. He also states that he spent considerable time in attempting to effect an amicable adjustment without suit, as instructed by his client. Due to petitioner's delay in handling the matter, the client requested return of the two orders. Approximately two weeks after opening his office in San Francisco, petitioner sent his client one of the orders. Repeated requests were made for the other one, without result. After the action had been filed, the client associated another attorney with petitioner. Pending hearing of a demurrer in the action, the associate made several written requests for the missing purchase order, to which petitioner made no reply. The client then complained to The State Bar, and petitioner for the first time advised his client and associate counsel that he had lost one of the purchase orders.

Petitioner testified before the committee that he had failed to return the second order because he had been unable to find it and was reluctant to admit the loss of it until he "was satisfied that it was useless to look further," and that he disliked "going on record" as admitting he had lost the paper. He also testified that at about this time his wife became seriously ill and spent considerable time in a sanitarium, thus placing the care of a child upon him. Petitioner further explained that not until the time of trial were the purchase orders needed to establish his client's cause of action. It also appears that petitioner obtained from counsel for the vendor photostatic copies of all pertinent contracts or orders, which he presented at the committee hearing.

At the conclusion of its hearings the committee made findings and concluded that petitioner had violated his oath and duties as an attorney, and recommended that he be given a private reprimand, adding that "while petitioner has been dilatory in attending to his client's litigation, and with particular reference to his failure to supply the missing document, or advise his client or associate counsel of its disappearance, we feel there is no moral turpitude involved, and * * * we are inclined to believe the neglect in this particular matter was contributed to by the serious illness at that time of his wife and the removal of his offices from Tule Lake to San Francisco." The Board of Governors adopted the committee's findings, but recommended that petitioner be suspended from practice for a period of six months.

We are of the opinion that a reprimand, as recommended by the local committee, is sufficient discipline under the circumstances and this opinion shall constitute such reprimand.

EDMONDS, Justice (dissenting).

The only dereliction of professional duty charged to the petitioner in the findings of fact made by the local administrative committee and adopted by the Board of Governors is that he neglected his client's business. This finding, considered in connection with the committee's conclusions stated in the form of a "recommendation," certainly does not show any conduct which justifies disciplinary action under the rules heretofore laid down by this court. Stephens v. State Bar, 19 Cal.2d 580, 122 P.2d 549; Trusty v. State Bar, 16 Cal.2d 550, 107 P.2d 10; Waterman v. State Bar, 8 Cal.2d 17, 63 P.2d 1133; Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403; Marsh v. State Bar, 210 Cal. 303, 291 P. 583. Accordingly, in my opinion, the proceeding should be dismissed.

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23 Cal.2d 862

In re GILMAN'S GUARDIANSHIP.

L. A. 18899.

Supreme Court of California.

March 29, 1944.

1. Insane persons 🔑27

Ward, as a "party aggrieved" by order adjudging her incompetent and appointing a guardian, had right to appeal therefrom if she so desired.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Aggrieved".

2. Insane persons 🔑27

The rule that a person under disability must appear by general guardian, or guardian ad litem, does not apply where question involved is validity of order of guardianship itself, and where appeal is taken directly from that order.

3. Insane persons 🔑27

An attorney, who represents an alleged incompetent, may appeal from order adjudging client incompetent on behalf of client, but where attorney is not authorized by client to notice an appeal he may not do so in his individual capacity.

4. Insane persons 🔑27

Where affidavit of client, an alleged incompetent, filed in support of guardian's motion to dismiss appeal from order adjudging client an incompetent, averred that client did not engage attorney to appear for her or to take appeal and that he was proceeding without her authority and against her wishes, purported appeal from order adjudging client an incompetent was ineffectual.

5. Insane persons 🔑27

Affidavit of client, an alleged incompetent, which averred that appeal taken on her behalf by her attorney from order adjudging client an incompetent was being prosecuted without client's authority and against her wishes, together with guardian's noticed motion to dismiss appeal, terminated attorney-client relationship and constituted a request by client for a dismissal of appeal.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceedings in the matter of the guardianship of the person and estate of Fanny B. Gilman, an incompetent person. From an order adjudging Fanny B. Gilman to be incompetent and appointing a guardian of her person and estate, an appeal was taken. On guardian's motion to dismiss the appeal.

Appeal dismissed.

Herbert Cutler Brown, of Los Angeles, for appellant.

G. W. Nix and Henry F. Walker, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is a motion to dismiss an appeal from an order adjudging Fanny B. Gilman to be incompetent and appointing a guardian of her person and estate. The appeal was noticed by Herbert Cutler Brown, subscribing himself as attorney for the incompetent. The guardian, as movant, alleges that Mr. Brown was never engaged by or on behalf of the incompetent and therefore was without authority to notice the appeal.

The order appointing guardian was entered August 24, 1943. Among the papers supporting the motion to dismiss the appeal is an affidavit of the incompetent that she had never engaged or employed Mr. Brown to appear for her or to take the appeal, and that he is therefore proceeding without her authority and against her wishes. In opposition thereto, he filed a counter-affidavit in which he avers that he first met the incompetent on September 29, 1943, and that she then stated to him, "I want you to act as my attorney. I want you to get me out from under the control of [the guardian] and away from this place." It is apparent from the record that Mr. Brown acted in good faith in noticing the appeal.

[1, 2] Mrs. Gilman, as a party aggrieved by the order adjudging her incompetent and appointing a guardian, had the right to appeal therefrom if she so desired. Matter of Moss, 120 Cal. 695, 697, 53 P. 357; Sullivan v. Dunne, 198 Cal. 183, 193, 244 P. 343; cf. In re Guardianship of Waite, 14 Cal.2d 727, 97 P.2d 238. The rule that a person under disability must appear by general guardian, or guardian ad litem, does not apply to a case where the very question involved is the validity of the order of guardianship itself and where the appeal is taken directly from that order.

[3-5] An attorney who represents an alleged incompetent may take an appeal therefrom on behalf of the incompetent. Matter of Moss, supra, 120 Cal. at page 697, 53 P. 357; cf. In re Guardianship of Waite, supra. But where the attorney was not authorized by the incompetent to notice an appeal he may not do so in his individual capacity. Sullivan v. Dunne, 198 Cal. 183, 192, 244 P. 343; In re Estate of Sullivan, 198 Cal. 195, 196, 244 P. 347. Here, the affidavit of Mrs. Gilman, filed in support of the motion to dismiss, avers that she did not engage or employ Mr. Brown to appear for her or to take the appeal and that he is proceeding without her authority and against her wishes. Any purported appeal under such circumstances would be ineffectual. Sullivan v. Dunne, supra, 198 Cal. at page 192, 244 P. 343; In re Estate of Sullivan, supra, 198 Cal. at page 196, 244 P. 347. If Mrs. Gilman did employ him to notice the appeal, nevertheless the attorney-client relationship would now have to be considered terminated in view of her affidavit that the attorney is presently proceeding against her wishes in attempting to further prosecute the appeal. The affidavit together with the noticed motion constitute a request by the incompetent for a dismissal of the appeal. See In re Moss, 7 Cal.Unrep. 172, 173, 74 P. 546. In this connection Mr. Brown states that under the circumstances he has no desire to further represent the incompetent and "will welcome an honorable discharge from all further duties and obligations as such attorney."

The motion is granted and the appeal is dismissed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

23 Cal.2d 774

MILLER v. McKENNA et al.
L. A. 18157.

Supreme Court of California.
March 20, 1944.

As Modified on Denial of Rehearing
April 18, 1944.

1. Taxation 🔑**658(3), 688, 734(9)**

Notices of sales for delinquent taxes and tax deeds predicated thereon were void for failure of notices to include the word "penalties" in stating amount due, and were not cured by 1929 amendment validating publications of delinquent lists which did not separately enter taxes, penalties and costs and declaring legislative intent that single entry of total was sufficient. St.1929, pp. 745, 746, §§ 4, 5; Pol. Code, § 3764.

2. Constitutional law 🔑**193**

The Legislature has power to enact statutes to validate prior tax proceedings.

3. Statutes 🔑**268**

A proper validating act directed at prior tax proceedings may be effective as to pending litigation.

4. Constitutional law 🔑**193**

The mere fact that prior tax proceeding was fatally defective is not alone an insurmountable obstacle to exercise of curative power of Legislature. Const. art. 1, § 1.

5. Constitutional law ⇨193

The Legislature, under its curative powers over prior invalid tax proceedings, may cure irregularities or omissions to comply with provisions of a statute which could have been omitted from statute in first instance.

6. Constitutional law ⇨193

The Legislature under its curative power over prior invalid tax proceedings cannot cure jurisdictional defects such as want of a duly constituted taxing authority, absence of property to be taxed from territorial jurisdiction of taxing body, want of property or subject matter legally subject to tax and want of sufficient notice and opportunity for hearing to constitute compliance with due process. Const. art. 1, § 1.

7. Constitutional law ⇨193

After tax jurisdiction is acquired and mandates of due process are complied with, the manner of procedure in taxing is within the legislative discretion and may be subjected to exercise of Legislature's curative powers over prior invalid tax proceedings so long as further constitutional inhibitions are observed. Const. art. 1, § 1.

8. Constitutional law ⇨93(2), 193

The Legislature in exercise of curative powers over prior invalid tax proceedings may not enact curative legislation the effect of which would be to destroy or unlawfully infringe upon vested rights. Const. art. 1, § 1.

9. Constitutional law ⇨67, 92

A "vested right", as used in relation to constitutional guaranties, implies an interest which it is proper for state to recognize and protect, and of which individual may not be deprived arbitrarily without injustice, and question of what constitutes such a right is confided to courts. Const. art. 1, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

10. Constitutional law ⇨92

Where power of court is invoked to protect a vested right, court must inquire whether the effect of applying statute in question is to deprive litigant of his property without due process of law, since Legislature has no power to take property of one person and give it to another. Const. art. 1, § 1.

11. Constitutional law ⇨93(1)

Where mortgagee's equitable estate was converted into a legal estate by sheriff's sale and deed under foreclosure proceeding and was acquired by plaintiff as mortgagee's successor prior to enactment of statute validating defects in prior invalid tax sale, plaintiff had a "vested right" of which he could not be divested except in manner provided by law. St. 1943, p. 1993, §§ 1–3; Pol.Code, § 3764; Const. art. 1, § 1.

12. Constitutional law ⇨54, 193
Taxation ⇨688

Where plaintiff in quiet title action claimed under sheriff's deed pursuant to mortgage foreclosure proceeding and defendants claimed under a tax deed which was void when made, curative act validating tax proceedings would not be given effect so as to transfer plaintiff's title to defendants, since application of curative act would sanction purported judicial determination by Legislature of conflicting rights in real property which is beyond constitutional power of Legislature to do. St.1943, p. 1993, §§ 1–3; Pol.Code, § 3764; Const. art. 1, § 1.

13. Constitutional law ⇨93(2), 193
Taxation ⇨688

One claiming through sheriff's deed in mortgage foreclosure action as against one claiming title under void tax deed had a vested right in property of which he was not divested by general provisions of section 1 of Curative Act of 1943, and which right was excluded from effect of act under sections 2(b) and 3. St. 1943, p. 1993, §§ 1, 2(b), 3; Const. art. 1, § 1.

14. Appeal and error ⇨843(3)

In action to quiet title where neither plaintiff nor defendants manifested dissatisfaction with finding on issue of adverse possession, and plaintiff was not aggrieved by finding and defendants were not aggrieved by the judgment, the Supreme Court, on review, would not determine the sufficiency of evidence to support such finding or the correctness thereof.

TRAYNOR, J., GIBSON, C. J., and EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Edward J. Miller against Catherine A. McKenna and others to quiet title, wherein Daniel B. Flenner filed a cross-complaint. From a portion of the judgment, plaintiff appeals.

Portion of judgment appealed from reversed.

Prior opinion, 129 P.2d 733.

Edwin J. Miller, in pro. per., and Ralph W. Miller, of Los Angeles, for appellant.

W. Verne Ahrens, Ernest M. Best, Ratzer & Bridge, and Glenn A. Lane, all of Los Angeles, for respondents.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., amici curiae on behalf of respondents.

SHENK, Justice.

The plaintiff sued to quiet title to 103 lots in the city of Los Angeles. His title is based on a sheriff's deed executed in pursuance of a mortgage foreclosure judgment and sale. The defendants' claims of title depend upon the validity of certain tax deeds. The plaintiff recovered judgment quieting his title to all but ten of the lots. He appealed from that portion of the judgment quieting in the defendants the title to those ten lots.

Nine of the ten lots involved on the appeal were sold to the state in 1912 for delinquent 1911 taxes. In 1917 they were sold by the state at public sale to the highest bidders. The tenth lot was sold to the state in 1918 for delinquent 1917 taxes, and in 1923 was sold by the state.

The plaintiff claimed through a mortgage executed in 1915 and a sheriff's deed on foreclosure executed and recorded in 1937. The mortgage contained a waiver of the statute of limitations, and the validity of the mortgage and foreclosure was decreed in Dexter v. Pierson, 214 Cal. 247, 4 P.2d 932, and Busing v. Pierson, 1 Cal.2d 495, 36 P.2d 116.

By findings and judgment dated March 20, 1941, the trial court found and concluded that the publications of the 1911 and 1917 delinquent tax lists involving the ten lots were not in accordance with the statute and that the tax sales and tax deeds issued pursuant thereto were invalid. The court held that the notices of sale in 1911 and 1917 were fatally defective and therefore invalid for the reason that they omitted the word "penalties" in stating the amount due. In so holding the court was fortified by many cases in this court and the District Courts of Appeal directly in point. The case which may be deemed the leading case on the subject is Bussenius v. Warden, 1925, 71 Cal.App. 717, 236 P. 371, wherein it was held that a sale pursuant to a notice which, as here, omitted the word "penalties" in stating the amount due, was void. The same notice there and here involved was held to be void in Snodgrass v. Errengy, 1927, 86 Cal.App. 664, 261 P. 497. In Wyser v. Truitt, 1928, 95 Cal. App. 727, 273 P. 147, a similar notice was held insufficient to support a tax deed. The holding in Bussenius v. Warden was approved by this court in January 1929, in Knoke v. Knight, 206 Cal. 225, 273 P. 786. Again in Gramson v. Geniella, 1930, 209 Cal. 610, 289 P. 817, this court approved the holding. To the same effect are Redman v. Newell, 1931, 114 Cal.App. 215, 299 P. 746; Myran v. Smith, 1931, 117 Cal. App. 355, 4 P.2d 219; Rexon v. Gaffey, 1931, 119 Cal.App. 389, 6 P.2d 534; Langstaff v. Mitchell, 1931, 119 Cal.App. 407, 6 P.2d 546; Ayars v. Faust, 1933, 131 Cal. App. 154, 20 P.2d 963; Trozera v. McDonell, 1933, 131 Cal.App. 473, 21 P.2d 706; and Jones v. Walker, 1941, 47 Cal. App.2d 566, 118 P.2d 299.

In Bray v. Jones, 1942, 20 Cal.2d 858, at page 862, 129 P.2d 357, at page 359, this court again recognized the correctness of the prior holdings by saying: "The failure to set forth the amount due for penalties, emphasized by the statements in the notices that penalties were not included, was plainly in violation of the statute as it then read."

Thus prior to the entry of judgment herein in 1941 the subject had been exhausted by the numerous holdings that the notices of sale here involved were invalid and that any tax deed issued thereunder was necessarily void. However the trial court further found and concluded that a ratifying statute adopted in 1929 was intended to and had the effect of curing the defects in those instruments. The original briefs on appeal (filed before the enactment of another curative act in 1943, which will be discussed later in this opinion) were devoted principally to the effect of the ratifying statute of 1929, the enactment of which appears to have been occasioned by the decision of this court in Gottstein v. Kelly, 206 Cal. 742, 276 P. 347.

At the time of the publication of the 1911 and 1917 delinquent tax lists and until 1929, section 3764 of the Political Code provided that the tax collector should "publish the delinquent [tax] list, which must contain the names of the persons and a description of the property delinquent, and the amount of taxes, penalties, and costs due", St.1913, p. 556, opposite each name and description. In March 1929 this court decided the Gottstein case. In that case certain tax deeds were held void because the published delinquent tax list stated one amount opposite descriptions of several parcels of property in one ownership (to designate the total of taxes, penalties and costs on all of such parcels), instead of stating, as required by said section 3764, the amount of taxes, penalties and costs opposite the description of each parcel. It was also held that the notice of sale was not in accordance with the statute and was defective in that it did not state the amounts due for "taxes, penalties, and costs" as required by the statute, citing Bussenius v. Warden, supra.

Following the decision in the Gottstein case, the Legislature amended section 3764 of the Political Code, effective on the 23rd of the following May, St.1929, p. 742, to provide that the published delinquent list should contain, among other requirements, "an amount equal to the total amount of all taxes, assessments, penalties, and costs due." By a separate section of the act the Legislature declared that the amendment was "not a change in, but a statement and declaratory of the law as the Legislature intended it to be by the terms" of said section 3764 prior to amendment. It was further declared that all publications of delinquent lists "failing to enter taxes, penalties and costs as separate entries but entering the foregoing amounts in one total sum and all sales, certificates of sale, tax deeds or other tax conveyances based upon such entries on any assessment roll or delinquent list are hereby confirmed, validated and legalized, and the same shall be construed and operate at all times and upon all occasions in law in the same manner as if such entries were separately set forth * * *." § 4. Following the declaration of the immediate effect of the act was a statement of the facts constituting the necessity therefor, as follows: "Due to the recent decision of the supreme court of the State of California in the case of Gottstein v. Kelly," the "possible construction" to be placed upon the pertinent requirements would be that taxes, penalties, and costs should be separately shown on the publication of delinquent lists and notices of sale; that "inasmuch as the tax collectors of the state have completed preparatory work on the publication of the delinquent list which must be published on or before June 8, 1929, and great expense would be involved in the publication of the delinquent list to state as separate items the amount of taxes, penalties and costs due on property subject to tax sales and the possibility of error would be greatly increased, many tax titles acquired at tax sales would be jeopardized." § 5.

[1] A casual reading of the opinion in the Gottstein case might afford some justification for the apprehension of the Legislature, but a more careful study of it reveals that in no sense was it intended to be, nor could it properly be, an adjudication that a separate amount for each of the items of taxes, penalties and costs must be stated in the notice of sale. That question was not involved in the case. Its solution, as apprehended by the Legislature to be a "possible construction" of the statute by this court, would have been obiter and would have been unsupported by any decision in this state. It is conclusively shown by the language used in the 1929 act amending section 3764, that the Legislature did not intend to change the law so as to conform to the apprehended "possible construction," but merely to declare, out of an abundance of caution, that the amendment did not work a change in the pre-existing law but was a continuation thereof. With this declaration we cannot be at odds for no case has been found in this state, either before or since the amendment of 1929, which held that a separate statement of the amount of each of the items of taxes, penalties and costs was essential to a valid notice of sale.

The curative provisions of the 1929 act appear to have been concerned only with the publication of delinquent lists or notices of sale which failed "to enter taxes, penalties and costs as separate entries but entering the foregoing amounts in one total sum," and with notices of sales and tax deeds based upon such entries. It may not be assumed that the Legislature thereby intended or attempted to validate tax deeds which were void for reasons not contemplated by the terms of the act. The 1929 enactment therefore had no effect upon the tax deeds here in question.

Pending this appeal and after the argument in the case the Legislature in 1943 adopted another curative act which it is claimed is much broader than the act of 1929 and has the effect of resuscitating the void tax deeds here involved and thus confirming title in the tax deed holders. The submission of the cause on appeal was set aside in order that the Attorney General might file a brief as amicus curiae in support of the effectiveness of the 1943 act as a cure of the defects in the tax proceedings here under review. The recent enactment is chapter 458 of the Statutes of 1943. (Stats.1943, p. 1993.) It became effective on August 4th and provides:

"Section 1. Every act and proceeding heretofore taken by any county, city and county or the officers thereof relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates of any county or city and county, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy, are hereby confirmed, validated and declared legally effective.

"Sec. 2(a) This act is limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements of law under which the acts hereby confirmed, validated and declared legally effective were taken.

"(b) This act is limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions.

"Sec. 3. If any provision of this act or its application to any person or circumstances is held invalid, the remainder of the act and the application of its provisions to other persons or circumstances is not affected."

The question then to be determined is whether the act of 1943 may be deemed to cure the defects in the prior invalid tax sales and thereby to validate a void tax deed executed pursuant thereto, under the facts here disclosed.

[2, 3] No doubt may be entertained of the general power of the Legislature to enact statutes to validate prior tax proceedings. Many cases recognize that power. Moore v. Patch, 12 Cal. 265; Cowell v. Doub, 12 Cal. 273; People v. Holladay, 25 Cal. 300; Wetherbee v. Dunn, 32 Cal. 106, 108; People v. McCreery, 34 Cal. 432; People v. Goldtree, 44 Cal. 323; Rollins v. Wright, 93 Cal. 395, 29 P. 58; Haaren v. High, 97 Cal. 445, 32 P. 518; Ramish v. Hartwell, 126 Cal. 443, 58 P. 920; Chase v. Trout, 146 Cal. 350, 80 P. 81; Baird v. Monroe, 150 Cal. 560, 89 P. 352; Carter v. Osborn, 150 Cal. 620, 89 P. 608; Peck v. Fox, 154 Cal. 744, 99 P. 189; Imperial Land Co. v. Imperial Irrigation Dist., 173 Cal. 660, 161 P. 113; Schamblin v. Means, 6 Cal.App. 261, 91 P. 1020; City of Santa Monica v. Los Angeles County, 15 Cal.App. 710, 115 P. 945; Stuart v. Chapman, 87 Cal.App. 552, 553, 262 P. 348. And a proper validating act may be effective as to pending litigation. Cooley, Const. Limitations, 8th ed., p. 787; United States v. Heinszen & Co., 206 U.S. 370, 387, 27 S.Ct. 742, 51 L.Ed. 1098, 11 Ann.Cas. 688; see, also, Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 242 P. 725; Clark v. City of Los Angeles, 160 Cal. 30, 43, 116 P. 722.

[4, 5] The fact that the proceeding was fatally defective is not alone an insurmountable obstacle to the exercise of the curative power; for, as said in People v. Holladay, supra, 25 Cal. at page 305, if it was not fatally defective it would stand in no need of the healing power. But there are certain limitations on the exercise of that power. Included therein are the inhibitions of the Federal and State Constitutions. The permissible exercise of the power and the limitations thereon are set forth generally in Chase v. Trout, 146 Cal. 350, 80 P. 81, and similar cases, and may be summarized as follows:

The Legislature may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance. This rule is quoted from Cooley on Constitutional Limitations, at page 457, as follows: "If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." Gordon v. City of San Diego, 101 Cal. 522, 528, 36 P. 18, 40 Am.St.Rep. 73; Cooley's Constitutional Limitations, 8th Ed., pp. 775, 776.

[6, 7] But the Legislature cannot cure defects which are sometimes termed jurisdictional. Among the jurisdictional requisites are (a) a duly constituted taxing authority; (b) property to be taxed within the territorial jurisdiction of the taxing body; (c) property or subject matter legally subject to the tax; and (d) sufficient notice and opportunity for hearing to constitute compliance with due process. See Graham and Foster v. Goodcell, 282 U.S. 409, 51 S.Ct. 186, 75 L.Ed. 415; Swayne & Hoyt, Ltd., v. United States, 300 U.S. 297, 57 S.Ct. 478, 81 L.Ed. 659; People v. Goldtree, 44 Cal. 323; People v. Lynch, 51 Cal. 15, 21 Am.Rep. 677; Harper v. Rowe, 53 Cal. 233; Baird v. Monroe, 150 Cal. 560, 89 P. 352; People v. Van Nuys Lighting Dist., 173 Cal. 792, 162 P. 97, Ann.Cas.1918D, 255; Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264; Golden Gate Bridge, etc., Dist. v. Felt, 214 Cal. 308, 323, 5 P.2d 585; Texas Co. v. Bank of America, etc., Ass'n, 5 Cal. 2d 35, 43, 53 P.2d 127; Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal.App. 615, 227 P. 649; 6 R.C.L. 321; 24 Cal.Jur. 30 et seq. While the Legislature cannot cure the omission of jurisdictional requisites, the manner of procedure, after jurisdiction is acquired and the mandates of due process are complied with, are matters within the legislative discretion and may be subjected to the exercise of the healing power so long as further constitutional inhibitions are observed.

[8, 9] The Legislature may not enact curative legislation the effect of which would be to destroy or unlawfully infringe upon vested rights. In such cases laws confessedly retrospective have been declared ineffective when they were held to be in conflict with some right secured either by a constitutional guaranty or protected by the principles of universal justice. Galland v. Lewis, 26 Cal. 46, 47, 49, citing Terrett v. Taylor, 9 Cranch 43, 3 L.Ed. 650; City of Los Angeles v. Oliver, 102 Cal.App. 299, 310, 283 P. 298; 5 Cal.Jur. 747.

As said in City of Los Angeles v. Oliver, supra, 102 Cal.App. at page 310, 283 P. at page 303, citing 6 R.C.L. 308, and Campbell v. Holt, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, a vested right, as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice. The question of what constitutes such a right is confided to the courts. In Glide v. Superior Court, 147 Cal. 21, at page 30, 81 P. 225, at page 229, it was said, through Mr. Chief Justice Beatty, concurring, that vested rights of property and contract rights are placed by the Constitution under the protection of the courts, where alone the questions of law and fact upon which they depend can be finally decided. That declaration was quoted with approval by this court in Inglin v. Hoppin, 156 Cal. 483, 488, 105 P. 582.

[10] When the power of the court is invoked to protect the right, the inquiry may be "Whether, in the case presented, the effect of applying the statute is to deprive the party of his property without due process of law." Chase v. Trout, supra, 146 Cal. at page 359, 80 P. at page 84. For example "the Legislature has no power to take the property of one person and give it to another." Gillan v. Hutchinson, 16 Cal. 153, 156. The right of "acquiring, possessing, and protecting property" is anchored in the first section of the first article of our Constitution. This right is as old as Magna Charta. It lies at the foundation of our constitutional government, and "is necessary to the existence of civil liberty and free institutions." Billings v. Hall, 7 Cal. 1, 6.

[11] As to the plaintiff's property right in the present case it was stipulated that his common source of title was in Edward Russek. In 1915 the Piersons, husband and wife, purchased the property and executed to Russek a purchase money mortgage including therein the parcels involved in this action. The validity of the mortgage, the foreclosure of which is the basis of the plaintiff's title, may not now be questioned. Dexter v. Pierson, supra; Busing v. Pierson, supra. The plaintiff is the successor in interest of the mortgagee. The mortgagee's interest was therefore at first an equitable estate in the property. By the sheriff's sale and deed the equitable estate was converted into a legal estate which became a property right vested in the plaintiff in 1937, prior to the passage of the

curative act of 1943, and of which he may not be divested except in a manner provided by law.

[12] In the enactment of the curative act of 1943 the Legislature was scrupulous in observing the constitutional limitations on the exercise of its power. Section 2(a) limits the operation of the act to the correction of "defects, irregularities and ministerial errors which the Legislature originally could have omitted." To this extent the curative provisions of the act, within the constitutional limitations, unquestionably would be effective. Then section 2(b) limits the act "to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions." The attorney general recognizes the necessity of this limitation, for the first proposition advanced by him is that "The Legislature may cure all defects in the taxing process not violative of constitutional rights." With this we agree. In section 3 the Legislature further recognizes that the act, in "its application to any person or circumstances" might be held invalid, and declares that notwithstanding that fact the act otherwise should be effective.

We are dealing here with a controversy between private parties concerning conflicting claims to the title to real property arising under separate conveyances of record, the plaintiff's deed on foreclosure on the one hand, and the defendants' tax deeds on the other. It has been demonstrated that the curative act of 1929 by its terms is inapplicable to this case; and to give the curative act of 1943 the effect claimed for it would be, "in its application to" the plaintiff under the "circumstances" of this case, to deprive him of his estate without due process of law and thus by a mere legislative rescript pronounce as valid a deed which was void when it was made (Harper v. Rowe, 53 Cal. 233, 237, 238), and thereby transfer the title of the plaintiff to the defendants. Indeed, it may be said that the application of that curative act in this case would be to sanction a purported judicial determination by the Legislature of conflicting rights in real property which that body may not constitutionally render. Roche v. Waters, 72 Md. 264, 19 A. 535, 7 L.R.A. 533.

[13] We conclude that the property interest of the plaintiff is a vested right of which he was not divested by the general provisions of section 1 of the curative act of 1943; that such interest was not otherwise affected by the act as contemplated by section 2(b) thereof; and that this is one of the cases wherein the "application" of the act is ineffective as contemplated by section 3 thereof.

[14] From the foregoing a reversal must follow. None of the parties has manifested any dissatisfaction with the finding of the trial court on the issues of adverse possession. The plaintiff was not aggrieved by the finding and the defendants were not aggrieved by the judgment. Therefore questions of the sufficiency of the evidence to support the findings on those issues, or the correctness of the findings and conclusions of the trial court thereon, are not determined.

Other questions discussed by the parties have been considered but a specific reference to them is unnecessary. The question of reimbursement if any to the tax deed purchasers is not involved on this appeal.

The portion of the judgment appealed from is reversed.

CURTIS, CARTER, and SCHAUER, JJ., concur.

TRAYNOR, Justice (dissenting.)

The majority opinion fails to specify any statutory requirement that the notices of sale did not meet. It states that the trial court found the notices of sale fatally defective because they omitted the word "penalties" in stating the amount due. Actually, however, there is no finding by the trial court as to why the notices were invalid or in what manner they departed from the statutes then in effect.

If any irregularity exists it is essential that it be identified. If there was no departure from the statutory requirements the tax deeds are valid; if there was, it is necessary to determine whether it was of a kind that could be remedied under the curative act of 1943. The statutes governing the publication of the delinquent lists are sections 3764 and 3765 of the Political Code.

The Requirements of Section 3764 Were Fully Met.

Section 3764 as it read in 1912 and 1918, when the lists were published, provided that at certain prescribed times the tax collector "must publish the delinquent list, which must contain the names of the persons and a description of the property delinquent, and the amount of taxes, penalties, and costs due, opposite each name and description." St.1913, p. 556. The delinquent lists in the present case were published at the prescribed times and contained the names of the persons and a description of the property followed by a figure representing the amount due, as required by section 3764. The plaintiff made no attempt to prove that this figure did not correctly represent the total amount of taxes, penalties, and costs due. Since presumably public officials follow the law and perform their duties properly, it must be assumed, in the absence of evidence to the contrary, that the figure opposite each description represented such amount. Code Civ.Proc. sec. 1963(15); Bray v. Jones, 20 Cal.2d 858, 860, 129 P.2d 357. Moreover, at the times of the execution of the deeds in question, Political Code, section 3786, provided: "Such deed, duly acknowledged or proved, is primary evidence that * * * 5. At a proper time and place the property was sold as prescribed by law, and by the proper officer; * * *," and Political Code, section 3787, provided: "Such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor, inclusive, up to the execution of the deed." It should be noted that while the delinquent list must contain the amount of taxes, penalties, and costs, there is no requirement that it state that it does so. The requirements of section 3764 were therefore fully met.

The Requirements of Section 3765 Were Fully Met.

Section 3765, as it read when the lists were published, provided: "The tax collector must append and publish with the delinquent-list a notice that unless the taxes delinquent, together with the costs and penalties, are paid, the real property upon which such taxes are a lien will be sold." The notice in the present case was phrased in substantially the language of that section: "Now, Therefore, I, W. C. Welch, Tax Collector in and for the County of Los Angeles, by virtue of authority in me vested by law, hereby give public notice that unless the taxes delinquent as appear by said list, together with the costs and *penalties,* are paid, I as said Tax Collector, at the office of the County Tax Collector, in the City of Los Angeles, on Monday, the First Day of July, 1912, at the hour of 10 o'clock, A. M. will sell all said real estate upon which taxes are a lien to the State of California." (Italics added.) There was thus no omission of the word "penalties" or any other word the inclusion of which was required by section 3765. The validity of such a notice was sustained by this court in Bray v. Jones, 20 Cal.2d 858, 861, 129 P.2d 357, 359, and the language there used applies with equal force to the present case: "When, as in this case, the notice sets forth the name of the person whose property is assessed, a description of the property, and 'an amount equal to the total amount of all taxes, assessments, penalties, and costs due,' and provides that the property will be sold unless the taxes delinquent, together with interest and penalties are paid, the notice conforms to the requirements of Political Code, sections 3764 and 3765."

The Omission of the Word "Penalties" in a Statement by the Tax Collector, Not Prescribed by Statute, Was Not Designed to Indicate an Exclusion of Penalties from the Amount Due.

If there was any irregularity in the publication of the delinquent lists it must be found in the violation of some principle not prescribed by the statutes of this state. The plaintiff attributes the invalidity of the proceedings to the omission of the word "penalties" in a notice not prescribed by statute but appended by the tax collector at the end of the delinquent list, reading as follows:

"Dollars and Cents

"Public notice is hereby given that the figures appearing opposite, following and last after each description of property in the foregoing Delinquent Tax List for 1911, of and for the County of Los Angeles, were intended to and do represent respectively in Dollars or in Cents, or in Dollars and Cents, as the case may be, the amount due for taxes and costs in the manner as follows, to-wit:

"When or where two figures appear therein, Cents were intended to be and are represented, when or where more than two figures thus appear therein, Cents were intended to be and are represented by the last two figures, and the figures occupying and appearing at the left of the said last two figures, and separated therefrom by a space were intended to and do represent Dollars, so that the amount due for taxes and costs in the respective cases aforesaid are thus expressed in Dollars and Cents."

Obviously the purpose of this statement was to explain that the figures represented dollars and cents, and the reference to taxes and costs was incidental to that explanation. It was not the purpose of this statement to set forth what the dollars and cents represented, and its omission of the word "penalties" cannot therefore be regarded as an intention to exclude penalties from the amount due. There was nothing misleading in the omission of the word "penalties," for the tax collector had not only complied fully with sections 3764 and 3765, which govern the publication of the delinquent lists, but he had stated clearly in the addenda notice published in 1917 that "no bid for said property will be accepted for less than the amount of all taxes, penalties and costs due on said property for the year same was originally struck off and sold to the state (in 1912 for taxes of the year 1911) which minimum amount is set forth opposite the description of said property." The cases relied upon by the plaintiff and cited in the majority opinion not only failed to show that the notice violated any statute, but erroneously assumed that the statutes required the tax collector to append a statement that the figures represented taxes, penalties, and costs. Since there is no such statutory requirement and no other reason appears why the error should render the notices invalid, these cases should be disapproved.

The majority opinion quotes from Bray v. Jones, 20 Cal.2d 858, 862, 129 P.2d 357, 359, as follows: "The failure to set forth the amount due for penalties, emphasized by the statements in the notices that penalties were not included, was plainly in violation of the statute as it then read." This statement was made in distinguishing that case from what had commonly been understood to be the holding in Gottstein v. Kelly, 206 Cal. 742, 276 P. 347, that section 3764 required taxes, assessments, penalties, and costs to be separately stated. It cannot be dissociated from the sentence immediately preceding it: "In any event the cases relied upon by the defendant were concerned with section 3764 when, as interpreted by Gottstein v. Kelly, supra, it required taxes, assessments, penalties, and costs to be separately stated." This general understanding of the holding in the Gottstein case prompted the legislation in 1929 to clarify the section and validate previous notices thereunder, Stats.1929, p. 742, and it therefore appeared unnecessary in Bray v. Jones to revive an issue as to the holding in the Gottstein case.

Further consideration of the Gottstein case discloses that it did not actually hold that taxes, assessments, penalties, and costs had to be separately stated. In that case several lots were separately assessed to the same person, and the notice of sale was held invalid because it showed the aggregate amount of taxes, penalties, and costs for all the lots instead of setting forth the proportionate amount thereof opposite each description as prescribed by the section. The court did not hold, as has been commonly assumed, that section 3764 required taxes, penalties, and costs to be separately stated. It held that when parcels in single ownership are separately assessed, the taxes, penalties, and costs due for each parcel must be set forth opposite the description thereof as provided by section 3764, so that the owner can determine the amount necessary to redeem any parcel that he may wish to redeem apart from the others. While the court referred to Cordano v. Kelsey, 28 Cal.App. 9, 151 P. 391, 398, holding that under Political Code, section 3897, as it read in 1911, taxes, penalties, and costs must be separately stated in the notice of sale under that section, this holding was not made applicable to section 3764. There was no necessity for such an application in view of the failure to set forth the amount due opposite each description as required by section 3764. In any event, had the Legislature intended to provide that taxes, penalties, and costs be separately stated it could have done so unequivocally. Its choice of the singular "the amount" of taxes, penalties, and costs plainly indicates that an aggregate amount was to be set forth opposite each description so that the owner would know the amount necessary to redeem his property. The opinion in Gottstein v. Kelly does not point to any language in section 3764 requiring that these items be separately stated or attempt to show how the section could be construed to make such a requirement. Since the Gottstein case did not hold what the quotation from Bray v. Jones assumed it held, and the majority opinion recognizes that it did not, that quotation cannot now be taken from its context to serve as a recognition of "the correctness of the prior holdings."

Even if the statutes governing the present case had required the tax collector to append a statement that the figures represented taxes, penalties, and costs, his omission of the word "penalties" from the statement is cured by the 1943 act. That act cannot be held unconstitutional without repudiating principles that have been the established law of this state since its earliest days. In 1859, in Moore v. Patch, 12 Cal. 265, involving legislation confirming a delinquent tax list, the court recognized the power of the Legislature to pass curative statutes validating proceedings in the levying and collecting of taxes notwithstanding irregularities therein, and this power has been reaffirmed in many cases since that time. Cowell v. Doub, 12 Cal. 273; People v. Holladay, 25 Cal. 300, 301; Wetherbee v. Dunn, 32 Cal. 106, 108; People v. McCreery, 34 Cal. 432; People v. Goldtree, 44 Cal. 323; Rollins v. Wright, 93 Cal. 395, 29 P. 58; Haaren v. High, 97 Cal. 445, 32 P. 518; Ramish v. Hartwell, 126 Cal. 443, 58 P. 920; Chase v. Trout, 146 Cal. 350, 80 P. 81; Baird v. Monroe, 150 Cal. 560, 89 P. 352; Carter v. Osborn, 150 Cal. 620, 89 P. 608; Peck v. Fox, 154 Cal. 744, 99 P. 189; Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 P. 113; Clayton v. Schultz, 4 Cal.2d 425, 50 P.2d 446; Schamblin v. Means, 6 Cal.App. 261, 91 P. 1020; City of Santa Monica v. Los Angeles County, 15 Cal.App. 710, 115 P. 945; Stuart v. Chapman, 87 Cal.App. 552, 553, 262 P. 348. Only those acts or omissions that the Legislature is restrained by constitutional limitations from sanctioning in advance, often characterized as "jurisdictional," cannot be validated by curative statutes. See 24 Cal.Jur. 30. The confusion that arose from describing as jurisdictional, irregularities that violated only material statutory requirements, without inquiring whether or not they were also in violation of the State or Federal Constitutions, prompted an examination of the whole subject in an exhaustive opinion for the court by Justice Shaw in Chase v. Trout, supra. That opinion reiterated the rule that a curative statute may preclude the investigation of all questions except whether the statute if enacted in advance would violate the due process clause or other provisions of the state or federal Constitution. As to all "other statutory steps or acts, the same power which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax, and that no inquiry may be made concerning them." Chase v. Trout, supra, 146 Cal. at page 359, 80 P. at page 84; Swayne & Hoyt, Ltd., v. United States, 300 U.S. 297, 57 S.Ct. 478, 81 L.Ed. 659; Graham & Foster v. Goodcell, 282 U.S. 409, 51 S.Ct. 186, 75 L.Ed. 415; Charlotte Harbor & N. R. Co. v. Welles, 260 U.S. 8, 43 S.Ct. 3, 67 L.Ed. 100. Shortly thereafter the rule was reaffirmed in Baird v. Monroe, supra, and the opinion of the court by Justice Angellotti distinguished Harper v. Rowe, 53 Cal. 233, on which the majority opinion relies, on the ground that "There the levy of the tax was invalid for want of any law authorizing it to be levied." [150 Cal. 560, 89 P. 355.]

It is contended that the alleged violation is a jurisdictional one because it prevented an effective transfer of title. If a defect prevents an effective transfer of title at the tax sale, title remains in the owner. If the defect does not prevent an effective transfer of title, the tax deed is valid and any discussion of curative acts becomes idle. People v. Holladay, 25 Cal. 300, 305. The foregoing contention would apply to any violation of a statutory requirement with respect to proceedings in tax sales and would serve to ban curative statutes entirely with respect to such proceedings. By assuming that noncompliance with a statutory requirement is jurisdictional even though the requirement is not essential to meet the mandates of the State or Federal Constitutions, this contention falls into the very error that Chase v. Trout, supra, sought to prevent. It is settled that the Legislature can validate conveyances between private persons that would otherwise be ineffective to transfer title because of noncompliance with statutory requirements. Dentzel v. Waldie, 30 Cal. 138; Steger v. Traveling Men's Bldg. & L. Ass'n, 208 Ill. 236, 70 N.E. 236, 100 Am.St.Rep. 225; and cases collected in 57 A.L.R. 1197. There is no reason why a different rule should govern transactions in which the state is an interested party. See Gordon v. City of San Diego, 101 Cal. 522, 36 P. 18, 40 Am.St.Rep. 73.

There can be no question that the Legislature could have omitted at the outset any requirement as to a statement that the amount due includes penalties. The subject of the tax was clearly within the jurisdiction of the taxing authorities; there was an assessment of the property and ample opportunity for the equalization of the assessment; there was a levy of the tax and notice was given of the delinquency and of the sale of the property; and there was liberal provision for the redemption of the property. Neither the majority opinion nor the briefs cite any act or omission in the entire proceedings from the assessment of the property to its sale by the state that would violate any constitutional provision or that could not have been previously authorized by the Legislature. The notices of sale to the state and of the subsequent sale by the state were more than sufficient to meet the requirements of due process of law. There is nothing in the due process clauses of either the State or Federal Constitutions requiring that such notices be given in a particular form or that a form once prescribed be adhered to meticulously. Certainly neither these nor any other constitutional provisions provide that the notices must contain a statement that the amount due include "penalties."

The majority opinion assumes that the mortgagor-owner had no rights that would prevent the application of the curative act but holds that since the plaintiff's rights are based on his title by deed at the mortgage foreclosure sale, they intervened between the tax deed and the curative act and are therefore excepted from the rule of the foregoing cases. A mortgagee's title, however, is no better than that of the owner, for the tax lien is at all times prior to the mortgage lien, and the mortgagee takes the property subject to the state's claim for taxes. Pol.Code, sec. 3716; California Loan & Trust Co. v. Weis, 118 Cal. 489, 50 P. 697; Williams v. Cooper, 124 Cal. 666, 57 P. 577; German Savings & Loan Society v. Ramish, 138 Cal. 120, 69 P. 89, 70 P. 1067; O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020; Guinn v. McReynolds, 177 Cal. 230, 170 P. 421; State v. Royal Consolidated Mining Co., 187 Cal. 343, 202 P. 133. The mortgages were dated May 28, 1915, which was before the attachment of the lien for the 1916–1917 taxes but after the attachment of the lien for the 1911–1912 taxes. The tax liens were superior to all prior as well as all subsequent liens arising out of private contracts. Ibid. The tax deeds validated by the 1943 legislation are based upon the tax liens, and are therefore superior to the claims not only of the former owners but of those deriving title therefrom, since the title of the mortgagee and of those claiming under him can be no better than that of his predecessors in interests. City and County of San Francisco v. Lawton, 18 Cal. 465, 474, 79 Am.Dec. 187; Branham v. Mayor and Council of San Jose, 24 Cal. 585, 604; Kreichbaum v. Melton, 49 Cal. 50, 54; Robinson v. Thornton, 102 Cal. 675, 680, 34 P. 120; Hoppe v. Hoppe, 104 Cal. 94, 99, 37 P. 894; Hodge v. Norton, 133 Cal. 99, 100, 65 P. 123; Freelon v. Adrian, 161 Cal. 13, 118 P. 220; White v. Rosenthal, 140 Cal.App. 184, 35 P.2d 154; see 18 Cal.Jur. 613; Code Civ.Proc., sec. 700.

Plaintiffs were not bona fide purchasers for value without notice of the tax liens and the proceedings for their enforcement, for they acquired the property subject to the tax liens (Pol.Code, sec. 3716; California Loan & Trust Co. v. Weis, supra; Williams v. Cooper, supra; German Savings & Loan Society v. Ramish, supra; O'Dea v. Mitchell, supra; Guinn v. McReynolds, supra; State v. Royal Consolidated Mining Co., supra; see, also, District Bond Co. v. Pollack, 19 Cal.2d 304, 307, 308, 121 P.2d 7, and cases there cited) and are charged with notice of the tax proceedings, which are matters of public record. Reeve v. Kennedy, 43 Cal. 643, 654; Grant v. Cornell, 147 Cal. 565, 567, 82 P. 193, 109 Am.St.Rep. 173; Newcomb v. City of Newport Beach, 7 Cal.2d 393, 406, 407, 60 P.2d 825; In re Seick, 46 Cal.App. 363, 369, 189 P. 314. It must be assumed that plaintiffs were aware of the technicality on which their grantor's title depended. No reason appears why a person thus gambling on the possibility that a defect in the tax proceedings may have established his grantor's title should not, like the grantor himself, be subject to the power of the state to correct the defect.

The intricacy of the tax laws makes it inevitable that proceedings in the levying and collecting of taxes should constantly fall short of perfection. If they succeed in accomplishing faithfully the objectives of the Legislature, it is captious to condemn them for failing to cross the T's of a detail not essential to those objectives, and doubly so to reject a curative statute of the Legislature that would avert serious consequences of an inconsequential error in an otherwise correct notice. Insistence upon an impossible perfection can only lead to wholesale invalidation of tax titles in Los Angeles County where notices like that in the present case were used for many years. One may well ask to what end, since the needless discouragement of the purchase of property at tax sales only serves to keep such property off the tax rolls and to increase the tax burden on other property with the net effect of penalizing property owners who pay their taxes.

GIBSON, C. J., and EDMONDS, J., concurred.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

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23 Cal.2d 859

JONES v. INDEPENDENT TITLE CO. et al.

L. A. 18685.

Supreme Court of California.

March 29, 1944.

1. Mortgages 🔑174

The grantee of recorded deed given as mortgage for value without notice of prior unrecorded trust deed on same property *held* prior incumbrance. Civ.Code, § 1214.

2. Vendor and purchaser 🔑238

A bona fide purchaser can convey his entire interest or title free of outstanding but undisclosed and unrecorded equities prior in point of time to purchaser's claims, even to one with notice of such equities. Civ.Code, § 1214.

3. Mortgages 🔑174

Beneficiary of mortgagor's trust deed, which was executed but not recorded prior to execution and recordation of mortgagor's deed given as mortgage, had a lien inferior to lien of donee of interest of grantee named in deed notwithstanding gift was made after recordation of trust deed, donee gave no consideration, and donee had notice of trust deed. Civ.Code, § 1214.

◆

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Edward M. Jones against the Independent Title Company and others to quiet title to land, wherein defendant Rae L. Sinclair cross-complained. From a judgment for plaintiff, the cross-complainant appeals.

Affirmed.

Prior opinion 141 P.2d 229.

William G. Condron, of Los Angeles, for appellant.

Albert L. Larsen, of Long Beach, and Harry H. Parsons, of San Bernardino, for respondent.

SCHAUER, Justice.

Defendant Sinclair (hereinafter referred to as the defendant) appeals from a judgment in a quiet-title suit whereby the trial court, sitting without a jury, decreed that plaintiff was possessed of a lien on certain land in San Bernardino County, apparently securing a debt in the sum of $1,000, together with interest thereon at the rate of 7 per cent per annum from May 5, 1939, and that such lien is superior to a lien possessed by the defendant, likewise to secure an indebtedness of $1,000 with interest, and evidenced by a deed of trust. The plaintiff's rights accrued by virtue of a deed to him from a predecessor in interest to whom the land had been conveyed by a deed absolute in form but found by the trial court to have been intended as a mortgage. The defendant's trust deed was executed prior to the deed to plaintiff's predecessor and was recorded prior to the deed to plaintiff but subsequent to recordation of the deed to his predecessor. We have concluded that the trial court must be sustained in its determination of the respective rights of the two claimants.

The pertinent facts, as found by the trial court, are as follows:

On or about December 21, 1936, one W. C. Simpson, the then owner of the land, executed and delivered to defendant a trust deed on the land to secure a $1,000 promissory note from Simpson to defendant. The trust deed was not recorded until March 15, 1940. In the meantime, by a grant deed dated May 5, 1939, and recorded September 29, 1939, Simpson conveyed the same land to one N. H. Collins as security for a loan of $1,000 from Collins to Simpson; at the time of such conveyance Collins had no notice or knowledge of the trust deed held by defendant. The trial court found specifically that Collins made and delivered to plaintiff a grant deed dated November 6, 1940, and recorded November 25, 1940, and that "said deed * * * assigned, set over and conveyed to * * * plaintiff * * * all the right, title and interest of * * * Collins in and to * * * [the land involved] and the deed therefor."

[1] Collins, as one in the position of a bona fide purchaser, held an encumbrance on the land superior to that of defendant. (Civ.Code, § 1214; see 25 Cal.Jur. 820–822, §§ 268, 269, and cases there cited; 22 Cal. Jur. 625, 626, § 34; 18 Cal.Jur. 114, 115, § 421.) Defendant, however, contends that such superiority was lost when Collins conveyed to Jones, and in support of such contention advances two points: (1) That Jones gave no consideration to Collins, and (2) that Jones had notice of defendant's trust deed (by reason of its recordation on March 15, 1940) prior to the conveyance from Collins to Jones (on November 6, 1940). We are of the opinion that neither of these points is material under the circumstances related.

[2, 3] A bona fide purchaser can convey his entire interest or title free and clear of outstanding but undisclosed and unrecorded equities prior in point of time to the claims of such purchaser, even (with one exception which is not involved here) to a transferee or grantee with notice of such equities. See March v. Pantaleo, 1935, 4 Cal.2d 242, 244, 48 P.2d 29; Schelling v. Thomas, 1929, 96 Cal.App. 682, 688, 689, 274 P. 755; Los Angeles Inv. Co. v. Torchia, 1930, 106 Cal.App. 21, 27, 288 P. 810; 25 Cal.Jur. 821, sec. 268, and cases there cited; Brown v. Sheets, 197 N.C. 268, 148 S.E. 233, 63 A.L.R. 1362 et seq.; 66 C.J. 1188, sec. 1045. In Whitney v. Sherman, 1918, 178 Cal. 435, at page 440, 173 P. 931, at page 933, this court held that even if the grantee of a bona fide purchaser received the property as a gift he "could rely upon the consideration paid" by his grantor and that, in effect, he "would be subrogated to" the latter's rights. Consequently, whether plaintiff did or did not give consideration to Collins for the deed from Collins to plaintiff is immaterial here, as is also the fact that he had at least constructive notice of defendant's trust deed before receiving the deed from Collins.

No contention is made that the evidence fails to establish that the creditor's property right in the debt itself was conveyed to plaintiff. The sole attack made by appellant on the sufficiency of the evidence to support the findings of fact is directed at the finding that Collins had no notice or knowledge of appellant's trust deed at the time Simpson conveyed to Collins. The only evidence on this matter is the testimony of Collins himself to the effect that "I examined the title and found nothing recorded against it [the land], so then I accepted the property," and that "I asked him [Simpson] if I was buying an obligation. He told me no, it was clear, and I examined the records." Appellant makes no claim that she or anyone else except Simpson was in possession of the land at the time involved. It appears that her attack on the mentioned finding is without merit. Plaintiff took the entire right and interest of Collins in the land involved and, as concluded by the trial court, the encumbrance held first by Collins and then by plaintiff is superior to defendant's trust deed.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

24 Cal.2d 53

HERRON v. STATE BAR OF CALIFORNIA.
S. F. 16833, 16881, 16959.

Supreme Court of California.

April 3, 1944.

Rehearing Denied May 1, 1944.

1. Attorney and client 🔑53(2)

In disciplinary proceedings against attorney, evidence established attorney's failure to take adequate steps to protect interest of one of his clients in quiet title action which he had commenced on her behalf with result that default judgment was entered against her. St.1939, pp. 354, 357, §§ 6067, 6068, 6103, 6106; Code Civ. Proc. § 284.

2. Attorney and client 🔑38

"Turpitude", with reference to disciplinary proceedings against attorney, means anything done contrary to justice, honesty, modesty or good morals.

See Words and Phrases, Permanent Edition, for all other definitions of "Turpitude".

3. Attorney and client ⚷53(2)

In disciplinary proceedings against attorney, evidence established that attorney failed to complete arrangements in relation to prosecution of an appeal with result that, contrary to wishes of client, the case was submitted to appellate court for decision without oral argument by attorney. St.1939, pp. 354, 357, §§ 6067, 6068, 6103, 6106.

4. Attorney and client ⚷53(2)

In disciplinary proceedings against attorney, evidence established that attorney practiced law while under suspension by order of court for nonpayment of his dues to the state bar. Code Civ.Proc. § 284.

5. Attorney and client ⚷1

The State Bar Act prescribing power of Board of Governors to fix and collect membership dues and assess penalties is constitutional as a regulatory measure under the police power. St.1939, pp. 360, 361, §§ 6140–6145.

6. Attorney and client ⚷38

An attorney is properly subject to suspension from practice within state for failure to pay membership dues imposed by Board of Governors under authority of State Bar Act. St.1939, pp. 360, 361, §§ 6140–6145.

7. Attorney and client ⚷53(2)

In disciplinary proceedings against attorney, infractions for which attorney had previously been suspended from practice for limited period could be taken into account in fixing the degree of discipline to be imposed. St.1939, pp. 354, 357, §§ 6067, 6068, 6103, 6106.

8. Attorney and client ⚷53(2)

In disciplinary proceedings against attorney, principles of criminal law regarding admissibility of evidence are inapplicable, since disciplinary proceedings are governed exclusively by statutes specifically covering them. St.1939, pp. 354, 357, §§ 6067, 6068, 6103, 6106.

9. Attorney and client ⚷58

Evidence disclosing attorney's complete disregard for fiduciary relation of an attorney to his clients and an absence of fair dealing in handling their affairs, together with attorney's prior misconduct for which he had been suspended from practice for limited period, warranted disbarment. St. 1939, pp. 354, 357, §§ 6067, 6068, 6103, 6106.

CARTER, J., dissenting.

In Bank.

Proceedings by William F. Herron against the State Bar of California to review recommendations of suspension and disbarment of petitioner as an attorney.

Petitioner disbarred.

William F. Herron, of San Francisco, in pro. per., and William E. Ferriter, of San Francisco, for petitioner.

P. H. McCarthy, of San Francisco, and Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

Now pending review by this court are three disciplinary proceedings instituted against the petitioner during the years 1940 to 1943 upon charges of professional misconduct arising out of the commission of acts involving moral turpitude, Business and Professions Code, chap. 4, art. 6, § 6106, and of the violation of his oath and duties as an attorney at law, Business and Professions Code, chap. 4, art. 6, § 6103; art. 4, §§ 6067, 6068. Commensurate with the import of the successive recommendations of the Board of Governors of The State Bar of California in these three matters, it is appropriate that they be considered in one opinion preliminary to a determination of the full measure of discipline to be imposed.

The first proceeding concerned the petitioner's alleged failure to take adequate steps to protect the interests of one of his clients in a quiet title action which he had commenced on her behalf, with the result that a default judgment was entered against her. After a rather extended hearing, the sessions of which were held intermittently during the course of some eleven months, the local administrative committee found the petitioner guilty of the charges preferred against him. However, the three members of said committee were not in agreement as to the measure of discipline to be imposed, two recommending that the petitioner be suspended from the practice of law for a period of two years and the third being of the opinion that the petitioner should be disbarred. The Board of Governors, after denial of the petitioner's motion for leave to present additional evidence and for a hearing de novo, adopted the findings of the local administrative committee, with one exception as will hereinafter be noted, but reduced the period of suspension recommended by the majority of said committee to three months.

The second proceeding related to the petitioner's alleged failure to complete specific arrangments made with certain clients in relation to the prosecution of an appeal, with the result that, contrary to their wishes, the case was submitted to the appellate court for decision without oral argument by the petitioner. After several hearings in the matter, the local administrative committee found the charges to be sustained by the evidence and recommended the petitioner's suspension from the practice of law for a period of ninety days. The Board of Governors, after full consideration of the record and the petitioner's statement made at the hearing before it, adopted the findings of the local administrative committee, with a slight amendment in the interest of accuracy in the recital of the factual sequence of pertinent events, but recommended that the petitioner be disbarred.

The third proceeding arose out of the petitioner's practice of law while under suspension by order of this court for nonpayment of his dues to The State Bar. The local administrative committee found in accordance with the charges as made in the notice to show cause issued in the matter and recommended that the petitioner be suspended from the practice of law for a period of ninety days. The Board of Governors, on a review of the record, approved and adopted the findings of the local administrative committee but recommended the petitioner's disbarment.

As to the first two proceedings above listed, the petitioner directs his main argument to the insufficiency of the evidence to sustain the charges made therein against him. The third proceeding he does not question upon its factual basis, but he does contest the board's recommendation as being too harsh under the circumstances, and as a further objection he urges the invalidity of pertinent portions of the State Bar Act concerning the payment of dues and the assessment of penalties for noncompliance therewith. In all three proceedings he challenges the propriety of the action followed by the different local administrative committees and the board herein in predicating their respective disciplinary recommendations in part upon a consideration of the petitioner's past record and conduct. With these principal points of dispute in mind, it is necessary at the outset to recite in some detail the prevailing factual situations as disclosed by the respective records herein.

The First Disciplinary Proceeding
S. F. No. 16833

On October 16, 1939, one Theresa M. Peters consulted the petitioner with reference to the proper legal action to be followed for the recovery of title to a certain lot in Burlingame which she had formerly owned. In 1934 foreclosure proceedings were taken against this piece of property in behalf of the Union Building and Loan Association, which was then being liquidated by the State Building and Loan Commissioner. After informing the petitioner of these facts, Miss Peters stated that the commissioner had agreed to let her purchase the property but later had refused to abide by the arrangement and was then on the verge of selling it to some persons by the name of Skreden. The petitioner agreed to represent Miss Peters in the matter, and she in the course of one of her initial visits to his office—on October 16, 17, or 18, 1939—paid him $25 on an agreed fee of $50.

On October 19, 1939, the petitioner filed on behalf of Miss Peters and against the Skredens and certain fictitious defendants a quiet title action predicated upon the theory of adverse possession and a lis pendens was duly recorded. (The petitioner claims that he instituted these legal proceedings in reliance upon Miss Peters' statement that she had paid taxes on the property for the preceding five years, but as shown in the findings made by the local administrative committee and adopted by the board, there was a sharp conflict in the evidence upon the question of whether the petitioner's client did so advise him, as well as upon the further consideration of whether she then mentioned the entry of a judgment taken against her in 1938 and quieting title in another with respect to this same property.) The Skredens filed an answer in the action disclaiming any interest in the property in question, but a corporation which had been served with summons as a fictitious defendant interposed an answer and cross-complaint, claiming ownership of the lot. Thereafter the petitioner in behalf of his client filed an answer to the cross-complaint, and the matter was set for trial on April 25, 1940.

The next time that Miss Peters discussed the pending quiet title action with the petitioner was on April 12, 1940. On that occasion she gained the impression that the petitioner was not entirely familiar with all of the circumstances involved, and accordingly on April 14, 1940, she sent him a detailed letter recounting the pertinent facts with regard to the controversy over the property in question. Among other things, Miss Peters stated therein that "From 1934 to 1939 the Building and Loan Commissioner held title to the property * * * and during this period they paid all the taxes on the property," and that in a quiet title action brought by the commissioner in 1937 judgment was obtained against her with respect to this same property. On April 16, 1940, the petitioner answered this lengthy report received from Miss Peters, commented that "considerable research work" would be necessary before he could "predict the outcome," and requested that she remit the balance of the retainer fee.

On April 20, 1940, Miss Peters again consulted with the petitioner regarding the pending litigation, and he then informed her that preparation for the trial of the case would involve extra work, for which he would have to charge an additional fee. In accord with such proposal, Miss Peters paid him the sum of $20, and the petitioner signed a receipt therefor as follows: "Received of Therese M. Peters $20.00 on account of trial fee in Peters v. Skreden, et al. Balance $30.00." A few days later, pursuant to the agreement of the parties, Miss Peters was given in this matter a further credit of $5.00, an amount which she had originally paid to the petitioner on account of his contemplated services with reference to an entirely different affair but which were in fact never rendered by him —hence, the transfer. The petitioner arranged for the continuance of the trial of the case to May 31, 1940.

Meanwhile, for the purpose of verifying the facts recited in Miss Peters' letter of April 14, 1940, the petitioner checked the court records in Redwood City affecting the property in question. From such examination he found that the Building and Loan Commissioner had secured a judgment in 1938 quieting title to the premises, enjoining Miss Peters "from asserting any right, title, interest or estate whatsoever" therein, and decreeing a money award of $1,960 against her "for the unlawful withholding of possession" of the said property. According to the findings of the local administrative committee herein, the evidence as to the petitioner's next step in the matter was in direct conflict. The petitioner testified that on May 9, 1940, he wrote to Miss Peters a letter stating, in substance, that she had no case because of the existence of the 1938 quiet title judgment, that in his opinion "it would be utterly futile to proceed with the trial," but that since the matter was set for hearing on May 31, 1940, there was ample time for her to "confer with other counsel if [she] be so advised." He also claimed to have repeated these statements to her in the course of a telephone call on May 30, 1940. Miss Peters denied receiving this letter from the petitioner and claimed that he gave her no oral notification either of his desire to withdraw from the case or of the new trial date. Without resolving this material conflict, the local administrative committee found that no formal steps were taken by the petitioner, pursuant to the provisions of section 284 of the Code of Civil Procedure, to effect his withdrawal as counsel for Miss Peters in the pending litigation; that he did not appear at the trial on May 31, 1940; and that on said day judgment by default was rendered against her and in favor of the cross-complainant in the action. Upon its consideration of the evidence on this point, the board, in adopting the findings of the local administrative committee, made its only exception thereto and expressly found that the petitioner "wrote and mailed to said Therese M. Peters said letter dated May 9, 1940."

The petitioner took no further action of any kind on behalf of Miss Peters in connection with the property in question, nor did he return, or make any offer to return, the $50, or any part thereof, paid by Miss Peters on account of this matter, as above stated. He justifies his retention of this sum upon the claim that the time he spent working on the case would warrant such charge. The present disciplinary proceeding was instituted in September, 1940, following Miss Peters' lodging of a complaint with The State Bar in July, 1940, and the preliminary investigation thereupon undertaken by the authorized local administrative committee.

[1, 2] Viewing this evidence in the light most favorable to the petitioner, it is clear that he failed to fulfill his professional obligations to his client, Miss Peters. Without regard for conflicts in the testimony, the following points stand undisputed: (1) the petitioner's acceptance of a payment from Miss Peters "on account of trial fee" in the pending quiet title litigation when he

knew the facts would not support the theory upon which he had commenced the action—adverse possession and the payment of taxes on the property for the preceding five years; (2) his knowledge prior to the scheduled trial date, from an examination of the pertinent court records showing the precise terms of a prior quiet title judgment entered against his client with respect to this same property, that persistence in the prosecution of the pending litigation might subject both him and Miss Peters to contempt of court proceedings; and (3) his failure under these circumstances to effect, in the manner provided by law, his withdrawal as the attorney in the case for Miss Peters, who admittedly had not agreed that he be relieved of his responsibilities therein and who, without the benefit of legal representation at the trial, suffered the entry of an adverse judgment by default in the matter. The petitioner advances many contentious claims—such as Miss Peters' lack of good faith in her original presentation of the facts to him, the meagreness of the fee retained by him for his services after the deduction of necessary expenditures made by him in connection with the commencement of the quiet title action, and the absence of damage sustained by her by reason of the entry of the default judgment, since no act or omission on his part could prevail against the bar of the prior judgment against her. However, these arguments cannot nullify the importance of the following matters: (1) the petitioner's acceptance of money for the purpose of prosecuting the quiet title proceedings begun by him after he had received from his client a definite statement of the true facts in the case showing that she had no cause of action therein; (2) his failure to return said money to her; and (3) his neglect to appear at the trial of the quiet title action, in explanation of his position, while still charged as her counsel of record. Also immaterial to the main issue of the petitioner's duty to Miss Peters as his client is his elaborate recital of her past negotiations with the Building and Loan Commissioner and various realty men in her efforts to reacquire the lot in question—matters which formed the basis of his request for leave to present additional evidence and for a hearing de novo before the board, and which that body properly deemed irrelevant in denying his application. Suffice it to say at this point that with reference to disciplinary proceedings the definition of turpitude as anything done "contrary to justice, honesty, modesty or good morals" has long been approved by this court (Marsh v. State Bar, 210 Cal. 303, 307, 291 P. 583; Dudney v. State Bar, 214 Cal. 238, 240, 4 P.2d 770, and within this concept the petitioner's misconduct in relation to his duties and obligations as an attorney is clearly included.

The Second Disciplinary Proceeding
S. F. No. 16881

In the prosecution of an appeal from an adverse judgment in a certain negligence action, Doris Zwerin Unger and her son, Kenneth Carlton Zwerin, also an attorney, in November, 1941, employed the petitioner to write the briefs and make the oral argument before the District Court of Appeal of this state. The briefs were prepared, the petitioner received $100 for his work in connection therewith, and the printing and filing expenses were paid by his clients. The case was then set for hearing by the District Court of Appeal in Los Angeles on May 20, 1942, and it was agreed that the petitioner should make the oral argument there, for which services his compensation would be $50, to be paid as follows: $25 in cash and two railroad tickets from San Francisco to Los Angeles and return on the Daylight Limited for himself and his wife. On account in this matter, Mr. Zwerin some time during the latter part of April, 1942, gave the petitioner $5. Thereafter, and on May 18, 1942, in the early afternoon, there was delivered to the petitioner in the office of Mr. Zwerin by the latter's secretary an envelope containing a check for $20 and two round-trip railroad tickets as specified. The petitioner took the check, which he subsequently cashed, but he left the envelope with the tickets therein enclosed and stated that he would return at 3:30 p. m. on that day. He did not so return to Mr. Zwerin's office, but Mrs. Herron did go there that afternoon and obtained the tickets. The following morning, May 19, 1942, she presented them to the Southern Pacific Company and secured a refund therefor, an amount originally paid by Mr. Zwerin. She thereupon advised Mr. Zwerin's office of her action and suggested that the money be collected from her husband, the petitioner. No part of the $50 so advanced was ever returned by the petitioner to his clients. In explanation of this remissness, he claims that Mr. Zwerin's refusal several days later to discuss the matter further with him precluded his making proper amends.

The petitioner failed to make the scheduled trip to Los Angeles, he failed to present an oral argument in the case before the District Court of Appeal as he had theretofore agreed to do, and he failed to notify his clients in time that he would not so appear in court so that they might procure other legal representation in the matter. Thereafter, and on May 20, 1942, when, in accordance with the calendar of said court, the Zwerin case was called for hearing, a notation was made therein that argument was waived and the cause was ready for submission; in June, 1942, the court so ordered, and thereafter the judgment was affirmed against the petitioner's clients. Zwerin v. Riverside Cement Co., 52 Cal.App.2d 715, 126 P.2d 920. On July 1, 1942, the petitioner was served with a notice to appear and show cause before a local administrative committee of The State Bar why he should not be disciplined for professional misconduct as charged by reason of the foregoing factual situation.

[3] The only point of conflict in the record relates to the financial arrangement between the petitioner and his clients with respect to his presentation of the oral argument upon the submission of their case to the District Court of Appeal for decision. The petitioner admits that he very strongly outlined to Mr. Zwerin and his mother the great advantage of the proposed procedure before said court, and accordingly they, while satisfied with the briefs prepared by the petitioner in the matter, were most anxious that he perform this additional service if it would be of such benefit to their appeal. As to the point here in controversy, the petitioner refers to his testimony before the local administrative committee to the effect that the agreement on the subject contemplated his receipt of $50 expense money plus the above mentioned railroad transportation for him and his wife, and he argues that when the cash amount was not forthcoming at the time of his scheduled departure from San Francisco, he was justified in not making the trip as planned. But contrariwise, Mr. Zwerin testified that the terms of the understanding comprehended no more than the full payment of $50 to the petitioner—$25 in cash and $25 for the railroad fare—and this account was embodied in the findings of fact made by the local administrative committee and approved by the board. In attacking the so accredited arrangement, the petitioner claims that it was absurd on its face—allowing the petitioner but $25 to defray his expenses in Los Angeles over a period of several days consequent of a likely delay in the calling of the Zwerin case for oral argument by reason of a crowded court calendar. But the conflict on the point is immaterial, for whether the petitioner was to receive an expense allowance of $50 or $25 in addition to the mentioned railroad transportation, the record conclusively establishes: (1) that, without notice to his clients that the sum advanced was insufficient as he understood their agreement respecting his compensation, he accepted the smaller amount and his wife secured the railroad tickets for the planned trip; and (2) that he failed to go to Los Angeles to make the oral argument in his clients' case before the District Court of Appeal. Moreover, there is evidence that factors other than monetary considerations actuated the petitioner's acceptance of the now disputed arrangement: (1) his extension of professional courtesy to a fellow attorney; (2) his hope of future appeal work from this initial contact; and (3) his plan to combine business with pleasure on the contemplated Los Angeles trip so that he and his wife might enjoy a "small vacation." In this condition of the record, the petitioner's failure to appear in the appellate court for oral argument of the Zwerin case constituted a most serious and flagrant breach of his professional duty.

The Third Disciplinary Proceeding
S. F. No. 16959

[4] The record herein shows without conflict the following facts: After the petitioner had been given the statutory notice of his delinquency and demand had been duly made upon him for certain fees and penalties prescribed and required by law, Business and Professions Code, chap. 4, art. 8, § 6143, this court, by its order of November 23, 1942, suspended the petitioner from the practice of law in this state (Bar Misc. 1752), and the period of suspension remained in effect until June 3, 1943, when he was reinstated by payment of dues and arrears. Meanwhile and on May 4, 1943, the petitioner had filed in the Superior Court for Marin County in this state a complaint in an action for damages and a petition in a related guardianship proceeding, wherein he designated himself respectively as "attorney for the plaintiffs" and "attorney for the petitioner." On May 11, 1943, the petitioner was directed to appear before a local administrative commit-

tee of The State Bar to show cause why he should not be disciplined for his disregard of the order of this court suspending him from practice. Business and Professions Code, ch. 4, art. 6, § 6103. Some three weeks following the issuance of the order to show cause in this matter the petitioner paid all arrearage shown on the records of The State Bar to be outstanding against him and thus effected his reinstatement as an active member of the profession on June 3, 1943, as above mentioned.

After a hearing at which the petitioner appeared in his own behalf, the local administrative committee found the petitioner to be guilty as charged by reason of his filing of the two pleadings above noted. It also found specifically that eleven prior disciplinary proceedings had been filed against him. Of these, four were consolidated for consideration by this court and resulted in an order of suspension from practice for a period of one year (Herron v. State Bar, 212 Cal. 196, 298 P. 474); two are those heretofore recited as now pending determination in this court (S. F. Nos. 16833 and 16881), and, as stated in the fore part of this opinion, respectively carry recommendations of suspension from practice for three months and disbarment; two were dismissed by the Board of Governors after formal hearing; and the remaining charges were characterized by the respective preliminary investigating committees as not calling for disciplinary action, so that The State Bar proceeded no further in those matters. As a conclusion from its findings herein the local administrative committee observed that while it "was not impressed with the explanation of [petitioner] that he was without actual notice or knowledge that the order of suspension was in force and effect on the date when he filed the proceedings which formed the basis of the notice to show cause herein," it was of the view that "the violation complained of was the result of a careless, rather than a wilful, disregard of the court's order and that severe disciplinary action which otherwise might be considered proper in the light of prior charges, is not warranted herein." Accordingly, it recommended that the petitioner be suspended from the practice of the law for a period of ninety days.

The petitioner did not appear at the time set for the hearing of this matter before the Board of Governors, but prior thereto he had advised said body by telephone that "he wished to waive oral argument and was willing to have the proceeding submitted on the record." Thereupon, after full consideration and discussion of the matter, the findings of fact as made by the local administrative committee were approved and adopted by the board. However, it rejected the local administrative committee's disciplinary recommendation, and instead, upon a more stern view of the petitioner's instant infraction in the light of his past conduct, recommended the extreme penalty of disbarment. Without detailing the petitioner's testimony offered in explanation of his action in having engaged in the practice of law during the period of his suspension for the nonpayment of State Bar dues, suffice it to say at this point that such evidence in the record attests the propriety of the conclusion above quoted from the local administrative committee's report in this matter and constrains this court to regard that body's recommendation as more commensurate with the nature of the offense here involved.

[5, 6] The petitioner's challenge of the constitutionality of pertinent provisions of the State Bar Act prescribing the power of the Board of Governors to fix and collect membership dues and assess penalties, Business and Professions Code, ch. 4, art. 8, §§ 6140–6145, requires no extended discussion here. The validity of the State Bar Act as a regulatory measure under the police power has been heretofore determined by this court, and it has been held that the reasonable expenses necessary to pay the costs of enforcement of the act, in furtherance of the purposes thereof, may be imposed upon the membership in the form of fees or dues. Carpenter v. State Bar, 211 Cal. 358, 360, 295 P. 23; Hill v. State Bar, 14 Cal.2d 732, 735, 97 P.2d 236. The petitioner relies with much confidence upon City of Sonora v. Curtin, 137 Cal. 583, 70 P. 674. However, that case has no application here. It merely stands for the proposition that a city may not impose upon an attorney, licensed as such by the courts, a tax for revenue purposes only where his acts fall short of carrying on a business within its jurisdiction, and accordingly, a municipal ordinance providing, without qualification, that "every lawyer shall pay" a quarterly license would be invalid as a revenue measure. Upon such basis the case is fully distinguished in Re Galusha, 184 Cal. 697, 700, 195 P. 406, and in Re Johnson, 47 Cal.App. 465, 468, 190 P. 852. Insofar as the cited opinion in the course of discussion negatives a city's power to regu-

late the practice of law, it simply accords with the settled principle that such an undertaking by a municipality would constitute an interference with state affairs. City of Sonora v. Curtin, supra, 137 Cal. at pages 587, 588, 70 P. 674; cf. In re Galusha, supra, 184 Cal. at page 699, 195 P. 406. Wholly distinct from the problem there considered is the present situation involving the Board of Governors' imposition of an annual fee upon a practicing attorney as a purely regulatory exaction authorized within prescribed limits by the Legislature in furtherance of the purposes of the State Bar. Act. State Bar of California v. Superior Court, 207 Cal. 323, 278 P. 432. Accordingly, for failure to pay membership dues, an attorney is properly subject to suspension from practice within this state. Carpenter v. State Bar, supra; Hill v. State Bar, supra.

[7, 8] There now remains for consideration the measure of discipline appropriate to the determination of the pending proceedings. The petitioner is fifty-eight years of age and was admitted to the practice of law in this state in October, 1909. The respective records herein disclose that in the course of his legal career and beginning with the year 1927, the petitioner has had frequent difficulties with his clients concerning money transactions and his failure to give reasonably prompt attention to the matters entrusted to his care. As heretofore noted, they had varying results insofar as disciplinary considerations are concerned: some, as consolidated for hearing, culminated in this court's order that the petitioner be suspended from practice for one year (Herron v. State Bar, 1927, supra, 212 Cal. 196, 298 P. 474), some were dismissed by the Board of Governors upon recommendation of the respective local administrative committees involved, and in the others no formal proceedings were instituted on the complaints lodged with The State Bar. Regardless of any argument as to whether or not it is proper here to attach any importance to previous charges for which no discipline was administered, certainly those infractions for which the petitioner was suspended from practice for a limited period (Herron v. State Bar, supra) should be taken into account in fixing the degree of discipline to be imposed in relation to the professional misconduct subject of the present proceedings. Ring v. State Bar, 4 Cal.2d 196, 197, 198, 47 P.2d 704; Mills v. State Bar, 6 Cal.2d 565, 567, 58 P.2d 1273; Petersen v. State Bar, 21 Cal.2d 866, 871, 136 P.2d 561. The petitioner's reference to various principles of criminal law as negativing the propriety of considering herein such established prior wrongdoing—professional misconduct for which a measure of discipline has already been exacted (Herron v. State Bar, supra) —has no bearing upon the disposition of disciplinary proceedings, which "this court has uniformly treated * * * as peculiar to themselves, and governed exclusively by the Code sections specifically covering them." Marsh v. State Bar, 2 Cal.2d 75, 78, 39 P.2d 403, 405. As was said in Prime v. State Bar, 18 Cal.2d 56, 62, 112 P.2d 881, 884, wherein the analogy of rules of criminal practice and procedure was likewise advanced and rejected: "The important factor is whether the attorney lacks the necessary and proper moral qualifications to continue in practice." Also to complete this recital of the petitioner's previous professional difficulties, mention should be made of The State Bar's application to this court in 1932 for his disbarment upon the record of his conviction of a misdemeanor involving moral turpitude and the denial of such summary discipline upon the ground that the trial court's order in the criminal action "suspending sentence" was equivalent to an order of probation. In re Herron, 217 Cal. 400, 19 P.2d 4; cf. In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644. In the determination of the measure of discipline warranted in connection with the present charges against the petitioner, regard need only be had for such past misconduct as has been heretofore established (Herron v. State Bar, supra), and it will be given no more than its just consideration for the protection of the public, the legal profession and the courts. Marsh v. State Bar, supra, 2 Cal.2d at page 79, 39 P.2d 403.

[9] While on the basis of the three factual situations now under review, it is not necessary for this court to pass upon the petitioner's professional integrity, the evidence here does disclose his complete disregard for the fiduciary relation of an attorney to his clients and an absence of fair dealing in handling their affairs. In both the Peters and Zwerin matters—the first two proceedings hereinabove outlined—the petitioner indisputably accepted fees without rendering the stipulated services and without making some adequate arrangement for the legal representation necessary in those cases. The petitioner's communica-

tion to Miss Peters relative to the lack of merit in her quiet title action shortly before the trial date would not excuse him from adhering to the fee arrangement made with her and appearing at the scheduled hearing so as to prevent the entry of a default judgment against her while he still remained as her counsel of record. Still more objectionable is the petitioner's remissness in his professional obligations in the Zwerin situation by reason of his failure, without prior warning or explanation, to make the trip to Los Angeles to present the oral argument in the appellate court as agreed. These instances of grave misconduct gave his respective clients just and serious cause for complaint, and may not be condoned. In contrast, the remaining charge here involved—the petitioner's practice of law during the period of his suspension by order of this court for nonpayment of State Bar dues—becomes a matter of secondary importance. While obedience to orders of court must of course be required, the petitioner did secure his reinstatement shortly after his citation by The State Bar and his violation appears to have been "a careless, rather than a wilful, disregard" of duty. From this aspect such infraction pales in significance as a disciplinary cause here, and it need not be the subject of further reference.

After considering carefully the full record in the Peters and Zwerin cases, together with the petitioner's prior record as heretofore limited, in order to determine his fitness to continue in practice, it is impossible to reach any conclusion but that his disbarment is warranted. Whatever might be said in favor of a milder punishment for single infractions not involving deliberate moral turpitude, there can be no doubt that any lawyer who is guilty of successive breaches of duty with relation to the management of his clients' affairs should be deprived of the license under which he is authorized to practice law, and by which he has been recommended to the public as a person worthy of trust. This court has heretofore been lenient in its disposition of disciplinary charges against the petitioner (Herron v. State Bar, supra, 212 Cal. 196, 298 P. 474; In re Herron, supra, 217 Cal. 400, 19 P.2d 4), but this policy cannot continue when the petitioner persists in his neglect to avail himself of the opportunity to mend his ways. Marsh v. State Bar, supra, 2 Cal.2d 75, 39 P.2d 403. In making an order of disbarment this court should and does exercise much care, for the denial of an attorney's right to practice law in this state is a grave matter, placing an indelible stain upon his name which affects him generally as a citizen, as well as depriving him of his chosen means of gaining a livelihood. As was said in Wilcox v. State Bar, 2 Cal.2d 614, 621, 42 P.2d 631, 633: "Once disbarred, experience teaches us that the barrier which is thereby raised becomes almost insuperable to reinstatement." But with due regard for the various factors of consideration herein reflecting the petitioner's lack of strength and stability in his moral concepts with relation to his professional duties, no alternative is open to this court.

It is therefore ordered that the petitioner be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys, effective thirty days after the filing of this decision.

CARTER, Justice.

I dissent. While I agree that the conduct of petitioner as disclosed by the record now before us warrants some discipline, I believe that the penalty of disbarment is altogether too severe and grossly disproportionate to the nature of the charges against him. It cannot be said that any of the charges against petitioner amount to embezzlement or misappropriation of funds. The Peters and Zwerin charges arose out of apparent misunderstandings with his clients. They indicate that petitioner was somewhat lax in the handling of his clients' cases, but in view of the finding of the Board of Governors with respect to his advice to Miss Peters relative to the lack of merit in her case shortly before the time fixed for the trial, I do not think it can be said that he was guilty of misconduct merely because he did not withdraw from the case. He did advise her to obtain other counsel.

The Zwerin case presents a different situation. In my opinion, he should either have gone to Los Angeles and argued the case or returned the expense money to his clients. His conduct in this case warrants some discipline.

In regard to practicing while suspended by order of this court, I think the record shows a rather trivial infraction, and in view of the fact that he became reinstated as soon as he was cited to appear before

The State Bar, I think that the amount of discipline for this alleged misconduct should be rather mild.

In the Peters case a majority of the local administrative committee recommended that petitioner be suspended for a period of two years. The Board of Governors adopted the findings of the local administrative committee with one exception, but reduced the period of suspension recommended by the majority of said committee to three months.

In the Zwerin case the local administrative committee unanimously recommended petitioner's suspension from the practice of law for the period of ninety days. The Board of Governors adopted the findings of the local administrative committee with a slight amendment, but recommended that petitioner be disbarred.

In the third proceeding, which arose out of petitioner's practice of law while under suspension by order of this court for nonpayment of his State Bar dues, the local administrative committee recommended that petitioner be suspended for a period of ninety days. The Board of Governors approved the findings of the local administrative committee, but recommended that petitioner be disbarred.

It is obvious that petitioner's conduct in the Peters case did not impress the members of the Board of Governors as being of serious import, or that there were extenuating circumstances which the board considered in ameliorating the discipline which should be administered, as the board recommended a suspension for the period of only ninety days. It is likewise obvious that petitioner's conduct in the other two cases did not impress the members of the respective local administrative committees as being of serious import, as each of said committees recommended a suspension for a period of only ninety days in each of these cases. While the cumulated charges indicate a course of conduct which reflects more unfavorably upon petitioner than a single charge, I am disposed to the view that the only one of the three charges against petitioner of any consequence arises out of his conduct in the Zwerin case. While his conduct in that case, based upon the findings of the local administrative committee, is reprehensible, it certainly is not of sufficient gravity to justify petitioner's disbarment, especially in view of the recommendation of the local administrative committee that he be disciplined by suspension from practice for the period of ninety days. And even if we conclude that petitioner was guilty of unprofessional conduct arising out of the other two charges against him, the combined effect of these charges, in my opinion, is not sufficient to warrant the infliction of the extreme penalty of disbarment.

While I would concur in a judgment suspending petitioner from practice for a short period of time for his conduct in connection with the Zwerin case, I find nothing in the record in any or all of these cases to support or justify a judgment of disbarment.

Rehearing denied; CARTER, J., dissenting.

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23 Cal.2d 865

PENAAT v. TERWILLIGER.

S. F. 16864.

Supreme Court of California.

March 30, 1944.

Rehearing Denied April 27, 1944.

1. Taxation 🔑630

The statute requiring publication of delinquent tax lists in "newspaper of general circulation" indicates legislative intention that newspaper must be one of general circulation. Pol.Code, § 3766.

See Words and Phrases, Permanent Edition, for all other definitions of "Newspaper of General Circulation".

2. Newspapers 🔑3(2)

Under statute requiring publication of delinquent tax lists in newspaper of general circulation, tax sale under publications of list in section of newspaper, general news and advertising being in first section and delinquent tax list in second section containing world map as filler, was not void where the two sections were folded together and constituted complete newspaper distributed to all subscribers on date of publication. Pol.Code, §§ 3766, 3767.

3. Taxation 🔑659

The tax collector must examine assessment roll to ascertain taxpayer's address, and must mail notice of sale if address appears. Pol.Code, § 3771a.

4. Taxation ⚿659

A tax sale was not void because notice was not mailed to last known address of parties to whom land was last assessed, where assessment roll did not disclose addresses of parties to whom land was last assessed, and parties whose addresses appeared on a prior assessment roll were not the parties to whom the land was last assessed. Pol.Code, § 3771a.

CARTER and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Naomi J. Penaat against Clara Terwilliger to quiet title to property purchased at a tax sale. From a judgment for defendant, plaintiff appeals.

Reversed.

Prior opinion 136 P.2d 642.

William H. Penaat and Penaat & Penaat, all of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., amici curiae on behalf of appellant.

Edmund J. Holl, of San Francisco, for respondent.

TRAYNOR, Justice.

Defendant failed to pay the county taxes for 1934 upon a lot that she owned in San Mateo County. Plaintiff purchased the property at a tax sale on June 28, 1940, and subsequently brought this action to quiet her title thereto. The trial court held the tax sale void and entered judgment quieting defendant's title to the property. From this judgment plaintiff appeals.

The trial court held that the publication of the delinquent tax list and of the notice of sale did not comply with sections 3766, 3767 and 3771a of the Political Code. The delinquent tax list was published on June 5, 12 and 19, 1935, in a separately folded section of the Burlingame Advance Star dealing exclusively with the delinquent tax list. The notice of sale was published on June 7, 14 and 21, 1940, in a separately folded section of the San Mateo Times, also devoted exclusively to the delinquent tax list except for a map of the world used as a filler on the last page.

Before 1921, section 3766 of the Political Code provided that publication of the delinquent tax list "must be made once a week for three successive weeks in some newspaper, *or supplement thereto*, published in the county * * *." St.1895, p. 326. (Italics added.) This section was amended in 1921 to provide: "the publication must be made once a week for three successive weeks in some newspaper *of general circulation* published in the county * * *." St.1921, p. 1723. (Italics added.) Before it was amended tax collectors and others might easily have supposed that the section authorized publication of the delinquent tax list in a supplement that was circulated separately from the newspaper because of the provision that the delinquent tax list could be published either in a newspaper "or" in a supplement to a newspaper. Such a construction, however, would probably have been erroneous in view of Tully v. Bauer, 52 Cal. 487, involving the antecedent of section 3766 in the Revenue Act of 1857, as amended in 1859 (Stats.1859, pp. 343, 348). It was therein provided that the delinquent tax list should be published "by one insertion, one time per week, for three successive weeks, in some paper published in the City and County, or in a supplement to such paper." The delinquent tax list was published in a supplement that was not circulated coextensively with the newspaper. The court held the publication invalid on the ground that it was the intent of the statute to authorize publication "in a supplement which was distributed for circulation generally with the newspaper." In revising section 3766 in 1921, the Legislature may well have decided to eliminate the words "or in a supplement thereto," rendered superfluous by the Tully case, to prevent any misinterpretation by those concerned with the publication of delinquent tax lists.

[1] Before the 1921 amendment, section 3766 was also open to the construction that since the delinquent tax list had only to be published in "some newspaper" it was immaterial how restricted the circulation of the newspaper might be. By adding the words "of general circulation" the Legislature made it clear that the newspaper must be one of general circulation. See In re Herman, 183 Cal. 153, 191 P. 934, 19 Cal. Jur. 1072, 1074; Pol.Code, secs. 4460, 4462.

[2] As amended, the section simply requires publication of the delinquent tax list

"in some newspaper of general circulation" without specifying that publication should or should not be in a supplement. This provision is like a multitude of other provisions for the publication of notices in newspapers. See, for example, Code Civ. Proc. secs. 413, 1277; Prob.Code, secs. 261, 700; 7 Cal.Jur. 471; 10 Cal.Jur. 39, 40; 11 Cal.Jur. 246, 640. For the convenience of the public and the publisher, newspapers are usually folded into two or more sections, each of which is an integral part of the newspaper. The question is not in what part of a newspaper the delinquent tax list is published, but whether it is published in a newspaper of general circulation as an integral part thereof and distributed as such to subscribers. Thus in Lent v. Tillson, 72 Cal. 404, 430, 14 P. 71; Id., 140 U.S. 316, 333, 11 S.Ct. 825, 35 L.Ed. 419, a special improvement bond act provided for the publication of prescribed notices in "two of the daily papers printed in the City of San Francisco." Stats.1875–1876, pp. 433, 434. The notices were published on a third sheet, designated as a supplement, of a two-sheet newspaper. The court held that the notice was published in compliance with the statute, for the supplement, even though designated as such, was "part and parcel of the newspaper itself" [72 Cal. 404, 14 P. 82] and was distributed coextensively with the rest of the paper. See, also, Heberling v. Moudy, 247 Mo. 535, 154 S.W. 65; Star Co. v. Colver Pub. House, C.C., 141 F. 129; 19 Cal.Jur. 1068; 46 C.J. 19; 50 C.J. 541.

The publication of a delinquent tax list in a separate section, uncluttered by other reading matter, makes it readily available to those interested. It would be highly arbitrary to require that other reading matter be interlarded with such lists in disregard of the exigencies incident to the editing of a newspaper as a whole. Often the delinquent tax lists run to such lengths that it would not be feasible to punctuate the successive pages with fragments of news columns or advertising matter. The requirement of publication in a newspaper of general circulation can hardly be construed as necessitating such a departure from good editorial practice.

In Clayton v. Schultz, 22 Cal.App.2d 72, 70 P.2d 512, on which defendant relies, the delinquent tax lists were "separately bound and covered and was not in anywise connected with the main part of the paper." 22 Cal.App.2d 74, 70 P.2d 512. In the present case, however, the newspaper in each instance was folded in two sections, the general news and advertising being in the first section and the delinquent tax list in the second. The two sections were folded together, and together constituted the complete edition of the newspaper, distributed to all subscribers on the dates of publication. Any suggestion in Clayton v. Schultz, supra, that a section of a newspaper is dissociated from the whole by being separately folded or by dealing exclusively with one subject is disapproved.

Since there is no question that the publications were newspapers of general circulation, and since the sections in which the delinquent tax lists appeared were integral parts of the newspapers for the days in question, such lists were published in compliance with the statutory requirements.

[3, 4] Defendant contends that the sale of the property on June 28, 1940, was void on the ground that a notice of the sale was not mailed pursuant to section 3771a of the Political Code providing that preliminary to any sale at public auction "the tax collector shall, within five days after the first publication of said delinquent list, mail a copy of said list or publication, postage thereon prepaid and registered, *to the party to whom the land was last assessed next before such sale, at his last known address,* said notice to be mailed at least twenty-one days before the date of sale * * *." (Italics added.) The parties to whom the land was last assessed next before the sale on June 28, 1940, on the 1940 assessment roll, were Clara Terwilliger and R. A. Jenkins. The first appearance of these names as owners of the property was on the 1935 assessment roll, but neither on this roll nor on any subsequent one were these names accompanied by addresses. It is well settled that the tax collector must look at the assessment roll to see "whether the address of the party appears thereon. If it does, he must mail a notice. If it does not, no mailing of notice is required." Healton v. Morrison, 162 Cal. 668, 673, 124 P. 240, 242; Kehlet v. Bergman, 162 Cal. 217, 218, 121 P. 918; Jacoby v. Wolff, 198 Cal. 667, 681, 247 P. 195; Crouch v. Shafer, 177 Cal. 154, 169 P. 1019. Defendant calls attention to the assessment roll for 1934, which shows the owners as Everett H. and Pearl B. Davis, care of Cypress Lawn Cemetery, Colma, California, but these were not the parties to whom the land was last assessed next before the sale in 1940 and were

therefore not the parties to whom the notice had to be mailed.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, and SCHAUER, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. If this were a case of first impression before this court, I would be disposed to agree with the conclusion reached in the majority opinion that the publication of the delinquent tax list and of the notice of sale complied with the requirements of sections 3766, 3767 and 3771a of the Political Code and that the judgment should therefore be reversed. But I am convinced that the case of Clayton v. Schultz, 22 Cal.App.2d 72, 70 P.2d 512, is squarely on all fours with this case and that these two cases cannot be fairly distinguished. While the majority opinion attempts to distinguish the factual situation in the case at bar from that existing in the Clayton case, I am sure that there is not a sufficient difference in the facts of the two cases to change the result. In the Clayton case the delinquent tax list was published in what was termed a supplement to the "Twin Peaks Sentinel." This supplement carried no other printed matter than that pertaining to the delinquent tax list. It was separately bound and covered and was not in anywise connected with the main part of the paper. The same situation exists in the case at bar. The delinquent tax list of San Mateo County, advertising the property here involved for sale, was published in a separately folded section of the "Burlingame Advance Star." This section carried the name and trade-mark of the newspaper at the top of the page, but there was printed therein no news or any other reading matter except that dealing exclusively with the delinquent tax list. The notice of sale of the lot in question was published in 1940 in a similar separately folded section of the "San Mateo Times," also devoted exclusively to the delinquent tax list, with no news or other reading matter except a map of the world, which was put in as a "filler" on the last page.

The trial court found that these publications did not comply with section 3766 of the Political Code (now sec. 3356, Rev. and Tax. Code, St.1939, p. 1321).

So, then, we have a situation in both of these cases which is substantially identical, the delinquent tax list and notice of sale in each case being published in a separately folded section of the newspaper devoted exclusively to the publication of the delinquent tax list and notice of sale of property for delinquent taxes. So far as appears from the opinion in the Clayton case, this separately folded section was circulated with and as a part of the newspaper which published it. To say that the delinquent tax list in the Clayton case was published in a supplement to a newspaper and that the one in the case at bar was not, is to state a clear contradiction.

The majority opinion does not purport to discuss the definition of what constitutes a supplement. In fact, the majority opinion does not state whether or not the sections of the paper in which the delinquent tax list and notice of sale were published were or were not supplements to the papers in which they were published. What the majority opinion in effect holds is that whether the sections of the papers in which the delinquent tax list and notice of sale were published were supplements or separate sections of the newspaper is immaterial, and that such publications constitute compliance with the provisions of sections 3766, 3767 and 3771a of the Political Code. In so holding the majority opinion in effect overrules Clayton v. Schultz, supra, without expressly so stating.

The case of Clayton v. Schultz, supra, was decided by the District Court of Appeal of the Third Appellate District on July 19, 1937, and a hearing was denied by this court in said case on September 16, 1937, without a dissenting vote of the members of this court. In said case the District Court of Appeal said:

"Prior to 1921, section 3766 of the Political Code * * * of this state provided as follows: 'Manner of making publication. The publication must be made once a week for three successive weeks, in some newspaper, *or supplement thereto,* published in the county.'

"The foregoing section was amended in 1921 * * * to read as follows: 'Publication of delinquent tax lists. The publication must be made once a week for three successive weeks in some newspaper of general circulation published in the county.'

"Obviously it was the intention of the Legislature to eliminate publications of delinquent tax lists in supplements to a newspaper, and to confine the publications thereof to a regular or main issue of a newspaper of general circulation"

Since the decision in the Clayton case the Legislature has held three regular sessions and numerous special sessions and no attempt has been made to amend section 3766 of the Political Code; in fact, at the 1939 session of the Legislature said section was re-enacted as section 3356 of the Revenue and Taxation Code. Stats.1939, ch. 154.

It is well settled that where a statute is re-enacted after it has been construed and interpreted by an appellate court, there is a strong presumption of the legislative intent to adopt the construction and interpretation placed thereon by the court. Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 98 A.L.R. 1499; In re Nowak, 184 Cal. 701, 195 P. 402; Dalton v. Lelande, 22 Cal.App. 481, 135 P. 54; In re Li Po Tai, 108 Cal. 484, 41 P. 486; State Commission in Lunacy v. Welch, 154 Cal. 775, 99 P. 181; Lindsay-Strathmore I. Dist. v. Superior Ct., 182 Cal. 315, 187 P. 1056; Blodgett v. Superior Ct., 210 Cal. 1, 290 P. 293, 72 A.L.R. 482; Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas. 1913C, 1093; Jaeger v. Jaeger, 73 Cal.App. 128, 238 P. 139; Blanchard v. Norton, 49 Cal.App.2d 730, 122 P.2d 349; Holmes v. McColgan, 17 Cal.2d 426, 110 P.2d 428; Estate of Hebert, 42 Cal.App.2d 664, 109 P.2d 729; In re Halcomb, 21 Cal.2d 126, 130 P.2d 384. It has also been held that a later meeting of the Legislature without changing a statute after it has been construed by the courts is presumptive evidence that the Legislature is satisfied with the judicial interpretation. Slocum v. Bear Valley Irrigation Co., 122 Cal. 555, 55 P. 403, 68 Am.St.Rep. 68; People v. Southern Pac. Co., 209 Cal. 578, 290 P. 25. Notwithstanding the apparent approval by the majority opinion of the interpretation placed upon section 3766 of the Political Code by the District Court of Appeal in its opinion in Clayton v. Schultz, supra, and by this court as evidenced by its denial of the petition for hearing in that case, and notwithstanding the express declaration in Clayton v. Schultz, supra, that: "Obviously it was the intention of the Legislature to eliminate publications of delinquent tax lists in supplements to a newspaper, and to confine the publications thereof to a regular or main issue of a newspaper of general circulation," the majority opinion in the case at bar states: "In revising section 3766 in 1921, the Legislature may well have decided to eliminate the words 'or in a supplement thereto,' rendered superfluous by the Tully case, to prevent any misinterpretation by those concerned with the publication of delinquent tax lists." I think it is clear that the two declarations above quoted as to the legislative intent in amending and revising section 3766 of the Political Code in 1921 are diametrically opposed, and this court is placed in the unfortunate position of giving expression to a legislative intent contrary to that which the Legislature has at least tacitly approved by failing to amend or revise section 3766 of the Political Code since the decision of the case of Clayton v. Schultz, supra, in 1937.

The majority opinion also invades the province of the Legislature in declaring what should be the legislative policy with reference to the manner and form of publishing delinquent tax lists and notices of sale of property for delinquent taxes. In this regard the majority opinion states: "The publication of a delinquent tax list in a separate section, uncluttered by other reading matter, makes it readily available to those interested. It would be highly arbitrary to require that other reading matter be interlarded with such lists in disregard to the exigencies incident to the editing of a newspaper as a whole. Often the delinquent tax lists run to such lengths that it would not be feasible to punctuate the successive pages with fragments of news columns or advertising matter. The requirement of publication in a newspaper of general circulation can hardly be construed as necessitating such a departure from good editorial practice." The foregoing statement discloses an unfamiliarity with the practical problems incident to the publication of delinquent tax lists. There is no basis from either a legal or practical standpoint for the statement that "other reading matter be interlarded with such lists" in order to satisfy the requirement that such lists be published in a newspaper of general circulation and not in a supplement thereto. It is a matter of common practice, and so common that it should be the subject of judicial notice, that delinquent tax lists have been published, in other than supplements or separate sections of newspapers devoted exclusively to delinquent tax lists, throughout the State of California since the amendment to section 3766 in 1921, and I have never yet observed in any of such lists "other reading matter [be] interlarded with such lists." I am sure it will be a shock to both the tax collecting officials and the newspaper men to hear that such practice has been suggested as a requirement for the valid publication of delinquent tax lists in newspapers in accordance with the interpretation placed upon section 3766 of the Political Code by the District Court of Appeal and this court in the case of Clayton v. Schultz, supra.

In my opinion the majority opinion in this case will create confusion and uncertainty in the administration of the tax laws of this state for the reason that the opinion fails to define what constitutes a "supplement" and approves the decision of the District Court of Appeal in Clayton v. Schultz, supra, which clearly holds that the publication of a delinquent tax list in a supplement to a newspaper is not in compliance with the provisions of section 3766 of the Political Code. The question will, no doubt, arise in numerous cases as to whether a separate section of a newspaper devoted exclusively to the publication of a delinquent tax list constitutes a supplement within the interpretation of the Clayton case or is simply a section of the newspaper and not a supplement within the interpretation of the majority opinion in this case.

In the case at bar the trial court found that both the delinquent tax list and notice of sale were published in supplements to the newspapers, and did not, therefore, comply with the provisions of section 3766 of the Political Code. The District Court of Appeal of the First Appellate District, Division Two, affirmed the judgment of the trial court. Both of these courts held that under the interpretation of section 3766 of the Political Code by the decision in Clayton v. Schultz, supra, the publications were made in a supplement to such newspaper in violation of the provisions of said section. As heretofore stated, the majority opinion does not state that the publications involved in this case were not made in supplements to the newspapers, and fails to define what constitutes a supplement.

When this case was before the District Court of Appeal of the First Appellate District, Division Two, an opinion was prepared therein by Honorable Maurice T. Dooling, Jr., sitting as justice pro tem. of said court, affirming the judgment of the trial court. This opinion was concurred in by Honorable John T. Nourse, presiding justice, and Honorable Homer R. Spence, associate justice of that court. I am in accord with the views expressed in said opinion and adopt the following portion thereof as a part of this dissent [136 P.2d 642, 643]:

"Appellant calls attention to the very general practice of newspapers of printing their regular issues in two or more separately folded sections, and argues that in view of such practice the separately folded delinquent tax lists in question were not supplements to the newspapers, but parts of the 'regular or main issue' of such papers.

"'Supplement' is defined in Funk & Wagnalls' New Standard Dictionary of the English Language (1933) as 'Something added that supplies a deficiency; especially, an addition to a publication. In a newspaper it is often a separate sheet * * *.'

"In Webster's New International Dictionary, 2d Ed., 1935, we find the following: 'Specif., a part added to, or issued as a continuation of, a book or paper, to make good its deficiencies, correct its errors, or provide special features not ordinarily included.'

"In seeking to determine the purpose of the legislature in eliminating the provision from § 3766, Pol.Code, which had theretofore authorized the publication of the tax list in a supplement to a newspaper we are entitled to look to these definitions of the term in standard and recognized works on the subject. Tested by these definitions we are satisfied that the delinquent tax lists were published in supplements to the newspapers. The only reason for the publication and distribution of the entirely distinct sections in question was, in the language of Webster's to 'provide special features not ordinarily included,' i. e. the delinquent tax list, and to 'make good its deficiencies' i. e. the omission of the delinquent tax list from the main section of the newspaper. It was 'a part added to' the paper in each instance for those purposes and those alone by way, to quote Funk & Wagnalls, of 'a separate sheet' or sheets. The newspaper in each instance was a complete newspaper without the section containing the delinquent tax list. The section containing this list added to the newspaper such list and nothing more. We can conceive of no meaning to be given to the word 'supplement' eliminated from this code section in 1921, unless it means a separately folded or bound page or pages added to and distributed with the newspaper and containing no printed matter which would otherwise appear in the newspaper except the list of delinquent taxes. The use of the map of the world as a filler in the 1940 publication does not in our opinion change this result, but conceding that it might, the 1935 publication contained nothing at all but the tax list.

"The cases and quotations from Corpus Juris cited by appellant are not in point. It may be conceded that normally provision for publication in a newspaper is satisfied by publication in a supplement thereto which is fully circulated as a part of the newspaper. But in view of the statutory history of § 3766, Pol.Code, it must be construed, as pointed out in Clayton v. Schultz, supra, as if it read 'in a newspaper, and not in a supplement thereto'.

"The distinction is clearly recognized in Morton v. Horton, 189 N.Y. 398, 82 N.E. 429, and Whitney v. Bailey, 88 Minn. 247, 92 N.W. 974. In the Morton case the statute of New York provided that certain publications should be 'in the bodies of the newspapers and not in a supplement' and others should be published in 'two newspapers'. * * * The court of appeals of New York held that the latter type of publication might be in supplements to the newspapers although the former clearly could not. In the Whitney case the law required the delinquent tax list to be published 'in a designated newspaper, or partly in such paper and partly in a supplement issued therewith.' * * * It further provided that the 'forfeited list' should be appended to the delinquent list. The delinquent list 'commenced in the newspaper, but it was concluded in the supplement, and then followed the forfeited list; all thereof being in the supplement.' The Minnesota court held, under the peculiar language of their statute, that a portion of the delinquent list having been published in the main body of the newspaper the publication complied with the statutory requirement.

"It may be said of these cases, and of all the cases on the subject which we have examined, that uniformly they proceed on the theory that the publication of tax lists on separately folded sheets constitutes publication in a supplement, the question involved in the cases generally being whether the publication in a supplement constitutes a publication in a newspaper within the meaning of the particular statute.

"Appellant complains that the judgment appealed from quiets defendant's title without securing the repayment of taxes, penalties and costs paid out by appellant. Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258 [L.R.A.1915C, 492]. There is nothing in the point. The judgment orders payment by respondent of $39.09 'taxes, costs, penalties and interest' to appellant. It gives judgment to respondent for $43.50 costs against appellant. The amount of costs is not questioned on this appeal. Since the costs exceed the amount which the judgment finds appellant entitled to be repaid she is fully protected by offsetting one against the other."

For the reasons above stated I am of the opinion that the judgment of the trial court should be affirmed.

SHENK, J., concurred.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

23 Cal.2d 840

VALENCIA v. SHELL OIL CO. et al.

Sac. No. 5637.

Supreme Court of California.

March 28, 1944.

1. Damages 🔑113

The owner of vehicle damaged by another's wrongful act is entitled to recover for damage to vehicle and loss sustained by being deprived of its use.

2. Damages 🔑62(1)

A person injured by another's wrongful act is bound to exercise reasonable care and diligence to avoid loss or minimize resulting damages, and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.

3. Damages 🔑113

Recovery by owner of damaged vehicle for deprivation of use thereof must generally be determined with reference to period of time reasonably required for making repairs thereto.

4. Damages 🔑188(3)

In action for loss of use of gasoline distributing truck, evidence warranted finding that defendant promised to have plaintiff's truck repaired and authorized repairs thereto so as to excuse plaintiff from duty to minimize damages by paying repair bill and obtaining possession of truck so long as he had reason to believe that defendant would perform such promise, but not after defendant demanded complete release from liability as condition precedent to defendant's payment of repair bill.

5. **Damages** ⚿62(1)

The duty to minimize damages does not require injured person to do what is unreasonable or impracticable, as by making expenditures necessary for minimization of damages when financially unable to do so.

6. **Damages** ⚿222

In action for loss of use of gasoline distributing truck, finding that plaintiff was financially unable to pay bill for repairs to his truck, after defendant's refusal to do so as agreed, on completion of repairs 25 days after accident, relieved plaintiff from duty to minimize damages by paying bill and taking possession of truck.

7. **Damages** ⚿62(1)

The essence of rule denying recovery of damages for losses which could have been prevented by reasonable efforts and expenditures of plaintiff is that his conduct, rather than that of defendants, proximately caused such losses.

8. **Damages** ⚿188(3)

In action for loss of use of gasoline distributing truck, evidence supported implied finding that plaintiff lacked financial ability, which would have required him, in exercise of ordinary care, to pay bill for repairs to his truck in order to minimize damages by taking possession of truck after defendant's refusal to pay such bill as agreed.

9. **Damages** ⚿62(3)

The owner of truck, damaged by tank falling from corporation's truck, was not required to yield to corporation's demand for release from all liability for damages as condition precedent to performance of its promise to pay for repairs to damaged truck in order to minimize damages from loss of use of such truck.

10. **Pleading** ⚿248(4)

In action for loss of use of gasoline distributing truck, where original complaint, stating cause of action based on defendant's negligence, alleged that defendant agreed to repair plaintiff's truck at defendant's expense and answer denied such agreement and defendant's negligence, amended complaint, re-alleging such negligence and stating defendant's agreement to repair truck with greater particularity in conformity to proof, did not change cause of action and was authorized by statute. Code Civ.Proc. § 470.

11. **Pleading** ⚿253

When amendment to complaint is properly filed to conform to proof, issues tendered thereby are deemed denied without pleading by defendant.

◆

In Bank.

Appeal from Superior Court, Siskiyou County; Albert F. Ross, Judge.

Action by J. R. Valencia against the Shell Oil Company, a corporation, and others to recover damages for loss of the use of a gasoline distributing truck. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 140 P.2d 36.

J. T. Blalock, of Los Angeles, A. P. Black, of San Francisco and Tebbe & Correia, of Yreka, for appellants.

Oliver J. Carter and Daniel S. Carlton, both of Redding, and J. Everett Barr, of Yreka, for respondent.

GIBSON, Chief Justice.

This is an appeal from a judgment for plaintiff in an action for damages resulting from loss of the use of a gasoline distributing truck.

Prior to September 27, 1935, plaintiff was engaged in the operation of his own service station and in the wholesale distribution of gasoline, on a commission basis, for the Mileage Gasoline Company. On that date plaintiff's truck, which was used in connection with his business as a wholesale distributor, was being driven on the highway between Dunsmuir and Weed in Siskiyou County when it was hit by a tank that fell from a truck belonging to defendant Shell Oil Company. Defendant company's truck was being operated at the time by its employee, defendant Foster. Plaintiff's truck was damaged to such an extent that it could not be continued in use until repaired. It was taken to a garage in Weed and repaired at a cost of $222.30. The trial court found that defendant company ordered the repairs to be made and agreed to pay for them, and that defendant company likewise undertook to furnish and pay for the hire of a truck to be used by plaintiff while the damaged truck was being repaired.

A substitute truck was furnished by defendant company for a period of three days, and plaintiff was thereafter unable to obtain a truck to use in his business in place of the damaged vehicle. The repair work was completed on October 22, 1935, and the proprietor of the garage sent the bill to defendant company and notified plaintiff of the completion of repairs. On November 15, 1935, the insurer of defendant company requested plaintiff to execute a release of all claims arising out of the accident as a condition to its payment of the repair bill. Plaintiff refused to sign the release and demanded $800 for asserted damages to his business caused by loss of the use of the truck. On December 3, 1935, the insurer sent a letter to the proprietor of the garage informing him that unless the release was signed he should look to plaintiff for payment of the repair bill. The owner of the garage refused to deliver the truck until the bill was paid.

On January 17, 1936, plaintiff commenced this action seeking damages in the sum of $11,655, consisting of (1) loss of sales, $1,500, (2) loss on contracts, $10,000, and (3) cost of use of substitute truck, $155. Just prior to trial on March 18, 1937, defendant company paid the repair bill and the cost of the use of the substitute truck, such payments being made pursuant to a stipulation that they would not constitute an admission of liability. At the beginning of the trial, counsel for defendants stipulated that the accident which caused the damage to plaintiff's truck was "the direct and proximate result of the negligence of the defendant," and the cause was tried solely on the issue of damages. At the conclusion of the trial, plaintiff was granted leave to amend his complaint to conform to proof by showing loss of use of the truck for a period of approximately seventeen months. The court made findings and entered judgment for plaintiff in the sum of $4,416.67, representing damages for loss of use of the truck during that period at the rate of $250 a month.

[1-3] Where a vehicle is damaged by the wrongful act of another, the owner is entitled to recover for the damage done to the vehicle and for the loss sustained by being deprived of its use. Marshall v. Golden State Milk Products Co., 113 Cal. App. 43, 45, 297 P. 109; Menefee v. Raisch Improvement Co., 78 Cal.App. 785, 789, 248 P. 1031; Chambers v. Cunningham, 153 Okl. 129, 5 P.2d 378, 78 A.L.R. 910. A person injured by the wrongful act of another is bound, however, to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part. Schultz v. Town of Lakeport, 5 Cal.2d 377, 383, 54 P.2d 1110, 55 P.2d 485, 108 A.L.R. 1168; Pretzer v. California Transit Co., 211 Cal. 202, 208, 294 P. 382; Vitagraph, Inc., v. Liberty Theatres Co., 197 Cal. 694, 697, 242 P. 709; Rest., Torts, sec. 918 et seq.; 15 Am.Jur. 420 et seq.; 25 C.J.S., Damages, §§ 32, 33, p. 499 et seq. Accordingly, an owner's recovery for being deprived of the use of a damaged vehicle is generally to be determined with reference to the period of time reasonably required for the making of repairs. Menefee v. Raisch Improvement Co., supra; Crain v. Sumida, 59 Cal.App. 590, 597, 211 P. 479.

Defendants contend that in awarding damages, measured by the value of the use of plaintiff's truck for a period in excess of seventeen months, the trial court failed to apply the rule of mitigation of damages. They argue that repairs to the truck were completed on October 22, 1935, twenty-five days after the accident; that possession of the vehicle could then have been obtained by the payment of the cost of repairs which amounted to $222.30; that plaintiff was able to make such payment but refused to do so; and that, therefore, any loss suffered by plaintiff after that date could have been reasonably avoided by him and must be attributed to his own negligence. On the other hand, plaintiff contends that he was relieved of the duty to minimize damages by having the truck repaired or paying the repair bill for the reasons that (1) defendant company undertook to have the truck repaired and he was not required to assume the burden of its contract with the repairman and (2) he lacked financial ability to pay the repair bill.

[4] Repairs to the truck were completed on October 22, 1935, and possession of the vehicle could have been obtained thereafter by payment of the bill. As previously noted, however, the trial court found that defendant company promised

plaintiff it would repair the truck at its own expense and that it placed the damaged truck in a garage with instructions to the garage owner to repair it. Although defendants challenge this finding, there is evidence in the record to support it. Plaintiff testified that he did not order repairs to be made and that defendant company secured for him a substitute truck with which to distribute gasoline. The mechanic who made the repairs testified that immediately after the accident he took part in a conversation between plaintiff and representatives of defendant company, that he brought the truck into a garage at Weed at the request of "a representative of the Shell Oil Company," that he was requested to repair the truck by "somebody employed by the Shell Oil Company," and that the "Shell Oil Representative" asked him if he could locate a truck for plaintiff's use while the repairs were being made. He further testified that after towing the truck into the garage he telephoned defendant company to determine "if it was okeh to proceed with the truck" and was informed that it was "okeh." The garage owner testified that after the truck was repaired he sent the bill to defendant company and that by a letter dated December 3, 1935, the defendant company's insurer informed him that "unless Mr. Valencia will sign the releases which we have forwarded to him, we would suggest that you look direct to him for your repair bill." The trial court could find from the foregoing evidence that the defendant company promised to have the truck repaired and authorized the repairs. The promise of the wrongdoer to take such steps to minimize damages was properly considered in connection with plaintiff's failure to pay the repair bill, and the trial court was justified in concluding that defendant company's promise and conduct excused plaintiff from the duty to minimize damages in that manner, so long as plaintiff had reason to believe defendant company would perform. Osterhoudt v. Hedger Transportation Co., Inc., 2 Cir., 54 F.2d 282, 284; Norfolk & W. R. Co. v. Amicon Fruit Co., 4 Cir., 269 F. 559, 563, 14 A.L.R. 547; Kentucky Distilleries & Warehouse Co. v. Lillard, 6 Cir., 160 F. 34, 40, 87 C.C.A. 190; Jacobson v. Graham Ship-by-Truck Co., Mo.App., 61 S.W.2d 401, 402; Davis v. Harris, 178 N.C. 24, 100 S.E. 111, 112; Kaufmann v. Delafield, 224 App.Div. 29, 229 N.Y.S. 545, 546; Shell Pipe Line Corporation v. Harris, Tex.Civ.App., 68 S.W.2d 236, 238; 15 Am.Jur. 424; 25 C.J.S. Damages, § 33, p. 502; Griffin v. Oklahoma Natural Gas Corp., 132 Kan. 843, 297 P. 662, 81 A.L.R. 282, 284.

When, however, defendant company demanded a complete release from liability as a condition of its payment of the repair bill, plaintiff should have abandoned faith in its promise and paid the bill himself if he was able to do so. Cf. Kentucky Distilleries & Warehouse Co. v. Lillard, supra; Osterhoudt v. Hedger Transportation Co. Inc., supra; Jacobson v. Graham Ship-by-Truck Co., supra.

[5-7] The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable, and, consequently, when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures. Birmingham Railway, Light & Power Co. v. Hatton, 187 Ala. 573, 578, 65 So. 934; North American Acc. Ins. Co. v. Henderson, 180 Miss. 395, 177 So. 528, 530; Light v. Detroit, etc., R. Co., 165 Mich. 433, 436, 130 N.W. 1124, 34 L.R.A.,N.S., 282; see W. B. Moses & Sons v. Lockwood, 54 App.D.C. 115, 295 F. 936, 941, 33 A.L.R. 1467; 15 Am.Jur. 425; 25 C.J.S., Damages, § 33, p. 502; Griffin v. Oklahoma Natural Gas Corp., 132 Kan. 843, 297 P. 662, 81 A.L.R. 282, 284. In the present case, the parties are in disagreement as to whether plaintiff's financial condition was such as to require that in the exercise of ordinary care he pay the repair bill following defendant company's refusal to do so. The trial court did not make an express finding regarding plaintiff's ability or inability in this regard. It did, however, in accord with the issues made by the pleadings, find "that plaintiff was by reason of the negligence * * * of defendant * * * and the wrongful failure of * * * defendant * * * to pay said repair bill deprived of the use of his truck for a period of seventeen months." A finding that plaintiff was unable to pay the repair bill results by necessary implication therefrom. Reiniger v. Hassell, 216 Cal. 209, 211, 13 P.2d 737; Tuso v. Green, 194 Cal. 574, 582, 229 P. 327. The essence of the rule denying recovery for losses which could have been prevented by the reasonable efforts and expenditures of plaintiff is that his conduct rather than that of defendants proximately caused such losses.

[8] There is ample evidence to support the implied finding that plaintiff lacked the funds and financial ability which in the exercise of ordinary care would have required him to pay the repair bill. The evidence shows that at the time of the accident plaintiff was the owner and operator of a service station costing $5,000 and against which there remained an indebtedness of $500; that he was the owner of a truck and automobile upon which two or three payments of $71.48 each were yet due; and that payments on the truck were completed a few months after the accident, while the service station indebtedness was not fully paid until just before trial of this action on March 18, 1937. Plaintiff testified that what little capital he had after the accident was needed for the operation of his service station; that he was compelled to refinance his automobile after the accident in order to complete payments on the truck; that at the time of the accident he was also indebted to the State Finance Company in the sum of $927.45, which was paid in full by December of 1935; that his business of distributing gasoline for the Mileage Gasoline Company on a commission basis was destroyed because of his inability to make deliveries, his earnings dropping from $639.91 in September to $171.17 in October, 1935. Plaintiff further testified, "Well, when my truck was wrecked, I couldn't make any payments on the truck. I was meeting all the obligations as far as I could. As soon as the truck was wrecked, they turned around and they tied up the truck and my car and my bank account, which left me, well, penniless." Defendants contend, nevertheless, that plaintiff had a credit rating of $600 with the Mileage Gasoline Company for payment on the truck and trailer and that, therefore, he could have raised the money for the payment of the repair bill. The contract with the Mileage Gasoline Company was terminated and plaintiff's account was closed on October 12, 1935, ten days before the repairs to the truck were completed. Although the credit was not expressly revoked or withdrawn, it would seem obvious that it was cancelled when the contract was terminated and the account closed. From the foregoing evidence the court was justified in concluding that plaintiff's financial condition was such that he could not reasonably be required to pay the repair bill in order to minimize the damages.

[9] It also appears from a finding of the trial court, which is amply supported by the evidence, that plaintiff attempted and was unable to obtain the use of a substitute truck while his truck was being repaired. Certainly he was not required to yield to defendant company's demand that he release it from all liability in order to minimize the damages resulting from its tortious act. Thus, it cannot be said that plaintiff did not act with the care and diligence to be expected of the ordinarily prudent man under similar circumstances.

[10] Defendants finally contend that the trial court erred in permitting plaintiff to amend his complaint after the case was submitted, and in refusing to set aside the submission in order to permit them to plead to the amended complaint and offer further evidence on the issues tendered thereby. They argue that the amendment changed the cause of action from one of tort to one of breach of contract, that the alleged contract to repair the truck set forth in the amendment was entered into without authority of defendant company, and that the cause of action based upon breach of contract was barred by the statute of limitations. The original complaint which set forth a cause of action based upon defendants' negligence alleged that defendant company agreed to repair the truck at its expense. In their answers, defendants denied that they were negligent or that defendant company agreed to repair the truck. The amendment to the complaint realleged defendants' negligence and, in conformity with the proof, set forth with greater particularity the company's agreement to repair the truck. The amendment did not change the cause of action, and it was authorized by section 470 of the Code of Civil Procedure. Andrus v. Smith, 133 Cal. 78, 81, 65 P. 320; Burrows v. Burrows, 18 Cal.App.2d 275, 278, 63 P.2d 1135. The trial court therefore did not err in permitting plaintiff to amend his complaint to conform to the proof.

[11] Nor did it err in refusing to set aside submission of the case to allow defendants to plead to the amended complaint and offer additional evidence. When an amendment to a complaint is properly filed to conform to proof, the issues tendered thereby are deemed denied without pleading since they already have been tried. Glougie v. Glougie, 174 Cal. 126, 132, 162 P. 118; McDougald v.

Argonaut Land, etc., Co., 117 Cal. 87, 95, 48 P. 1021. The issues presented by the amended complaint were raised by the pleadings prior to the amendment, and defendants had ample opportunity to, and did, offer evidence thereon during the course of the trial.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., and SPENCE, Justice pro tem., concur.

24 Cal.2d 95

CARPENTER et al. v. HAMILTON.

L. A. No. 18679.

Supreme Court of California.

April 10, 1944.

1. Action 🔑53(3)
Judgment 🔑593

All possible issues of irregularity in trust deed foreclosure action and in execution sale were deemed to have been decided adversely to trustors by prior decisions wherein foreclosure judgment was affirmed and sale held valid, and under rule that parties may not litigate a controversy piecemeal, trustors instituting action to quiet title were not entitled to litigate question whether word "mortgage", as used in statute authorizing forced sale of homestead in satisfaction of judgment secured by mortgage, includes a trust deed when foreclosed as a mortgage. Code Civ.Proc. § 725a; Civ.Code, § 1241, subd. 4; § 1245 et seq.

2. Quieting title 🔑39

In action to quiet title, where the complaint alleged declaration of homestead, foreclosure of trust deed and commissioner's sale which was claimed to be void, cross-complaint seeking to recover value of trustors' use and occupation of property during redemption period was authorized, even though the relief sought thereby was distinct from that demanded by trustors. Code Civ.Proc. §§ 442, 707.

3. Mortgages 🔑549

Trustors in possession during redemption period following trust deed foreclosure sale were "tenants in possession" within statute entitling purchaser at execution sale to receive from tenants in possession value of use and occupation during redemption period. Code Civ.Proc. § 707.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Possession".

4. Execution 🔑265

The right of purchaser at execution sale to rents and profits of property inures to him by virtue of his succession to the debtor's right, title and interest. Code Civ. Proc. § 700, 707.

5. Execution 🔑265

Judgment debtors are "tenants in possession" within statute providing that until redemption purchaser at execution sale is entitled to receive from tenant in possession rents of property sold and judgment debtors are liable to purchaser for rents and profits. Code Civ.Proc. §§ 700, 707.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action to quiet title by Margaret B. Carpenter and another against Archibald J. Hamilton, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Prior opinion, 138 P.2d 356.

See, also, 59 Cal.App. 149, 138 P.2d 355.

Roy A. Linn, of Los Angeles, for appellants.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondent.

SHENK, Justice.

The plaintiffs brought this action to quiet title to a parcel of land in Los Angeles County. The defendant claimed through a trust deed executed by the plaintiffs and a court foreclosure thereof pursuant to section 725a of the Code of Civil Procedure. The plaintiffs claimed ownership by virtue of a declaration of homestead filed after the deed of trust was recorded. The defendant had judgment and the plaintiffs appealed.

In April 1935 the defendant was the owner of the land on which a residence was located. In that month he sold the property to the plaintiffs for $12,500; $5,000 in cash and the balance of $7,500 secured by a note and deed of trust. The deed of trust was recorded on May 9, 1935. On August 14, 1935, the plaintiffs' declaration of homestead was recorded. The plaintiffs defaulted in the payment of the note and the defendant deposited the note and trust deed with the trustee with a written declaration of default and a demand for the sale of the property. The trustee recorded the notice and election to sell, but before any further proceedings were taken thereon the defendant cancelled those instruments, abandoned the proceedings to exercise the power of sale under the trust deed, and in September, 1937, brought an action to foreclose the deed of trust pursuant to section 725a of the Code of Civil Procedure. A judgment of foreclosure was affirmed on appeal in February, 1940. Hamilton v. Carpenter, 15 Cal.2d 130, 98 P.2d 1027, certiorari denied 311 U.S. 656, 61 S.Ct. 10, 85 L. Ed. 420; Carpenter v. Superior Court, 312 U.S. 705, 61 S.Ct. 825, 85 L.Ed. 1138. Thereafter, on December 3, 1940, the commissioner's sale on foreclosure was held, at which time the defendant purchased the property for $10,757.59 and received a certificate of sale which was duly recorded. The plaintiffs did not redeem and at the expiration of the period of redemption, on December 5, 1941, the commissioner's deed was delivered and duly recorded. On December 6th the court issued a writ of assistance and the defendant was placed in possession of the property.

In September, 1941, the plaintiffs moved to set aside the sale on the ground of alleged irregularities. The court denied the motion and the plaintiffs appealed. On June 2, 1942, the order was affirmed in Hamilton v. Carpenter, 52 Cal.App.2d 447, 126 P.2d 395. A purported appeal from an order denying the plaintiffs' motion to strike an affidavit filed by the defendant in opposition to the motion to set aside the sale was dismissed. Hamilton v. Carpenter, 52 Cal.App.2d 449, 126 P.2d 397. The plaintiffs then brought two actions, one to set aside the judgment decreeing foreclosure of the trust deed as a mortgage and ordering sale of the property, and the other to set aside the sale. The defendant had judgment in each action, and each judgment was affirmed. Carpenter v. Hamilton, 59 Cal.App.2d 146 and 149, 138 P.2d 353, 355.

Thus, after the judgment of foreclosure became final, the plaintiffs attempted to set aside the sale on motion; they brought an action to set aside the judgment of foreclosure; they brought an action to set aside the sale; and failing in all of the foregoing they reassert the validity of their title in the present action to quiet title by attempting again to establish the invalidity of the foreclosure sale. The ground of the present claim of invalidity is stated to be a noncompliance with section 1245 of the Civil Code providing for the appointment of persons to appraise the value of the homestead upon execution of the judgment of foreclosure. It is the contention of the plaintiffs that the failure of the defendant to pursue the provisions of that section in the execution of the foreclosure judgment and order of sale entitles them to prevail in the present action.

Section 1245 provides: "When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 1241 is levied upon the homestead, the judgment creditor may at any time within sixty days thereafter apply to the superior court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof, and if such application shall not be made within sixty days after the levy of such execution the lien of the execution shall cease at the expiration of said period, and no execution based upon the same judgment shall thereafter be levied upon the homestead." Succeeding sections provide for the appointment of appraisers, appraisal, setting off a portion of the property to the claimant if the appraised value exceeds the homestead exemption and the property be divisible, or sale for an amount over the exemption value and the division of the proceeds to the homestead claimant and in satisfaction of the execution.

Section 1241 provides that the "homestead is subject to execution or forced sale in satisfaction of judgments obtained: * * 4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record."

The question thus presented by the plaintiffs is whether a judgment on a debt secured by a trust deed executed and recorded before the declaration of homestead was filed for record, and foreclosed as a mortgage pursuant to said section 725a, is within the classification of judgments enumerated in section 1241, subdivision 4. The plaintiffs concede that if the sale had taken place under the trust deed power of sale the question would not have arisen, because in that event the entire interest of the plaintiffs in the property would have been subject to the exercise of the power. But they say that because the defendant elected to proceed by action to foreclose the deed of trust as in the case of a mortgage, his judgment was not within the exception of section 1241 which expressly applied to a mortgage, and was therefore governed by sections 1245 et seq. of the Civil Code.

[1] Whether the word "mortgage" as used in section 1241, subdivision 4 should be construed to include a deed of trust when foreclosed as a mortgage, is unnecessary to be determined in the present case. The trial court concluded that all of the plaintiff's present claims were decided adversely to them by the previous judgments, orders and decisions. Reference to that litigation demonstrates that the plaintiffs are precluded from presenting any further claims of invalidity of the commissioner's sale of the property. All possible issues of irregularity in the foreclosure action and in the execution sale must be deemed to have been decided adversely to them by the prior decisions wherein the foreclosure judgment was affirmed and the commissioner's sale held valid. The only case which need be cited as authority is Hamilton v. Carpenter, 15 Cal.2d 130, 98 P.2d 1027, supra, wherein this court applied the rule that parties may not litigate a controversy piecemeal and arrived at the conclusion that a prior decision in Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397, was res judicata and foreclosed the plaintiffs from relitigating issues of fraud and misrepresentation alleged to have been made by the defendant in the sale of the property. The same result applies equally to other contentions of irregularity made by the plaintiffs, some of which were specifically disposed of adversely to them in the prior decisions. In effect, the plaintiffs attempt to relitigate in the form of a quiet title action the questions of the validity of the foreclosure action and the commissioner's sale which heretofore have been decided adversely to them. Having failed in the prior actions they cannot prevail here.

The question remains whether the defendant, purchaser at the execution sale, was entitled to recover from the plaintiffs the value of the use and occupation of the property during the period of redemption. The plaintiffs were in possession and occupied the property during that period. The defendant by his cross-complaint sought to recover the value of such use and occupation relying on the provisions of section 707 of the Code of Civil Procedure. The plaintiffs filed a demurrer which was overruled. The trial court granted the relief, fixed the reasonable value of the use and occupation at $1,080, and rendered judgment for the defendant accordingly.

[2] The plaintiffs contend that the cross-complaint was improper in the present action and that their demurrer should have been sustained. There was no error in the ruling and order. The complaint alleged the declaration of homestead, the foreclosure of the trust deed, and the commissioner's sale which was claimed to be void. The cross-complaint set up matter for affirmative relief which bore a necessary relationship to and affected the property concerned in the action, and the fact that the relief sought was distinct from that demanded by the plaintiffs was immaterial. Code Civ. Proc. § 442; California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297; H. & J. Mabury Co. v. Bryant, 9 Cal.2d 586, 71 P.2d 1111. There is no sufficient showing that the evidence does not support the finding as to the amount of the reasonable rental value of the premises.

[3] The plaintiffs' right of possession during the period of redemption is not expressly granted by statute. It is said to be conceded thereby. First Nat., etc., Bank v. Staley, 219 Cal. 225, at page 227, 25 P.2d 982, and cases cited; Petersen v. Jurras, 2 Cal.2d 253, 40 P.2d 257. The plaintiffs contend, however, that although they occupied the premises in the exercise of that right, they were not tenants in possession as contemplated by section 707 of the Code of Civil Procedure and were therefore not liable to the defendant for the value of their use and occupation. That section provides that until redemption the purchaser at an execution sale is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, but that any rents or profits received by the purchaser are to be credited on the money to be paid in redeeming the property from the sale.

The plaintiffs discuss asserted differences between mortgages and deeds of trust, but any such differences are not here pertinent. The plaintiffs, whether mortgagors, trustors, or otherwise the debtors of the defendant, are judgment debtors within the meaning of the code sections relating to executions and redemptions, and their rights are governed thereby.

[4, 5] It must be conceded that the right of the purchaser at an execution sale to the rents and profits of the property enures to him by virtue of his succession to the debtor's right, title and interest (Code Civ.Proc. § 700), and has been declared by the courts of this state on numerous occasions. Pollard v. Harlow, 138 Cal. 390, 71 P. 454, 648; Shintaffer v. Bank of Italy, 216 Cal. 243, 13 P.2d 668; First Nat., etc., Bank v. Staley, supra; Petersen v. Jurras, supra; Munzinger v. Caffrey, 49 Cal.App.2d 180, 121 P. 2d 13; 18 Cal.Jur. 612 et seq. and cases cited. The procedure which may be pursued in the exercise of that right need not be discussed. See First Nat., etc., Bank v. Staley, supra. It must also be conceded that tenants of the judgment debtor are tenants in possession and liable to the purchaser for the rents and profits. Here we are concerned with the question whether a judgment debtor, occupying the property during the period of redemption, is also a tenant in possession within the meaning of the section.

Prior to 1870 section 236 of the Practice Act provided that the purchaser at an execution sale was entitled pending redemption to receive from the tenant in possession the rents of the property sold or the value of its use and occupation. In that year there was added to section 236 the provision for crediting rents received by the purchaser against the amount of any money paid on redemption. The courts interpreted the purchaser's right under section 236 prior to the amendment as a right to recover from the tenant in possession the rents and profits or the value of the use and occupation without any liability to account therefor in the event of redemption. Reynolds v. Lathrop, 7 Cal. 43; Kline v. Chase, 17 Cal. 596; Knight v. Truett, 18 Cal. 113; Page v. Rogers, 31 Cal. 293, 294. In Reynolds v. Lathrop, 1857, supra, the question whether the words "tenant in possession" were intended to refer also to the judgment debtor so as to make him liable for the value of the use and occupation was expressly left open. But in Harris v. Reynolds, 1859, 13 Cal. 514, 517, 73 Am.Dec. 600, it was determined that the words "tenant in possession" meant the judgment debtor as well as his lessee. The court said: "A privilege of redemption is given to the judgment debtor; but it is uncertain whether he will exercise it. Time is not given for the purpose of enabling the debtor to make a profit out of the estate, but for the purpose of enabling him to raise the money to redeem. * * *

"The phrase 'the tenant in possession,' is a generic term, intended to designate the class of persons from whom the purchaser was to receive the rents. The language is not that, when a tenant of the debtor is in possession, the tenant shall pay the purchaser, or that the debtor, when in possession, shall not; but the phraseology [was] designed, evidently, to fix a general right, applying to all cases of tenancy, for none are excluded.

"It is not very easy to see the reason for such a distinction as that contended for. It would give but little help to the purchaser, since the debtor, on the eve of judgment, might change a possession by tenancy, and take possession personally; or change the terms of tenancy so as to make of little or no value the purchaser's right; and why should a debtor be any more inhibited from getting profit from rent than getting profit from use * * * ? The definition of 'tenant in possession' embraces, within the natural and usual meaning of the words, a judgment debtor as well as his lessee. The owner in fee in possession is no less, in legal contemplation, a tenant, than the man who occupies under him. The definition of tenant is, 'one that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will.' "

The holding in Harris v. Reynolds was followed in Knight v. Truett, 1861, supra, where the judgment debtor occupied the premises by his agent; in Hill v. Taylor, 1863, 22 Cal. 191, where the judgment debtor remained in possession and occupancy of a mining claim during the period of redemption; in Walls v. Walker, 1869, 37 Cal. 424, 432, 99 Am.Dec. 290, where the rule was held applicable to the administrator of an estate. The opinion in Harris v. Reynolds was quoted from, and the holding therein approved and followed in Walker v. McCusker, 1887, 71 Cal. 594, 12 P. 723, in applying the provisions of section 707 Code of Civil Procedure. The court there determined that the successor of the mortgagor in possession was liable to the purchaser for the value of the use and occupation. The same principle was recognized in Clarke v. Cobb, 1898, 121 Cal. 595, 599, 54 P. 74. The case of Walker v. McCusker was cited in the more recent cases of First Nat., etc., Bank v. Staley, supra, and Munzinger v. Caffrey, supra, without questioning the holding. It thus appears that in no case in this state since the decisions in Harris v. Reynolds and Walker v. McCusker, has the liability of the judgment debtor to the purchaser for the value of the use and occupation been questioned and that no distinction in that rule has been made because of the 1870 amendment. See, also 11 Cal.Jur. 137.

The plaintiffs place great reliance on the case of Local Realty Co. v. Lindquist, Dec., 1938, 96 Utah 297, 85 P.2d 770. That case involved facts and statutory provisions similar to those prevailing in this state since 1870. The court there attempted to distinguish the rule of Harris v. Reynolds and Walker v. McCusker, as being based on the statute as it read prior to 1870. By a three to two decision the Utah court held that during the period of redemption the purchaser was entitled to receive the rents and profits from the lessee of the judgment debtor, but that when the judgment debtor remained in occupancy he incurred no liability to the purchaser for the value of the use and occupation. That decision appears to stand alone in its construction of a statutory provision similar to section 707 of the Code of Civil Procedure. The dissenting opinion denominates the majority view as "judicial wishful thinking," and discloses the fallacies there employed. Particularly it stresses that the majority distinction of the cases of Harris v. Reynolds and Walker v. McCusker, the latter decided seventeen years after the 1870 amendment, could not exist, inasmuch as that amendment did not change the conditions of the debtor's possession but served only to charge the rents collected by the purchaser against the redemption money to be paid. The majority holding in that case was rejected, and the reasoning of the cases of Harris v. Reynolds and Walker v. McCusker was accepted and applied, in the later Idaho case of Caldwell v. Thiessen, July 1939, 60 Idaho 515, 92 P.2d 1047. The contention of the plaintiffs here, that a judgment debtor remaining in possession as of right is entitled to all the benefits accruing from that possession, was likewise rejected in Geo. B. Clifford & Co. v. Henry, 1918, 40 N.D. 604, 169 N.W. 508, 510, although a statutory provision in North Dakota expressly gave the mortgagor the right to possession during the period of redemption. The court there followed the case of Harris v. Reynolds in construing a statute similar to section 707, saying, "* * * but that section (giving the mortgagor the right to possession) does not fix the terms of occupancy." In 1919 the Legislature of North Dakota amended the law to provide that the mortgagor should be entitled to both the possession and the rents, use and benefit of the property until the expiration of the period of redemption. This was recognized as a complete reversal of legislative policy. Farm Mortg. Loan Co. v. Pettet, 51 N.D. 491, 200 N.W. 497, 36 A.L.R. 598. The cases of Harris v. Reynolds and Walker v. McCusker were also followed in Citizens' Nat. Bank of Laurel v. Western Loan & Bldg. Co., 1922, 64 Mont. 40, 208 P. 893. In that case the court noted the fact that in 1921, subsequent to the commencement of the proceedings, the Montana Legislature had amended the statute to make an exception in favor of the execution debtor who personally occupied the premises as a home for himself and family.

It must therefore be concluded that in the absence of a legislative declaration to the contrary, said section 707 must again be applied as it has heretofore been construed by the courts of this state; and that the trial court correctly determined the plaintiffs' liability as tenants in possession during the period of redemption.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

24 Cal.2d 73

SEKT v. SUPERIOR COURT OF MARIN COUNTY.

S. F. 16943.

Supreme Court of California.

April 3, 1944.

Criminal law ⟹260(7)

Superior court had no authority to dismiss a criminal appeal from justice's court on ground that statement on appeal and transcript had not been timely filed, where the justice's court had denied motion to terminate proceedings on appeal and the failure to settle the statement and transcript and to transmit record to superior court was not chargeable to appellant, although he had been negligent in requesting preparation of transcript and in the matter of reporter's fees. Rules of the Judicial Council, rule 3, § 9; rules 4, 6, 10.

TRAYNOR, J., dissenting.

In Bank.

Proceeding in mandamus by A. A. Sekt against the Superior Court of Marin County to compel respondent to hear and determine an appeal from a justice's court.

The alternative writ of mandate discharged and order dismissing appeal annulled.

Leo R. Friedman, of San Francisco, for petitioner.

A. E. Bagshaw, of San Rafael, for respondent.

EDMONDS, Justice.

Following the conviction and sentence of A. A. Sekt, in the Justice's Court of San Rafael, he filed a written notice of appeal. Upon motion, the superior court dismissed the appeal upon the ground that it had not been perfected within the time required by the rules of the Judicial Council. The question for decision, presented by the petition of Sekt for a writ of mandate requiring the superior court to hear and determine the appeal, concerns the authority of that court to make the challenged order.

The petitioner filed his notice of appeal on March 30th. On the same day he was granted until April 19th within which to prepare and file a statement and the transcript on appeal. The twenty days fixed by this order is the maximum time which may be allowed by the justice's court for the preparation of the record upon appeal. Rules of the Judicial Council in the matter of Criminal Appeals to the Superior Court from Inferior Courts; rules 4 and 6. On April 24th, five days late, the petitioner filed his statement upon appeal specifying the ground, among others, that the evidence is insufficient to support either the verdict or the judgment. The statement declares that the insufficiency of the evidence is disclosed by the transcript of the evidence and proceedings had at the trial which "has been filed in said cause and said transcript by this reference is included in and made a part of this statement on appeal."

It appears from the stipulation of the District Attorney of Marin County and counsel for Sekt, upon which the superior court determined the motion to dismiss, that at the time the statement on appeal was filed the reporter's transcript had not been prepared. Because of the delay in filing the transcript, on May 14th the district attorney moved the justice's court to terminate all proceedings upon the appeal and to carry the judgment into effect. The motion was denied. Other facts shown by the stipulation are that, on May 24th, the transcript prepared by them was filed in the superior court. Four days later, counsel for Sekt served a notice stating that on May 24th the transcript had been filed in the justice's court.

It was on May 27th that the district attorney served and filed in the superior court a notice of motion to dismiss the appeal. Later he served an amended notice of his intention to make such a motion upon the ground that Sekt had failed to file his statement upon appeal or a transcript of the evidence and proceedings as required by law. The motion, based upon the notice as amended, was heard and determined on June 18th. The parties' stipulation recites that the transcript remained on file in the superior court until shortly prior to the date of the hearing when it was withdrawn and filed with the justice's court. So far as the record shows, neither the statement nor the transcript has been settled.

The petitioner contends that the rules of the Judicial Council are not jurisdictional and a failure to comply with them does not deprive the superior court of jurisdiction to hear an appeal from an inferior court upon the merits where noncompliance is excusable. He urges that he has done all in his power to perfect the appeal and should not be penalized for delay based upon orders of the justice's court extending time occasioned by the irregular extensions of time granted by the justice's court to its official reporter. It is the duty of the trial court, he concludes, to determine whether delay justifies a termination of the proceedings to procure a record, and in the present case that question has been determined favorably to the petitioner.

In support of its order, the respondent court asserts that because of the petitioner's failure to file the statement on appeal and the transcript within the time provided by the rules of the Judicial Council it has no jurisdiction to entertain the appeal. But if compliance with the rules of the Judicial Council is not jurisdictional, it adds, the order granting the motion to dismiss was made in the exercise of its discretion to dismiss an appeal not prosecuted diligently or regularly, as authorized by rule 10, and that there was no abuse of discretion.

Rule 4 of the rules of the Judicial Council regulating appeals to the superior court in criminal cases, requires that the statement and transcript upon appeal must be served upon the respondent and filed with the trial court within five days after the filing of the notice of appeal. But by rule 6, the court from which the appeal is taken may extend the time for filing the statement and transcript to a maximum of twenty days from the date upon which the notice of appeal was filed. "As soon as the statement or transcript on appeal has been settled and certified," the rules further provide, "the clerk of the trial court or the judge thereof, if there be no clerk, shall forthwith transmit the record on appeal to the clerk of the Superior Court to which the appeal is taken, together with all exhibits or other documents properly referred to and identified in the statement or transcript." Rule 3, § 9. In the present case the transcript was not filed with the trial court within the time specified by these provisions, nor even within the time as extended by the order made in violation of rule 6. But that court denied the People's motion to terminate the proceedings upon appeal; whether it has settled either the statement or transcript does not appear. At the time the motion to dismiss the appeal was noticed, and also when it was heard and determined by the respondent court, the transcript had not been transmitted as required by rule 3.

The rules of the Judicial Council authorize the dismissal of an appeal under these circumstances: "If the appeal is not brought to a hearing within the time limited, or the appellant otherwise fails to prosecute it with diligence, or if the appeal is irregular in any substantial respect, the Superior Court may, on motion of the respondent or on its own motion, after written notice to the appellant, order it dismissed." Rule 10. But the singular situation here shown is that although, according to the return of the superior court, at the time the motion to dismiss the appeal was heard and determined there was pending before it the appeal taken by Sekt, the record upon appeal had not been settled and the trial court had denied a motion to terminate the proceedings for obtaining it.

The rules regulating appeals from the superior court which were superseded by the Rules on Appeal, effective July 1, 1943, authorized the dismissal of an appeal upon the failure to file the record within the specified time. But under the former procedure, a motion of the respondent must have been based upon a certificate or affidavit "that no proceeding for a bill of exceptions or transcript under section 953a is pending in the trial court, and if no such proceeding was ever instituted that the time to institute the same has expired." Rule VI, Rules for Supreme Court and District Courts of Appeal. The theory underlying this practice and the rules of court which have been in effect from time to time is that ordinarily whether the appellant has taken action to perfect his appeal within due time is not a question for investigation and consideration in this court on a motion to dismiss the appeal. Such matters, it has been pointed out, may more properly be determined in the superior court. Town of Mill Valley v. Massachusetts, etc., Co., 189 Cal. 52, 207 P. 253. Accordingly, an order of the superior court denying a motion to terminate proceedings to procure a record is usually upheld. Smith v. Jaccard, 20 Cal. App. 280, 128 P. 1023, 1026. "The question of whether due diligence has been exercised is one that necessarily rests largely in the discretion of the trial court and its determination of this question will not be disturbed unless it plainly appears that such discretion has been abused." Wood v. Peterson Farms Co., 131 Cal.App. 312, 315, 21 P.2d 468, 469.

These principles are applicable to the facts which were presented to the superior court upon the motion to dismiss. True, it appears that there had been a long delay, occasioned by Sekt's neglect in requesting the preparation of the transcript and his difficulties in connection with the fees of the reporters. But his inattention had been excused by the trial court. Moreover, the trial court's failure to settle the statement and transcript and to transmit the record to the superior court, so far as appears in the present proceeding, is not chargeable to the appellant. The motion to dismiss the appeal should, therefore, have been denied.

Nevertheless, it is obvious that a peremptory writ of mandate requiring the superior court to hear and determine the appeal should not issue when neither the statement nor the transcript has been settled by the justice's court and it is conceivable that the record on appeal may never be transmitted to the superior court. On the other hand, the challenged order effectively bars any consideration of the appeal if, as and when the record is transmitted by the trial court. The petitioner has therefore stated facts entitling him to an order annulling the order dismissing the appeal Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109. For although a petitioner demands an inappropriate prerogative writ, the court should grant such relief as is warranted by the facts shown. Van Tiger v. Superior Court, 7 Cal.2d 377, 384, 60 P.2d 851; Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 381, 220 P. 306; Van Hoosear v. Railroad Commission, 189 Cal. 228, 236, 207 P. 903.

The alternative writ of mandate is discharged; the order dismissing the appeal is annulled.

CURTIS and CARTER, JJ., concurred.

SCHAUER, Justice (concurring).

I concur. The essential jurisdictional step in taking an appeal to the superior court is the filing of a notice of appeal within the time limited (rule 2, Criminal Appeals to the Superior Court[1]) but the record shall not be transmitted to the superior court unless and until it is settled as provided by the rules (rules 3 and 8, Criminal Appeals to the Superior Court[1]). The filing of the notice of appeal with the trial court within the time prescribed is jurisdictional and, even though the notice of appeal is filed in time, the appellant may lose his right to have the record transmitted to the higher court, but until the record is transmitted, the superior court ordinarily will be in no position to entertain and pass upon a motion to dismiss. There is no absolute time limit fixed for the perfecting and settlement of the record (rule 7, Criminal Appeals to the Superior Court[1]) and upon the showing before us it does not appear that the superior court had authority to dismiss the appeal; the trial court had denied the respondent's motion to terminate the proceedings therein and that order is not subject to review in this proceeding. For a further discussion of the rules in question see People v. Carpenter (1939), 36 Cal.App. 2d Supp. 760, 93 P.2d 276.

SHENK, J., concurred.

TRAYNOR, Justice (dissenting).

I dissent. I subscribe to the view that appeals should, if possible, be heard on the merits, and that a dismissal for procedural default should only be ordered where the appellant is clearly at fault. If a motion to dismiss an appeal were made in this court under circumstances similar to those shown by the record herein, denial of the motion would be reasonable, despite the fact that much of the delay was caused by appellant's own neglect in failing to commence proceedings promptly, and to his subsequently delivering bad checks to the reporter as advances on his fees. That this is a criminal appeal, that eventually appellant paid the reporter's fees, and that subsequent delays in settlement and certification of the record were not within his power to avoid, would ordinarily be persuasive reasons for leniency in ruling on the motion.

These considerations, however, are not before us. The motion to dismiss was not addressed to this court, and we are not deciding it. The motion was addressed to the superior court, in which the appeal was pending, and was granted by that court. We have recently pointed out that "the jurisdiction of the superior court upon an appeal from a proceeding in a justice's court was the same as that of any appellate court unless the superior court sought to conduct a new trial." Portnoy v. Superior Court, 20 Cal.2d 375, 377, 125 P.2d 487, 489, restating the holding in Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490. Since the superior court in appeals from justices' courts is in fact an appellate court, with the usual appellate jurisdiction, its judgments of affirmance, reversal, or dismissal within its jurisdiction are free from review in another appellate court. There is no provision, by statute or rule, for a further appeal to or hearing in this court; and the determination by the superior court that the appellant was guilty of inexcusable neglect, even if regarded as erroneous or harsh, was no more our concern than its determination of any substantive question of law or fact. Our procedural system does not provide for an ultimate right of review of every controversy in this court, but instead gives finality to decisions of the various appellate courts, except in the situations in which hearings in the Supreme Court are permitted after decisions by the District Court of Appeal.

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[1] The rules governing criminal appeals to the superior court referred to above are those which were in force at the time this proceeding originated.

All this is implied in the majority decision and opinion, which treats the application herein as a petition for a writ of certiorari, and grants relief by annulling the order of dismissal. The opinion therefore holds that the superior court exceeded its jurisdiction in making that order, notwithstanding the fact that the appellant was admittedly guilty of neglect and improper conduct in the proceedings for preparation of the record, and that the sole question was whether the resulting delays should be excused. The failure of another appellate court to exercise leniency in favor of a defaulting appellant can hardly be regarded as in excess of its jurisdiction. In the light of all of the facts disclosed, it cannot even be said with assurance that the superior court exercised its discretion unwisely.

The majority opinion nevertheless purports to find the superior court lacking in jurisdiction to dismiss the appeal by reason of the absence of an order of the trial (justice's) court "terminating proceedings for a record." It is said that the question whether the appellant is in default is one for the trial court and not for the appellate court to determine. If this view is correct, an important part of its appellate jurisdiction has been stripped from the appellate court, and given to justices of the peace, who are, in many cases, not lawyers. They may countenance delay of months—perhaps years—without any control by the superior court. Before we accept any such theory we ought to be assured that the law plainly demands it. Actually, the law is clearly to the contrary.

The former rule governing appeals to the Supreme Court or District Court of Appeal was that a motion to dismiss for failure to file a record would not be considered unless a motion to terminate proceedings for a record had first been made in the trial court and granted by that court. The reason was that the former Supreme Court rules fixed no time for filing of the record on appeal, and expressly made an order of termination a prerequisite to the motion to dismiss. (Former Supreme Court rule I, § 1, and rule VI; see Hohnemann v. Pacific G. & E. Co., 31 Cal.App.2d 692, 88 P.2d 748; Crocker v. Crocker, 76 Cal.App. 606, 245 P. 438. The procedure on a motion to terminate, and the incidental appeal from an order of termination (see Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922; Howland v. Howland, 11 Cal.2d 20, 77 P.2d 475) was a serious cause of delay in the prosecution of appeals, and was eliminated from the new Rules on Appeal recently adopted by the Judicial Council. (See Judicial Council Annotated Rules, p. 45; Witkin, New California Rules on Appeal, 17 So.Cal.L.Rev. 79, 127.)

The rules governing criminal appeals from inferior courts to the superior court do not establish this procedure, either expressly or by implication. The attempt to apply it herein is by analogy only, and any justification for its introduction disappeared when the new Rules on Appeal were adopted. Rule 10(a) of the rules governing appeals to the superior court provides that if "the appellant otherwise fails to prosecute it with diligence * * * the Superior Court may, on motion of the respondent or on its own motion, after written notice to the appellant, order it dismissed." Nothing is said therein about a motion to terminate proceedings. Yet the majority opinion, without explanation, not only imposes on the superior court a procedure already abandoned in the other appellate courts, but makes that outmoded procedure jurisdictional. Neither reason nor authority can be found to sustain this decision.

If the superior court should arbitrarily dismiss an appeal where the uncontroverted evidence clearly established compliance by the appellant with all applicable rules, we might hold that its act was an unwarranted refusal to assume jurisdiction, and issue mandate to compel it to hear the cause. But where, as here, the record contains some evidence of lack of diligence in prosecution of the appeal, the granting or refusing relief to the appellant lies with the court to which the appeal was taken. If the rule for which this case stands were to be followed, every litigant whose appeal was dismissed for lack of diligent prosecution, in the superior court or appellate department thereof, or in any District Court of Appeal, would be entitled to a writ of review in this court, for the purpose of determining whether the facts justified the dismissal of the appeal.

WEST KEY NUMBER SYSTEM

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23 Cal.2d 849

HANNAH v. POGUE et al.

L. A. No. 18365.

Supreme Court of California.

March 29, 1944.

Rehearing Denied April 27, 1944.

1. Easements 🔑41, 50

The scope of prescriptive easement is determined by use through which it is acquired, and person using another's land for prescriptive period may acquire right to continue such use, but does not acquire right to make other uses thereof.

2. Easements 🔑47

An easement acquired by grant in given location in servient tenement becomes fixed by use, and its location may not be substantially changed.

3. Waters and water courses 🔑152(11), 247(2)

Where parties having easement for maintenance of dam and ditch failed to show that they or their predecessors in interest ever maintained a dam and ditch in other locations than those occupied by old dam and ditch before river washed around end of dam, they showed no right, by prescription or otherwise, to make any use of remainder of such land, and were properly restricted to site previously occupied.

4. Easements 🔑48(6)

An owner of easement over another's land has no right to change location of easement, even if such change would cause no harm to landowner or would actually benefit him.

5. Waters and water courses 🔑244

Owners of easement for maintenance of dam and ditch had no right to extend ditch by excavating in dry land of servient owner, whether regarded as dry bed of river or dry bank.

6. Waters and water courses 🔑247(2)

A judgment allowing owners of easements for maintenance of dam in river to build new dam at site of old dam after river washed around it should be construed to allow them to do whatever is necessary to such construction, so as to entitle them to tie dam into shore, and hence is not erroneous as rendering construction of any dam impossible because they are authorized only to build dam to shore.

7. Waters and water courses 🔑247(2)

A judgment authorizing owners of easements for maintenance of dam to construct new dam from site of old dam to one shore of river after it washed between end of dam and such shore established their continued right to extend dam to such shore, and should not be construed as denying comparable right if opposite shore receded.

8. Boundaries 🔑48(8)

A court may infer from adjoining landowners' long-standing acceptance of fence as boundary between their lands that they agreed that such fence should be boundary in case of uncertainty as to true boundary line.

9. Boundaries 🔑37(5)

A landowner's testimony that she believed that a fence in existence from time when her husband acquired land until time of trial marked boundary between such land and adjoining land until she learned that owner of such adjoining land had employed surveyor to determine boundary established witness' acceptance of fence as boundary, and her further testimony that she knew of no agreement that fence should constitute boundary did not necessarily rebut inference from long-standing acceptance of fence as boundary that there was such an agreement.

10. Boundaries 🔑49

Where boundary line between adjoining lands could not be ascertained from early surveys because monument determining one end of boundary and most of other landmarks could not be found, trial court properly recognized that line which had served for many years as practical boundary was true boundary line.

11. Appeal and error ⚷1178(1)

A judgment describing stake and iron pin, which deputy county surveyor testified that he removed before judgment, as monument marking point where fence on boundary line between adjoining lands met edge of swamp and overflowed area surveyed by county surveyor must be reversed, with directions to re-establish such stake and pin, so that boundary line may be made certain.

12. Waters and water courses ⚷247(2)

Where there was no evidence that one taking dirt and branches on two occasions from land over which he had easement for maintenance of dam and ditch intended to continue such taking, judgment enjoining him from taking dirt or branches from such land was erroneous as violating rule that injunction is ordered against past acts only if there is evidence that they will probably recur.

13. Easements ⚷55

A party claiming right on pleadings to enter another's land at other points than those later designated by court in locating such party's easement over land was improperly enjoined from entering land, in absence of evidence that he ever entered it without owner's consent or intended to do so, as such claim should be determined by declaratory judgment.

14. Waters and water courses ⚷247(1)

Where only testimony on issue of amount of damages from wrongful obstruction of party's right of way over another's land to and from dam and ditch was such party's general statement that he was convinced that cost of his operations had been increased about one-third, court was justified in regarding such testimony as unreliable, in view of witness' interest, and refusing him damages for such obstruction.

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In Bank.

Appeals from Superior Court, Tulare County; Andrew R. Schottky, Judge.

Actions joined for trial by Kate H. Hannah against J. W. C. Pogue and another to quiet title to certain land and to enjoin maintenance of certain levees and entry on land by named defendant, who filed a cross-complaint against plaintiff and the Regents of the University of California, a corporation, to enjoin interference with certain rights of way over plaintiff's land. From the judgments rendered, defendants appeal.

Affirmed in part, and reversed in part.

Prior opinion 138 P.2d 790.

McFadzean & Crowe, of Visalia, for appellants.

Conley, Conley & Conley, W. M. Conley, Philip Conley, and Mathew Conley, all of Fresno, and Calkins, Hall, Linforth & Conard, of Oakland, for respondents.

TRAYNOR, Justice.

Plaintiff Mrs. Kate H. Hannah is the owner of approximately a section of land in Tulare County subject to a $50,000 mortgage held by the Regents of the University of California. Through it runs the Kaweah River, from which defendant Harley Smith has for many years diverted water by means of a dam located on plaintiff's land and a ditch known as the Hamilton Ditch, which also runs through plaintiff's property. The Hamilton Ditch has been in use since about 1860, and the trial court found that the dam has been in use for over twenty years. The dam in existence before 1920 was built of rock, but in that year it was replaced by a cement dam on the same site. By 1925 the latter had sunk into the sand of the river bed and was replaced by another cement dam on the same site. In 1928 and 1929 defendant J. W. C. Pogue purchased the land served by the ditch and entered into a contract to purchase the ditch and its appurtenances.

In 1936 the river washed round the north end of the dam. Defendant Pogue then entered plaintiff's land and repaired the dam with dirt and branches from the surrounding area. Plaintiff brought suit and obtained a temporary order restraining defendant from entering plaintiff's property. After defendant agreed to take no more materials from plaintiff's property, the injunction was modified by stipulation to permit defendant to enter and repair the dam. Defendant thereafter filed a cross-complaint in this proceeding, asking that plaintiff be enjoined from interfering with certain rights of way to the dam over plaintiff's land. The University of California was joined as cross-defendant to this cross-complaint.

Early in 1937 the Kaweah River again washed round the north end of the dam, doubling the width of the channel and depositing a large sand bar in front of the ditch. Early in 1938 the river widened the channel still more. Through 1937 defendant Pogue made no attempt to extend the dam to the opposite bank of the river, but obtained water by cutting the ditch through the sand bar to the river and by pumping water into the ditch. In 1938 he constructed a new dam of rock some distance upstream from the old cement dam. The old dam was placed squarely across the river, its wall perpendicular to the banks, so that it forced water into the ditch by impounding it at a level higher than the bottom of the ditch. The new rock dam was placed at an acute angle across the river, so that the end that touched the bank opposite the mouth of the ditch was farther upstream than the end nearest the mouth. The current of the river was thus directed into the ditch, which had been extended upstream to the site of the new dam. The downstream end of the new dam was about 185 feet upstream from the south end of the old cement dam; the upstream end was about 950 feet above the point where the old dam would have touched the bank of the river had it been extended that far.

On June 19, 1939, plaintiff brought suit to enjoin the maintenance of the new dam and the channel running thereto from the Hamilton Ditch. A quiet title suit was also pending between plaintiff and defendant to settle a controversy over the ownership of land arising out of the erosion caused by the river's washing round the northern end of the dam. The eroded land is near the boundary between section 7, largely owned by plaintiff, and section 8, at least the eastern part of which is being purchased by defendant Pogue. There is an old fence running from north to south in this neighborhood of the disputed boundary. The monument that once marked the north corner of these sections no longer exists and surveyors differed in their testimony as to where it had probably been located.

On August 21, 1939, plaintiff brought suit to quiet title to the disputed triangle of land along the boundary. On August 19, 1939, plaintiff brought suit to enjoin the maintenance of certain levees by defendant Pogue. These suits, together with the original action by plaintiff against defendant Pogue to enjoin defendant from entering plaintiff's lands, and defendant's cross-complaint in that action, were joined for trial. They were tried by the court, findings of fact and conclusions of law were made and judgment was entered. Defendants Pogue and Smith were enjoined from entering plaintiff's land except over designated rights of way; plaintiff was enjoined from interfering with those easements; defendants were required to remove the new dam and to fill in the ditch running from the dam to the former mouth of the Hamilton Ditch. Defendants were enjoined from maintaining any dam, except on the site of the concrete dam as extended to the opposite shore, and from maintaining a ditch on plaintiff's land except along the line where the Hamilton Ditch had run, meeting the Kaweah River about 20 to 30 feet above the concrete dam. In the quiet title action the court determined that the boundary followed the old fence, thus establishing that the erosion at the north end of the rock dam was on plaintiff's land. While defendants object to the location at which the trial court placed a right of way for them to the dam on the north side of the river, the trial court granted a new trial as to this issue, so that it is not now before the court. As to the location of the other rights of way, there is no objection by either party. Defendants appeal from the judgments set forth above. Plaintiff takes no appeal from these judgments or from the judgment denying her an injunction against the maintenance of the levees mentioned above.

[1, 2] The principal dispute between plaintiff and defendants concerns the defendants' claim of a right to change the site of the dam and ditch. Defendants contend that the scope of their easement has been too narrowly determined, and that the construction of the new dam upstream and of a connecting channel was within the scope of their right to repair and improve their easement. It must be assumed that their easement is based on prescription, for the proof was not that the right was granted, but that these facilities had been maintained for the prescriptive period. The scope of a prescriptive easement is determined by the use through which it is acquired. A person using the land of another for the prescriptive period may acquire the right to continue such use, but does not acquire the right to make other uses of it. Vestal v. Young, 147 Cal. 715, 82 P. 381; North

Fork Water Co. v. Edwards, 121 Cal. 662, 54 P. 69; Oliver v. Agasse, 132 Cal. 297, 64 P. 401; Allen v. San Jose Land & W. Co., 92 Cal. 138, 28 P. 215, 15 L.R.A. 93; Pacific Gas & E. Co. v. Crockett L. & C. Co., 70 Cal.App. 283, 233 P. 370; Felsenthal v. Warring, 40 Cal.App. 119, 180 P. 67; see White Bros. & Crum Co. v. Watson, 64 Wash. 666, 117 P. 497, 44 L.R.A., N.S., 254; 3 Tiffany, Real Property, 3d Ed., 334; 28 C.J.S., Easements, § 84, p. 763. Likewise if an easement is acquired by grant in a given location in the servient tenement, it becomes fixed by use and its location may not be substantially changed. Kern Island Irr. Co. v. City of Bakersfield, 151 Cal. 403, 90 P. 1052; Felsenthal v. Warring, supra; Evangelical, etc., Home v. Buffalo Hydraulic Ass'n, 64 N.Y. 561; see Ward v. City of Monrovia, 16 Cal.2d 815, 108 P.2d 425. Thus in Vestal v. Young, supra, and in Felsenthal v. Warring, supra, it was held that a person having the right to maintain a ditch in the land of another cannot substantially change the route of the ditch. See, also, Kern Island Irrigating Co. v. Bakersfield, supra. In the Evangelical Home case, supra, it was held that a person having the right to maintain a dam cannot change its location, and in White Bros. & Crum Co. v. Watson, supra, it was held that a person with a right to divert water through a ditch in the land of another has no right to replace the ditch with a dam and a flume elsewhere on the land, even though changes in the natural conditions make effective diversion impossible except by such means.

[3] Defendants have not shown that they or their predecessors in interest ever maintained a dam and ditch in locations other than those occupied by the old concrete dam and the ditch. They have thus shown no right by prescription or otherwise to make any use of the remainder of plaintiff's land, and the trial court properly restricted them to the site previously occupied. Otherwise they would have had a floating easement enabling them to maintain a dam wherever they chose along the length of the river on plaintiff's land, preventing plaintiff from selling any of the land bordering on the river free of the easement. Defendants contend that the new dam constitutes no greater burden than the previous one.

[4] There is no right, however, to change the location of an easement over the land of another, even if it would cause no harm to the owner or would actually benefit him. Vestal v. Young, supra, 147 Cal. at page 719, 82 P. at page 383; see Allen v. San Jose Land & W. Co., supra, 92 Cal. at page 141, 28 P. at page 216, 15 L.R.A. 93.

[5] Defendants contend that the extension to the Hamilton Ditch is permissible on the ground that it is placed in the channel of the river. The evidence shows that it was excavated in dry land on plaintiff's property, and it is immaterial whether that land be regarded as the dry bed of the river or the dry bank, for under the principles set forth above defendants may not thus appropriate plaintiff's property. Defendants rely on the early case of Ware v. Walker, 70 Cal. 591, 12 P. 475. In that case a gravel bar in the bed of an arroyo built up by freshets prevented the water therein from reaching the head of Ware's ditch. It was held that Ware had the right to remove obstructions to the flow of the stream and did not exceed his right when he cut a channel through the bar and constructed a wing dam to divert water into the channel. Defendants, however, are not seeking to cut through the bar built in front of the old head of their ditch, a right that has never been denied them, but to replace the dam they once maintained with a new dam working on different principles, at a different site, and to connect that dam with their ditch by maintaining a 187-foot channel on plaintiff's land behind and paralleling the sand bar. Nothing in the Ware case authorizes such alterations in established easements.

[6, 7] It is contended that the decree preventing defendants from constructing a dam except at the former site makes it impossible for them to construct any dam, for they are authorized only to build a dam to the shore but not to tie it into the shore. The judgment allowing them to build the dam, however, should be construed to allow them to do whatever is necessary to such construction, including the right to tie the dam into the shore. It is also contended that since the judgment authorizes construction of a dam from the old site to the north shore, it does not authorize extensions in case the river works its way round the south shore of the dam. The language in question, however, appears to anticipate the possibility that a dam on the old site, no longer than the old dam, would

touch the south shore but not the north. This language establishes that defendants still have the right, frequently exercised in the past, to extend the dam so far as is necessary to meet the north shore. It should not be construed as denying a comparable right if the south shore receded.

[8] Defendants appeal also from the judgment that the boundary between plaintiff's land and defendants' land is the old fence. The trial court found that about the year 1917 the owners of these lands agreed that the fence should be the boundary. Defendants contend that there is no evidence of such an agreement, and that in any event it could not be given effect unless the boundary were uncertain, or disputed. It is the rule, however, that the court may infer that there was such an agreement ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between the lands of two owners. Roberts v. Brae, 5 Cal.2d 356, 54 P.2d 698; Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.2d 58; Moniz v. Peterman, 220 Cal. 429, 31 P.2d 353; Board of Trustees v. Miller, 54 Cal.App. 102, 201 P. 952; Todd v. Wallace, 25 Cal.App.2d 459, 77 P.2d 877; Perich v. Maurer, 29 Cal.App. 293, 155 P. 471; Swartzbaugh v. Sargent, 30 Cal.App.2d 467, 86 P.2d 895; Southern Counties Gas Co. v. Eden, 118 Cal.App. 582, 5 P.2d 654; Raney v. Merritt, 73 Cal.App. 244, 250, 238 P. 767; see Park v. Powers, 2 Cal.2d 590, 599, 42 P.2d 75; Clapp v. Churchill, 164 Cal. 741, 746, 130 P. 1061; see 14 Cal.L.Rev. 138.

[9, 10] Mrs. Hannah testified that the fence was in existence when her husband acquired the property, that it remained standing down to the time of the trial, and that she believed it marked the boundary until she learned that defendant Pogue had employed a surveyor to determine the boundary. This testimony establishes her acceptance of the fence as the boundary, in all likelihood reflecting the belief of her husband and former owners on the other side of the fence. She also testified that she knew of no agreement that the fence should constitute the boundary. This testimony does not necessarily rebut the inference that there was such an agreement, however, for the inference may be made that an agreement was inherent in the long-standing acceptance of the fence as the boundary. Roberts v. Brae, supra, 5 Cal.2d at page 359, 54 P.2d at page 699; Vowinckel v. N. Clark & Sons, supra, 217 Cal. at page 260, 18 P.2d at page 59; Moniz v. Peterman, supra, 220 Cal. at page 435, 31 P.2d at page 356; Board of Trustees v. Miller, supra, 54 Cal.App. at page 105, 201 P. at page 953; Southern Counties Gas Co. v. Eden, 118 Cal.App. 582, 586, 5 P.2d 654; see 14 Cal.L.Rev. 138. The courts have recognized such boundaries because the early surveys in the state were most uncertain, and in later years the monuments and landmarks they described could not be found. See Loeb, The Establishment of Boundary Lines by Practical Location, 4 Cal.L.Rev. 179. In the present case the boundary lines could not be ascertained from the early surveys, for the monument determining the northern end of the boundary and most of the other landmarks cannot be found. Given the difficulties of fixing the boundaries anew according to the old surveys, the trial court properly recognized a line that has served for many years as the practical boundary.

The trial court decided that this boundary was settled by agreement in 1917, apparently because this year marked the acquisition of the property by the Hannahs and their acceptance of the fence as a boundary. It is unnecessary to decide whether on this evidence the agreement can be assigned to this particular date, for the precise date of agreement is immaterial in view of the acceptance of the fence as a boundary over a long period of years.

[11] Defendants contend that the description in the judgment of the location of the fence lacks definiteness. Part of the section was surveyed by the federal government, but part was swamp and overflowed land first surveyed by the county surveyor after the land was granted by the federal government to the state. The federal survey defined the eastern boundary from its southern end to the point where it met the swamp and overflowed area; the county survey defined the rest of the boundary. The boundary from that point northerly to the intersection of the fence with the northern line of the section was regarded as marked by the fence. The monument described as marking the point where the fence met the edge of the swamp and overflowed area was a 2" by 2" stake and iron pin which the deputy county surveyor testified he removed before judgment. Since the judgment ties the fence as the boundary line to the stake and pin as established before removal, it must be

reversed with directions to re-establish the stake and pin so that the boundary line may be made certain.

[12] The third judgment from which defendants appeal fixes the locations of defendants' easements. Defendants were enjoined from entering plaintiff's property except by route of designated easements and from taking dirt or branches from plaintiff's land. The latter part of the judgment violates the rule that an injunction is ordered against past acts only if there is evidence that they will probably recur. Ball v. Kehl, 87 Cal. 505, 25 P. 679; Blackmore Inv. Co. v. Johnson, 213 Cal. 148, 1 P.2d 978; Thome v. Honcut Dredging Co., 43 Cal.App.2d 737, 111 P.2d 368; see 32 C.J. 46; cases collected 14 Cal.Jur. 209. There was evidence that on two occasions defendant Pogue took dirt and branches. There was no evidence that he intended to continue doing so.

[13] Defendant Smith was improperly enjoined from entering plaintiff's land, for there was no evidence that he had ever entered without plaintiff's consent, or that he intended to do so. While he claimed the right on the pleadings to enter at points other than those that the court later designated in locating his easement, such a claim should be determined by declaratory relief rather than by injunction. This judgment is therefore reversed insofar as it enjoins defendants from taking dirt and branches and enjoins defendant Smith from entering, with directions to declare that Smith has the right to enter only over the easements that it declares to be on the north and south sides of the river. In other respects this judgment is affirmed.

[14] Defendant Pogue contends that the trial court erred in refusing him damages for the obstruction of his rights of way. The trial court found that plaintiff had wrongfully obstructed his easement, to his loss, but was unable to determine the amount of damage. The only testimony regarding that issue was that of defendant Pogue, limited to the general statement that he was convinced the cost of his operations had been increased about one-third. The total cost of repairing and maintaining the dam was about $8,500. In contending that Pogue's testimony should be admitted, his attorney stated that this figure was an estimate, and that it was impossible to show the loss of any specific amount on any specific occasion. There was no other evidence of damage, and the trial court was justified in regarding this testimony as unreliable in view of the interest of the witness. Caldwell v. Weiner, 203 Cal. 543, 264 P. 1100; Davis v. Judson, 159 Cal. 121, 128, 113 P. 147; Blanc v. Connor, 167 Cal. 719, 723, 141 P. 217; Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 18 P.2d 429.

The judgments are affirmed in part and reversed in part as set forth above, with costs to be borne by appellant.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

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24 Cal.2d 40

STANDARD OIL CO. OF CALIFORNIA v. JOHNSON, State Treasurer.

Sac. 5506.

Supreme Court of California.

April 3, 1944.

Rehearing Denied May 1, 1944.

1. Sales 🔑201(4)

Whether delivery to carrier constitutes delivery to buyer depends upon the intention of the parties as ascertained from the contract and other circumstances of the case. Civ.Code, §§ 1738; 1739, rule 5; 1766.

2. Sales 🔑201(4)

Ordinarily, unless a contrary intent appears, where seller contracts to deliver goods at a given destination and he delivers them to a carrier, consigned to the buyer with freight charges paid by the seller, the delivery to carrier does not constitute delivery to buyer and title does not pass until the goods have arrived at their destination. Civ.Code, §§ 1738; 1739, rule 5; 1766.

3. Sales 🔑201(4)

That the railroad which received shipments of oil in the state to be transported outside the state was also the buyer of the oil did not necessarily show actual delivery in the state to the railroad as buyer rather than as common carrier. Civ.Code, §§ 1738; 1739, rule 5; 1766.

4. Carriers ⚷39

As a common carrier, a railroad is required to accept all goods tendered to it for carriage that it is able to carry, and it cannot legally refuse to carry goods as property of the shipper if the goods were tendered to it for such purpose.

5. Sales ⚷201(4)

Where contract for sale of oil to railroad provided for delivery to points to be specified and oil was delivered to railroad's tank cars within the state for delivery to railroad outside the state, the seller prepaying freight charges f. o. b. destination, the delivery to tank cars within the state was merely a delivery to "carrier," and delivery to railroad as "buyer" was outside the state. Civ.Code, §§ 1738; 1739, rule 5; § 1766.

See Words and Phrases, Permanent Edition, for all other definitions of "Buyer".

6. Licenses ⚷15(1)

The terms of contract for sale of oil to railroad, and the form of shipping documents providing for delivery outside the state freight prepaid f. o. b. destination, would not be disregarded on ground that whole purpose of terms of contract and form of shipping documents was to avoid payment of sales tax on sales made within the state. Gen.Laws Supp.1935, Act 8493, §§ 2(b, i), 3.

7. Carriers ⚷108

Under statute, a railroad is not made an insurer of property entrusted to it, since risk of loss from injury caused by acts of the public enemy, acts of the law, and any irresistible superhuman cause remains with the owner. Civ.Code, §§ 2194, 2195.

8. Commerce ⚷40(1), 63

Where contract for sale of oil to railroad provided for delivery to points to be specified and oil was delivered to railroad's tank cars within the state for shipment outside the state, freight prepaid by seller f. o. b. destination, the sales so made were not made within the state and were not subject to state sales tax. Gen.Laws Supp. 1935, Act 8493, §§ 2(b, i), 3; Civ.Code, §§ 1738; 1739, rule 5; § 1766.

9. Licenses ⚷15(1)

That the Legislature amended the Retail Sales Tax Act so as to exempt transactions under consideration in pending case justified inference that Legislature intended to clarify rather than to change the law. St. 1943, p. 2457, § 6385.

CARTER, J., dissenting.

◆

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by the Standard Oil Company of California against Charles G. Johnson, as State Treasurer, to recover retail sales taxes. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion 135 P.2d 638.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for appellant.

Pillsbury, Madison & Sutro and Harry H. McElroy, all of San Francisco, for respondent.

GIBSON, Chief Justice.

Plaintiff brought this action against defendant, as Treasurer of the State of California, to recover with interest a retail sales tax in the sum of $120,196.78, paid under protest. At trial evidence was received in the form of a stipulation of all facts. Judgment was for plaintiff and defendant has appealed therefrom.

The tax assessment was based upon sales of fuel oil by plaintiff to the Southern Pacific Company (hereinafter called the railroad) from March 16, 1936, to March 31, 1937, inclusive, pursuant to a contract entered into on January 1, 1928, as amended January 1, 1936. Under the terms of the amended contract, which covers all sales involved herein, plaintiff agreed to sell to the railroad fuel oil required for its operations in the states of Oregon, Nevada, Arizona, Utah and elsewhere. It was provided, among other things, that: "Requisition by the Railroad * * * shall be filed by the Oil Company by deliveries at such places as are herein specified, and at such times as the Railroad may reasonably designate." It further provided that "oil required by the Railroad for its operations in the States of Nevada and Utah shall be delivered at Sparks, Nevada, oil required by the Railroad for its operations in the States of Arizona and New Mexico, other than that delivered at El Paso, Texas, shall be delivered at Yuma, Arizona, and oil required by the Railroad for its operations in the State of Oregon, other than delivered at Willbridge, or transported to Portland by the Railroad, shall be delivered at Ashland, Oregon, or Klamath Falls, Oregon, as the Railroad may direct. Oil for such deliveries shall be shipped by the Oil Company in such quantities as the Railroads may designate from time to time from the points of shipment above mentioned, Tracy, Los Angeles, Richmond and Kern River Oil Field. * * *

"The prices to be paid by Railroad for fuel oil delivered under the terms of this contract at Sparks, Nevada; Yuma, Arizona; Ashland, Oregon, and Klamath Falls, Oregon, shall be the prices payable hereunder for delivery at the point of shipment thereof hereinabove specified, plus the current rail freight between such point of shipment and such point of delivery."

Oil was to be accepted or rejected by the railroad "at the time of tender of delivery," and all samples for inspection purposes were to be taken "at time of delivery from the pipe line from which delivery is made or from the storage tank and or tank cars into which delivery is made. * * *" Measurement "for quantity of deliveries to the Railroad" was to be taken "in the Railroad's tank cars and tanks into which delivery is made. * * *" Tank cars were to be furnished by the railroad and placed for loading without cost to plaintiff, and plaintiff was not to be liable for demurrage if cars were promptly loaded or if delay in loading was due to causes beyond its reasonable control.

Pursuant to the contract the railroad ordered fuel oil from plaintiff "giving shipping directions that said oil should be shipped to Southern Pacific Company or its agents or employees at the respective intended destinations" in Oregon, Nevada, Arizona and Utah. The oil was loaded into tank cars of the railroad at various California points and was "transported with tariff rate charges prepaid by plaintiff under the usual standard commercial railroad bills of lading issued to it specifying as destinations the respective points in the states of Oregon, Nevada, Arizona or Utah specified in said orders, and was delivered at such points outside California so denoted in accordance with said bills of lading." The oil was consumed by the railroad in its operations in those states. Attached as exhibits to the stipulation are copies of "typical" bills of lading naming the Southern Pacific Company as consignee, freight bills for prepaid charges and statements of freight paid. The oil was ordered "f.o.b. points of destination as indicated in said bills of lading." The head office of plaintiff and the main railroad operating office of the Southern Pacific Company were located in San Francisco, and all transactions and payments were handled there.

It further appears from the stipulation that crude oil had never been produced in commercial quantities in Oregon, Nevada, Arizona or Utah, that fuel oils there used "had necessarily to be obtained from sources outside said states," and that deliveries under the contract were "necessarily made from sources of production of plaintiff within the State of California." It is specifically stated that: "There was no practical means of transporting the fuel oil in question from plaintiff's points of manufacture in California to the points of storage of Southern Pacific Company outside said states other than the railroad lines of said Southern Pacific Company."

The Board of Equalization assessed a retail sales tax against plaintiff based upon the above sales. Plaintiff paid the tax under protest and thereafter filed this action for refund. Plaintiff contends that the tax should not have been assessed because the sales either were made outside of California or were sales in interstate commerce and therefore not taxable under the Constitution of the United States or under California tax laws. Defendant contends that the sales were intrastate, completed upon transfer of the oil to the tank cars in California and, further, that even if the sales were made in interstate commerce, the tax was not discriminatory and would therefore not be prohibited under the federal Constitution.

The Retail Sales Tax Act of 1933, as amended in 1935, imposed a tax upon retailers based upon gross receipts "from the sale of all tangible personal property sold at retail in this State." Stats. 1933, p. 2599, Deering's Gen.Laws, 1935 Supp. Act 8493, § 3. Section 2(i) of the act defined "in this State" to mean "within the exterior limits of the State of California * * *." Section 2(b) provided that: "'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property * * *."

Ruling No. 26 of the Sales Tax Rules and Regulations of the Board of Equalization which applied at the times here involved provided:

"The California sales tax does not apply to gross receipts from sales made in interstate or foreign commerce. * * *

"If tangible personal property, pursuant to a contract of sale, is delivered by the retailer at a point outside the State, or is delivered by the retailer to a carrier consigned to a bona fide consignee at a point outside the State and the property is transported and delivered outside the State, the transaction is one in interstate or foreign commerce and the gross receipts from the sale of such property are not taxable.

"If tangible personal property is sold and delivered to the purchaser or his representative in this State, the gross receipts from the sale of the property are taxable, even though the disclosed or undisclosed intention of the purchaser is to transport the property outside the State and the property is subsequently transported outside the State." (On April 1, 1937, Ruling No. 26 was revised in form but the substance thereof remained unchanged insofar as pertinent here.)

[1-2] Under the provisions of the statute and Ruling No. 26, the validity of which is not disputed, sales were not taxable unless there was a "transfer of title or possession, or both" in California, or unless the property was "sold and delivered to the purchaser or his representative in this State." In the present case the contract required plaintiff to fill the railroad's requisitions "by deliveries at such places as are herein specified," and oil required for the operations of the railroad in Oregon, Nevada, Arizona and Utah, was to be delivered at named points outside of California. The oil was delivered to the railroad, a common carrier, and was shipped to the out-of-state destinations under standard bills of lading with the buyer named as consignee and with freight charges prepaid by the plaintiff. Whether or not delivery to a carrier constitutes delivery to the buyer depends upon the intention of the parties as ascertained from the contract and the other circumstances of the case, and ordinarily, unless a contrary intent appears, where the seller contracts to deliver goods at a given destination and he delivers them to a carrier consigned to the buyer with freight charges paid by the seller (f.o.b. point of destination), the delivery to the carrier does not constitute delivery to the buyer and title does not pass until the goods have arrived at their destination. See Lewis v. Farmers' Grain, etc., Co., 52 Cal.App. 211, 214, 198 P. 426; 1 Williston on Sales, 2d Ed. 1924, §§ 280–280b; 46 Am.Jur. 349, 350, 609; 101 A.L.R. 292, 295 et seq.; cf. Civ. Code, §§ 1738, 1739 [rule 5], 1766; Sales Tax Ruling No. 26, supra. The rule is based upon the theory that in such event the carrier is made the agent of the seller, not the buyer, in transporting the property.

[3, 4] Counsel for defendant concede that no tax would be due if the shipments had been made over the rail lines of a different common carrier, but it is contended, in effect, that because the carrier which received the oil in California was also the buyer, there was necessarily an actual delivery in California to the railroad as *buyer* instead of delivery to it in its capacity as a common carrier. We cannot hold as a matter of law, however, that regardless of the intent and conduct of the parties a taxable sale took place in California rather than in another jurisdiction because of the one circumstance that the parties did not select a carrier other than the railroad of the buyer. As plaintiff points out, it was purely fortuitous, and not a necessary part of the sales transaction, that the buyer was also the carrier, and here it is apparent from the stipulation of facts that the railroad of the buyer was chosen because there "was no practical means of transporting the fuel oil * * * other than the railroad lines of said Southern Pacific Company." Moreover, under the laws governing common carriers, the railroad is required to accept all goods tendered to it for carriage that it is able to carry, and it could not legally refuse to carry goods *as property of the shipper* if the goods were tendered to it for this purpose. In this case it is clear that the shipper tendered the oil to the railroad under such terms, and it is immaterial that the railroad was operated by the buyer of the oil.

[5] In our opinion the terms of the contract and the circumstances under which the oil was shipped clearly disclose an intent that the railroad in its capacity as common carrier receive the oil at the point of shipment as property of the seller, and that delivery to the railroad *as buyer* should not take place until the oil arrives at its destination outside California. Defendant urges that a contrary intent is disclosed by the provisions in the contract relating to demurrage charges, inspection, acceptance or

rejection by the buyer "at time of tender of delivery," and measurement "for quantity of deliveries to the Railroad * * * in the Railroad's tank cars and tanks into which delivery is made." These provisions, however, do not show that either acceptance of the oil, or delivery to the railroad *as buyer,* took place in California, as defendant argues, and any possible inference that such was intended or done is dispelled by the specific provision in the contract that delivery was to be made at designated points outside this state and by the fact that the shipments were actually made f.o.b. such destinations. Further, had the parties intended a completed sale and delivery to the buyer upon loading of the oil on tank cars in California, it would have been sufficient to provide in the contract for delivery f.o.b. the shipping point. Had such been their intent, it is unlikely that they would have gone through the unnecessary procedure of shipping the oil consigned to the buyer out of state under commercial bills of lading issued to the seller with freight charges prepaid by the seller.

[6, 7] Defendant contends, next, that the terms of the contract and the form of the shipping documents must be disregarded upon the ground that the whole purpose of making the delivery ostensibly f.o.b. destination outside of California instead of f.o.b. the tank cars was to avoid the payment of sales taxes to the State of California. In support of this contention defendant urges that there was no actual difference in fact between the situation here and the situation as it existed under the 1928 contract, when the sales were designated f.o.b. tank cars. There are, however, material differences. Although it is true, as defendant asserts, that the freight charges prepaid by the seller under the 1936 contract were added to the sales price, the seller was deprived of the use of the money paid for freight until the oil was paid for by the buyer. Also, under the 1936 contract, risk of loss during transportation was upon the seller, as owner, rather than the buyer. Defendant argues that the railroad bore the risk of loss during transit because of sections 2194 and 2195 of the Civil Code which assertedly made it an insurer of property entrusted to it. These sections, however, do not make the carrier an insurer against all losses; they make certain exceptions including injury caused by acts of a public enemy, acts "of the law," and any "irresistible superhuman cause." Risk of loss from such a cause remains with the owner of the property. Further, as heretofore said, the time when title passes and whether or not delivery to a carrier constitutes delivery to the buyer depends upon the intent of the parties, and, therefore, the form of the dealings between them cannot be disregarded. The parties are, of course, free to set up their transaction, if bona fide, so as not to be within the taxing statute, and there is nothing in the record which indicates that the contract here is not bona fide.

[8] It is our conclusion, therefore, that the sales of fuel oil involved in this action were not made in California within the meaning of the Retail Sales Tax Act of 1933 or Ruling No. 26 of the Sales Tax Rules and Regulations of the Board of Equalization.

[9] That the transactions were not subject to the tax is further indicated by the 1943 amendment to the Revenue and Taxation Code which added section 6385 specifically exempting all sales of this type. (Stats. 1943, p. 2457.) The section provides: "There are exempted from the computation of the amount of the sales tax the gross receipts from sales of tangible personal property to a common carrier, shipped by the seller via the purchasing carrier under a bill of lading whether the freight is paid in advance, or the shipment is made freight charges collect, to a point outside this State and the property is actually transported to the out-of-state destination for use by the carrier in the conduct of its business as a common carrier." That this court may consider the 1943 amendment in determining the scope of the tax statute at the time of the transaction here involved is indicated by Union League Club v. Johnson, 18 Cal.2d 275, 278, 279, 115 P.2d 425. It was there held that in view of an amendment to the Retail Sales Tax Act at a time when certain groups were resisting collection of taxes assessed against them, the court could infer a legislative intent to clarify rather than to change existing law. See, also, San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 264, 125 P.2d 36; Martin v. California Mut. B. & L. Assn., 18 Cal.2d 478, 484, 116 P.2d 71. Similarly, the 1943 amendment was made while the instant case was pending upon appeal and after the decision in Standard Oil Co. v. Johnson, 56 Cal.App.2d 411, 132 P.2d 910, which held that the sales tax act applied to

sales of oil to a carrier for use outside the state but delivered f.o.b. tank cars of the carrier in California.

The authorities cited by defendant do not require a different conclusion. Barker Bros., Inc., v. Los Angeles, 10 Cal.2d 603, 76 P.2d 97, involved a municipal ordinance purporting to tax gross annual receipts of certain stores, and there was no discussion of the state Retail Sales Tax Act or Ruling No. 26 supra. Department of Treasury v. Wood Preserving Corp., 313 U.S. 62, 61 S. Ct. 885, 85 L.Ed. 1188, involved the legality of taxes laid by the State of Indiana upon gross receipts from sales to a railroad of ties which were accepted in Indiana by an inspector of the railroad and were there loaded under bills of lading naming as consignee the railroad's chief engineer in Ohio. No freight charges were paid for the transportation. The court in holding that Indiana had not exceeded its constitutional authority by taxing interstate commerce stated that the transactions were local sales and deliveries in Indiana because, among other things, the ties were there accepted by an inspector of the railroad. It also said that the seller "did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana." 313 U.S. at page 68, 61 S.Ct. at page 888, 85 L.Ed. 1188. The contract provided for delivery of the ties "f.o.b. cars on the railroad tracks," whereas the contract in the present case required delivery at points outside the state. The cases are therefore distinguishable on the facts. The case of McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876, is not in point. There goods were delivered in New York City by the seller, a Pennsylvania corporation. The question involved was whether New York, the state of the buyer (state of destination) had power under the federal Constitution to impose a sales tax. We, of course, are not concerned with powers of the states of Oregon, Nevada, Arizona, or Utah to tax the sales involved here. Nor is it necessary for us to consider the power of California, the state of the seller, to tax interstate commerce. O'Kane v. State, 283 N.Y. 439, 28 N.E.2d 905, is not in point for the reason that the New York statute imposed the tax upon "all sales, or *agreements to sell*" (page 907 of 28 N.E.2d), and the court said (page 909 of 28 N.E.2d): "The taxable event, to wit, the making of the *agreement* for the sale of the property, occurred in this State prior to the transportation of the goods in interstate commerce * * *." (Italics added.) State Board of Equalization v. Blind Bull Coal Co., 55 Wyo. 438, 101 P.2d 70, did not involve a sale to a common carrier, and the purchasers, after receiving the goods in the taxing state, transported them in their own trucks to another state.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, and SCHAUER, JJ., and SPENCE, Justice pro. tem. concurred.

TRAYNOR, J., did not participate.

CARTER, Justice (dissenting).

I dissent. The primary issue presented in this case is whether or not there was a sale in California within the terms of the Retail Sales Tax Act (Stats. 1933, p. 2599, Deering's Gen.Laws, 1937, Act 8493). It should be noted at the outset that the determination of whether a transaction constitutes a sale under taxing statutes is not necessarily governed by the technical rules applicable between seller and buyer and that the substance of the transaction rather than its form will be examined. See Hellebush v. Commissioner of Internal Revenue, 6 Cir., 65 F.2d 902; Embry Realty Co. v. Glenn, 6 Cir., 116 F.2d 682. In that connection this court has held that it will look through the veil of corporate entity to the actual circumstances in ascertaining whether a corporation is subject to the Bank and Corporation Franchise Tax Act, Gen.Laws 1937, Act 8488. See H. A. S. Loan Service, Inc. v. McColgan, 21 Cal.2d 518, 133 P.2d 391, 145 A.L.R. 349.

A sale is defined by the Retail Sales Tax Act as "any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale."

In the light of that definition I believe it is clear that the instant transaction constituted a sale in California. (1) Both, the seller, Standard Oil Company of California, and the buyer, Southern Pacific Company, maintain places of business in California. (2) The contract for the sale of the oil was made in California by the contracting parties. (3) The purchase price for the commodity was paid in California. (4) The seller had its oil supply in California. (5) It delivered custody of the oil to the buyer in California. (6) The price paid for the oil transported by the buyer to Nevada, Arizona and Oregon was the same as that charged for deliveries made at the point of shipment plus freight charges. In that connection, however, the seller prepaid the freight charges which were repaid by the buyer. (7) The tank cars required by the buyer "for receipt of deliveries" by the seller were furnished by the buyer and placed for loading by the seller, a clear indication that delivery was in fact made in California. The only feature of an ordinary sale in California that might be said to be lacking was, that there was no delivery of the oil in California; that delivery under the contract took place outside of California and hence the sale was made there.

First, there are conflicting provisions in the contract with regard to delivery as seen from the seventh point above mentioned. From that provision it may reasonably be concluded that the legal delivery was in fact made in California when the oil was loaded from the seller's supply depot into the buyer's tank cars. This court may make such an interpretation inasmuch as the interpretation of a contract is one of law where there is no evidence outside the contract.

Second, the substance of the transaction speaks for itself. To accept the language of the contract that there was no delivery until the oil reached a point outside of California, and taking into consideration the purported dual capacity of the buyer, as both a buyer and a common carrier, as being distinct from each other, is to pursue form rather than substance. The facts of the matter are that the possession of the oil was delivered to the buyer in California and that possession was pursuant to a contract of sale. The definition of a sale in the tax act states that it is a transfer of *possession or title* or both. As between the parties the title may not have passed until the oil passed the California state line, and under the tax act a mere transfer of possession alone may not be taxable. But inasmuch as *title* need not necessarily pass in order to bring the transaction within the tax act, a transfer of possession under and pursuant to a contract of sale certainly constitutes a sale within the meaning of the act. It cannot be doubted that the transfer of possession to the buyer in California was pursuant to the contract of sale. True, the bill of lading and payment of shipping charges by the seller were indicative of a transfer pursuant to a shipping arrangement. But that entire arrangement was set forth and fixed in the contract of sale. Everything in connection with the sale was completed before the oil left California except the anomalous circumstance of the buyer transferring possession from itself as carrier to itself as buyer after the oil arrived at a designated point outside of California. Can it be said that this mere fiction changed the transaction from a taxable to a nontaxable one under the law of California? I think not. Regardless of the rights and obligations of the parties to the contract, as between themselves, the taxing statutes should not be so easily evaded.

In my opinion the judgment should be reversed.

Rehearing denied; CARTER, J., dissenting.

24 Cal.2d 1

BEELER v. AMERICAN TRUST CO.

Sac. No. 5386.

Supreme Court of California.

April 3, 1944.

1. Mortgages 🔑38(2)

Clear and convincing evidence is required to justify court in finding that a deed which purports to convey land absolutely in fee simple was intended to be a mortgage.

2. Appeal and error 🔑1009(4)

Whether evidence offered to show that deed purporting to convey land absolutely in fee simple was intended to be a mortgage is clear and convincing is a question for the trial court to decide.

3. Appeal and error 🔑1009(4)

Appellate court will not disturb the finding of the trial court to effect that deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect.

4. Mortgages 🔑38(1)

Evidence supported finding that deed purporting to convey land absolutely in fee simple was in fact a mortgage.

5. Mortgages 🔑38(1)

In action to have a deed absolute in form declared a mortgage, accredited evidence indicating that the property was worth in excess of $75,000 more than consideration stated in conveyance was a strong circumstance tending to show that deed was intended to operate as a mortgage.

6. Mortgages 🔑38(1)

In determining whether deed absolute in form was in fact a mortgage the fact that lease and option to repurchase given to grantor provided for annual rental which was equivalent to interest on mortgage debt at rate of 5 per cent., whereas annual rental value of property was more than $7,500, was a strong circumstance tending to show that rent under lease agreement was in reality an interest payment consistent with character of transaction as a loan.

7. Mortgages 🔑38(5)

That mortgagee retained possession of notes secured by trust deed after recordation of deed by which land was purportedly conveyed to mortgagee in satisfaction of debt tended to show that deed to mortgagee was intended to operate as a mortgage and not as an absolute conveyance, though notes bore indorsement to effect that mortgagee had acquired title by deed and that notes were cancelled.

8. Mortgages 🔑38(4)

In absence of delivery of notes by payee either to maker or one assuming payment thereof, notations of payee on notes to effect that it had acquired title to property covered by mortgage securing notes and that notes were paid was without force and effect on issue of whether such deed purporting to convey land absolutely in fee simple was in fact a mortgage.

9. Mortgages 🔑38(5)

In determining whether deed purporting to convey land absolutely in fee simple was intended as a mortgage, the fact that grantor while in possession under lease and option to repurchase, which required him to make ordinary repairs, expended $3,000 in replacing permanent improvements destroyed by a flood was a factor substantiating claim of continued occupancy of the property as owner.

10. Mortgages 🔑38(5)

In determining whether deed purporting to convey land absolutely in fee simple was in fact intended as a mortgage, the fact that grantor continuing in possession under lease and option to repurchase sold trees from land with grantee's approval and retained proceeds without objection reflected grantor's exercise of rights of owner in relation to property.

11. Mortgages 🔑32(3, 5)

The test of a "mortgage" is whether the relation of debtor and creditor continues so that there is a subsisting debt after conveyance, and where a deed, absolute on its face, is given to secure debt, it will be held to be a mortgage even though the parties stipulate that it shall be an absolute conveyance.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

12. Mortgages 🔑32(3)

If a deed is made for the purpose of securing payment of a debt it is a mortgage no matter how strong the language of the deed, or any instrument accompanying it may be.

13. Mortgages 🔑37(2)

Grantor's affidavit that contemporaneously executed deed was an absolute conveyance and not intended as a mortgage did not preclude proof that deed was intended as a mortgage to secure antecedent debt.

14. Mortgages 🔑38(4)

A collateral written agreement declaring that a contemporaneously executed deed should be treated as an absolute conveyance, and not as a mortgage, is not conclusive but only one of the facts of the transaction worthy of consideration in determining the real intention of the parties. Civ.Code, § 2924.

15. Mortgages 🔑303

In action to have deed absolute on its face declared a mortgage wherein grantor claimed that deed was intended as a mortgage pursuant to an arrangement for reduction of mortgage indebtedness, reciprocal agreements in contemplated financial arrangement, one of which concerned understanding as to discount of existing debt, and resulting in execution of deed, was sufficient consideration for agreement for reduction of indebtedness as claimed by grantor.

16. Appeal and error 🔑173(6)

Where lack of consideration for agreement to reduce mortgage debt was not pleaded in action to have deed absolute in form declared an equitable mortgage and case was tried on other issues, the question of lack of consideration could not be raised for first time on appeal.

17. Interest 🔑50

Where equitable mortgagor in possession of mortgaged premises under lease and option to repurchase which required him to pay taxes thereon, in good faith and with ability to perform offered to pay delinquent installment of taxes and mortgagee rejected offer, the mortgagee, though entitled to reimbursement to extent of payment of installment of taxes then delinquent, was not entitled to interest thereon after such offer. Civ.Code § 1485.

18. Appeal and error 🔑1009(3)

Finding of trial court on conflicting evidence that assignment of rents was in full payment of installment of taxes payable by lessor in accordance with lease and option to repurchase as well as for rental charge under terms of lease agreement was binding on Supreme Court.

19. Appeal and error 🔑1122(2)

Where trial court in action to have deed absolute in form declared a mortgage inadvertently failed to make a finding with respect to grantee's right to reimbursement for taxes paid on mortgaged premises, and there was no question as to validity of claim for reimbursement, Supreme Court had jurisdiction to supply omitted finding. Code Civ.Proc. § 956a.

20. Appeal and error 🔑994(3)

Credibility of witnesses is a matter wholly within province of trial court and its discretion will not be disturbed on appeal.

21. Interest 🔑50

Where equitable mortgagor in good faith offered to pay mortgage debt before maturity and was ready and able to pay, mortgagee's refusal to negotiate with mortgagor, though not objecting to form of tender or questioning mortgagor's ability to perform, suspended the running of interest upon indebtedness from date of offer. Civ. Code, §§ 1496, 1501, 1504.

TRAYNOR, J., dissenting.

In Bank.

Appeal from Superior Court, Tehama County; Herbert S. Gans, Judge.

On rehearing.

Judgment modified, and, as modified, affirmed.

Prior opinion, 140 P.2d 814.

Brobeck, Phleger & Harrison, of San Francisco, Carr & Kennedy, of Redding, and M. B. Plant, of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark and Landels & Weigel, all of San Francisco, amici curiae on behalf of appellant.

Carter, Barrett & Carlton, Daniel S. Carlton, and Oliver J. Carter, all of Redding, and McGregor & McGregor, Major McGregor and Dudley G. McGregor, all of Paradise, for respondent.

CURTIS, Justice.

A rehearing was granted herein to permit additional study of the points involved. The further consideration consequently given this case has only served to confirm the conclusions heretofore reached, and accordingly, the following opinion expresses our sustained views.

The defendant, American Trust Company, appeals from an adverse judgment holding that a deed absolute in form was in fact an equitable mortgage. The principal contention presented by the defendant bank as a basis for a reversal of the judgment is the familiar claim that the evidence is insufficient to justify the conclusion of the trial court. As a related consideration, it is particularly urged that a verified affidavit of the grantor declaring the contemporaneously executed deed to be an absolute conveyance of the property, and not intended as a mortgage, is a conclusive expression of the understanding between the parties and precludes the admissibility of parol evidence to the contrary.

The facts and circumstances surrounding the transaction out of which this controversy arose appear to be substantially as follows: Prior to July 28, 1937, Henry Weiss owned a large tract of land in Tehama County subject to a deed of trust dated March 21, 1933, running in favor of the American Trust Company to secure two promissory notes for the aggregate sum of $74,400 and bearing interest at the rate of 5½ per cent per annum. Weiss was unable to make the stipulated payments and on October 5, 1936, he was served with a notice of default announcing the bank's election to proceed with the sale of this ranch property. At the request of Weiss the foreclosure proceedings were delayed to give him an opportunity to try to find a purchaser. In June, 1937, Weiss introduced C. W. Beeler to the officers of the bank interested in this matter, and the parties thereupon discussed various propositions looking toward a discount of the debt and its reduction to a satisfactory figure incident to Beeler's purchase of the property. Finally, Mr. Hammond, an assistant vice-president of the bank, agreed to accept $55,000 in cash if that sum were paid within the next few weeks. On July 28, 1937, Weiss conveyed the ranch to Beeler, and it was expressly provided in the terms of the transfer that Beeler assumed and agreed to pay the indebtedness secured by the deed of trust. At the same time Weiss executed and delivered to Beeler a bill of sale of certain personal property on the ranch.

The financial arrangement contemplated by Beeler as the basis for his negotiations with the bank for the early discharge of the debt on the property at the discounted figure did not materialize, and as of September 1, 1937, no part of the $55,000 had been paid. Accordingly, on the last-mentioned date the bank served upon both Beeler and Weiss a second notice of default. The indebtedness on its original scale had then increased to the aggregate sum of $81,000.

Subsequent to said notice and on September 22, 1937, Beeler visited the bank for the purpose of negotiating with its officers some refinancing plan whereby he might continue to retain the ranch and have an extension of time for the payment of the debt as theretofore reduced. The bank's officers refused to carry this property transaction any longer on the records as a security arrangement, and they therefore proposed the following course of procedure: Beeler would deed the property to the bank and in return the bank would execute to Beeler a lease of the premises for the period of one year at a rental of $3,000 per annum, Beeler to pay all taxes and maintenance expense on the ranch and to have an option to purchase the land at any time during the term of the lease for the sum of $60,000. Beeler accepted this proposition and by an absolute deed dated September 27, 1937, he conveyed the property to the bank. As an accompanying instrument, Beeler executed and delivered to the bank his verified affidavit, in which he stated that said deed "is intended to be and is an absolute conveyance of the title to said premises to the grantee named therein, and was not and is not now intended as a mortgage, trust conveyance or security of any kind; that it was the intention of affiant as grantor in said deed to convey, and by said deed this affiant did convey to the grantee therein all his right, title and interest absolutely in and to said premises; that possession of said premises has been surrendered to the grantee; that in the execution and delivery of said deed affiant was not acting under any misapprehension as to the effect thereof, and acted freely and voluntarily and was not acting under coercion or duress; that the consideration for said deed was and is the full cancellation of all debts, obligations, costs and charges secured by that certain deed of trust heretofore existing on said property, * * * and the reconveyance of said property under said deed of trust; * * * This affidavit is made for the protection and benefit of the grantee in said deed, its successors and assigns, * * * and particularly for the benefit of the Title Insurance and Guaranty Company, which is about to insure the title to said property in reliance thereon, * * *." Pursuant to the terms of this affidavit, the bank executed a reconveyance under its trust deed reciting that the indebtedness thereby secured had been fully paid. On November 5, 1937, both the deed from Beeler and the reconveyance were duly recorded.

As of May 16, 1938, neither installment of the 1937–1938 taxes on the ranch had been fully paid, and on said mentioned day the bank served upon Beeler a notice to pay the taxes or quit the premises for failure to comply with the terms of the lease.

The parties were unable to settle their differences on this score and in July, 1938, the bank brought suit in unlawful detainer seeking Beeler's eviction from the property. In the ensuing trial Beeler successfully maintained his defense on the ground that the notice of breach given him was defective, and judgment was rendered accordingly in his favor.

On October 19, 1938, Beeler commenced this action against the American Trust Company to have his deed of conveyance to the defendant bank declared a mortgage to secure the antecedent debt. In his complaint plaintiff alleged that the bank agreed to reduce the outstanding indebtedness against the property to the sum of $60,000 to be paid, together with interest at the rate of 5 per cent per annum, within the period of one year as provided by the terms of the lease, and that the bank accepted the deed of conveyance as a mortgage to secure that debt. To this complaint the defendant bank filed an answer and cross-complaint, denying the material averments of the plaintiff's pleading and asserting that the parties intended the deed to be an absolute transfer of title to the property as it in form purported to be, and not a mortgage or other security arrangement. With the principal controversial issue thus defined, the action proceeded to trial, and at the conclusion thereof the court adopted findings favorable to the plaintiff. Judgment was rendered accordingly against the defendant bank, determining the plaintiff, C. W. Beeler, to be the owner in fee of the property in question subject to a mortgage lien as security for the payment of the following sums: (1) the agreed indebtedness of $60,000, together with interest at the rate of 5 per cent per annum, according to the terms expressed in the lease and option agreement; and (2) the first installment of the 1937–1938 taxes, $477.88, with interest from the date of the entry of the decree herein. It was further ordered that on receipt of these sums within the time limitation specified by the court, the defendant bank should reconvey the property to the plaintiff and execute and deliver to him a release and satisfaction of the lien thus adjudicated. From this judgment the defendant, American Trust Company, prosecutes this appeal.

[1-3] It is without doubt the law, as repeatedly declared in our decisions, that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey land absolutely in fee simple was intended to be a mortgage. "That a deed purporting on its face to convey the title absolutely may be shown by parol evidence to be something else—namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot be thus changed except upon clear and convincing evidence." Woods v. Jensen, 130 Cal. 200, 203, 62 P. 473; see, also, Mahoney v. Bostwick, 96 Cal. 53, 30 P. 1020, 31 Am.St.Rep. 175; Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93; Couts v. Winston, 153 Cal. 686, 96 P. 357; Todd v. Todd, 164 Cal. 255, 128 P. 413; Kohn v. Parent, 174 Cal. 570, 163 P. 1008; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1; Carlson v. Robinson, 7 Cal.2d 235, 60 P.2d 426. But whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court to decide. Mahoney v. Bostwick, supra; Todd v. Todd, supra; Lockhart v. J. H. McDougall Co., supra; 17 Cal. Jur. 757, § 59. In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review on appeal. Sherman v. Sandell, 106 Cal. 373, 39 P. 797; Locke v. Moulton, 132 Cal. 145, 64 P. 87; Beckman v. Waters, 161 Cal. 581, 119 P. 922; 17 Cal.Jur. 758, § 60. As was said in this regard in Wadleigh v. Phelps, supra, 149 Cal. at page 637, 87 P. at page 98, "the appellate court * * * will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court."

[4] A review of the record in the light of these rules does not establish that the finding declaring the deed in question to be a mortgage is without sufficient evidentiary support.

In construing the disputed financial arrangement concededly made as the result of the understanding reached between the plaintiff and certain officers of the defendant bank at the aforementioned conference of September 22, 1937, regard must be had at the outset for the parties' course of negotiations at that meeting relative to some appropriate disposition of the indebtedness secured by the property here involved under the outstanding deed of trust. In this connection the plaintiff testified at length at the trial, as the following pertinent excerpts from the record will show:

Direct Examination

"Mr. Carter [plaintiff's attorney]: Q. Mr. Beeler, give us the conversation that took place between yourself and the representative of the American Trust Company on September 22, 1937.

"A. We all went into the little room, the small board of directors' meeting room, and sat down. I said, 'I am here to make some other arrangement than the present arrangement of paying the indebtedness off in 55,000 dollars cash. I find at this time I can't do it. The principal man that I had to get financed has been in an accident and had to have his arm amputated and has been in the hospital and he just couldn't do anything for me at that time.' I said, 'I want the ranch. I want to continue with the ranch. I don't want you to foreclose on it like this letter says, but is there some other way that we can do something about it? Is there some other arrangement we can make to carry this loan?' The conversation practically altogether was between Mr. Kennedy and myself. He said, 'There is not any way I can say. You have got to pay the money. That was the agreement and that is what we have got to have.' I said, 'Well, I just can't pay it but there must be some other way.' He said, 'That is the same old story with this ranch. We just have grief and trouble with it. We get half way through a deal and something blows up and goes wrong. We can't do anything unless we get some money.' He said, 'Can't you pay us some money? Can't you pay us five thousand dollars on it. We want some money on the thing.' I said, 'I need what money I have to carry me along in my business and so on.' I again insisted, 'Isn't there some way that we can handle this thing without you foreclosing on it? I want to keep the ranch.' Finally after some words back and forth Mr. Kennedy said, 'The only way I can see for you to do it is to deed us the property and let us take the title to the property so that we can write off this amount of money and this discount on it.' I said, 'If you do that will I still get it for the 55,000 dollars?' He said, 'No, we should have 60,000 dollars.' I said, 'Well, if you do that, you ought to reduce the interest from six per cent to five per cent.' As I understood all along it had been six per cent. That was agreeable to Mr. Kennedy and we discussed back and forth how it could be done. I didn't want to see it that way, but he said, 'That is the only way we can do it. It has been grief and trouble and the bank examiners say "You have got to get it off the books as a loan or foreclose on it or do something about it." On the one hand we can't give you title to the property and give you back a mortgage on it and write off the loss we are going to take on it right there. We have got to put it into the real estate department. That is the way we have got to do it. Then we can write off the loss in the real estate department or get a new deal later on and get this refinancing over with and we will have a chance to look at your property in Paradise.' In the conversation I tried to get him to take property in Paradise which we have to reduce the indebtedness down. He said, 'I can't do that. I don't know what the value of it is.' He asked me a lot of questions about it. He said, 'Well, if you want to do it this way now, and deed us the property and you take a lease and an option back on it for a year, we will have time to send somebody back up and look at the property and get an appraisal on it and maybe we can take it in that way. If we can't take it in that way, maybe we can take it in as additional security.' I said, 'I don't want to trade it in as additional security. One big ranch is enough to look after. That is one of the reasons I want to trade it. I want to get rid of the worry and trouble of that property.'"

* * * * * *

"Mr. Carter: Q. Just * * * give the substance of what was said.

"A. Mr. Kennedy finally said, 'We will do that. We will take the deed to the property and give you a lease and an option back on it and that will give us time to inspect the Paradise property and we can carry the deal on that way until we can get these things done, get the property inspected and see if we can take it in.' I said, 'If that falls down is there some other way that we can do it?' I said, 'I know you generally sell properties for a small down payment and if you could get some money on the ranch, like you just said a while ago, what could we do about that? If this falls down, we can't do it.' He said, 'We have had nothing but grief and trouble with that thing and we want to get it off of our books.' I said, 'If these things don't go through, can I pay you a payment of five thousand dollars at the end of the time or during the time and carry the balance of the loan and make my payment?' He said, 'We want to settle it and we will settle it in any kind of a deal at all and if you can give us some money that is what we asked you both all along, for some money.' The discussion went on. Mr. Kennedy said, 'We don't know you so well. What security can you give us for this *interest* and taxes so we will know they are being paid? All we have been getting is promises on this place for years.' I said, 'I am making a lease on the grain land on the bottom for forty-five hundred dollars with Herschell Giles at that time.' That is as far as they had gone. 'I am glad to assign that to you to pay the *interest* and the taxes.' He said, 'You haven't got it yet. You can't assign something you haven't got.' We talked back and forth about that. He said, 'What about the equipment and so on that you own? Will you give us a chattel mortgage on that to secure the payment of the *interest* and taxes until you do get the Giles lease?' I said, 'Sure I will.' It was left that way."

* * * * * *

"A. I said, 'Is it possible that these negotiations or this prospective deal to reduce the mortgage down with the Paradise property, if that isn't acceptable to the bank, can I make some new arrangement or some arrangement now to make a payment on the indebtedness and then continue with a new mortgage.' And he said, 'Yes, all we want to do is to get some money out of that property. All we have ever had is promises.' And I tried to pin Mr. Kennedy down to if he would take five thousand dollars and in an off-hand way he said, 'Yes, some way. We want to make some kind of a deal. We want to get some money out of it. *We want to know finally that it will be paid off. We don't want it.* That is the only piece of property we have in that country. It is no good to us there. We have just had a lot of trouble with it.' That was the gist of the conversation, was the difficulty that had been had with the property in regard to financing.

"Q. Have you given us the substance of the conversation that took place that day?

"A. After the last end of the conversation, why, I said, 'Well, now, how will we handle these papers to get this done?' And Mr. Kennedy said, 'I can't draw them up here in five minutes. It takes time. We are busy. If you will bring us in the list of the chattels on the property up there, personal property, so that we can make out this chattel mortgage, I will draw the papers or have them drawn and send them up to you.' We both agreed then. I asked them what they were and it was to be a *deed* and *a bill of sale, or a chattel mortgage rather,* and the *lease and the option.*"

Cross Examination

"Mr. Plant [defendant's attorney]: Q Now when you had that conversation down there at the bank on September 22, 1937, didn't you ask Mr. Kennedy if they couldn't just let the matter stay in abeyance and you give them a new mortgage? A. Yes. I asked him if he could carry the property on a new mortgage and reduce the amount down to fifty-five thousand.

"Q. And didn't he say, 'We can't do that. We can't do that because we can't just write off fourteen thousand and some odd hundred dollars, write off one mortgage and take a new one like that'? A. Yes. *They couldn't do that on account of bank examiners or some ruling of the bank* or some principle of the bank that they didn't want to do it.

"Q. He told you that they couldn't write off some fourteen thousand dollars and take a new mortgage? A. *No, couldn't take a new mortgage for 55,000.*

"Q. I didn't ask you that. Didn't Mr. Kennedy say that they couldn't write off fourteen thousand and some odd hundred dollars, write off one mortgage and then take another mortgage? A. Well, those may have been the words, yes, as I remember. That was the substance of the conversation.

"Q. Yes. A. *One portion of it, but that isn't all of it, of course.*

"Q. Didn't Mr. Kennedy at that time advise you they had had too much trouble with that ranch already with foreclosures and so forth? A. Yes.

"Q. And what he would have to do is take a deed and clear the whole thing up? A. Well, he told me, after the course of a lot of conversation, he said *that was the only way he would refinance it for me, was to take a deed.*

"Q. That is the only thing he would do, was to take a deed to the property and clear the whole thing up? A. Well, I see you are reading from my deposition, yes. I probably said those words and that was probably the intent of the conversation, was to clear the thing up and give it a new lien on life.

"Q. And they would give you back a lease and an option? A. Yes, that was the final conversation.

"Q. That is what he said, was it not? A. Yes.

"Q. Now at that time was there any discussion as to whether or not the Weiss indebtedness, that is the 74,000 dollar indebtedness, would be satisfied or cancelled? A. Well, there might have been some little discussion but it didn't impress me very much at all as I can remember. There might have been some.

"Q. Wasn't the substance of that discussion this, that when you gave them the deed to the property they would cancel, that is, wipe out, the indebtedness that Mr. Weiss owed them? A. That was my impression. It would be, naturally. When they took it, they would have to wipe that out in order to give me a new mortgage. That probably was said, yes.

"Q. *So that you understood that that indebtedness was to be cancelled?* A. *Oh, I didn't—nothing was promised me to that effect at all that I can recall.*

"Q. But that was the substance of the discussion? A. I suppose that was some of the substance of the discussion.

* * * * *

"Mr. Plant [Reading from plaintiff's deposition portions of testimony relative to the disposition of the Weiss indebtedness]:

"'A. [by Mr. Beeler] Well, before that I was in the bank there at one time, I don't recall what time it was. We were discussing about that fifty-three acres in the bottom land which was clear and they pulled out their folder there. I saw them. It was either Jerry Kennedy or it was right there by him and they showed me where they had a deed all ready for Mr. Weiss to sign to the ranch and to the fifty-three acres besides, which was supposed to be free and clear or was free and clear, so far as I was concerned.

"'Q. [by Mr. Plant] Did he tell you what that deed was going to be for? A. They were going to take it from Henry Weiss in lieu of his indebtedness. That was before I made a deal with Henry Weiss.

"'Q. That was in satisfaction of his indebtedness? A. That's what Henry Weiss was going to do.'

"Now is that statement correct?

"A. That was my understanding, Mr. Plant, for them taking the deed. There wasn't anything said that they were to cancel the indebtedness and they didn't go into that at all but they just said, 'We have the deeds prepared for Henry Weiss to sign here,' and they did show me the deeds.

"Q. Was the statement I have just read you correct? A. Yes, that I saw the deeds in there and that they would take the deeds for the property from Henry Weiss.

"Q. They were going to take that deed in lieu of the indebtedness. A. I said that voluntarily, Mr. Plant, that I assumed that is what they were doing it for and I still assume that is why they would take the deed. They didn't tell me that is what they would do it for.

"Q. You knew that their taking a deed from you would have the same effect, is that correct? A. No. Why should I pay five thousand dollars for a deed a couple of months before and then just give it away for nothing? [Beeler had given Weiss a $5,000 promissory note and assumed Weiss' obligation in return for the deed from Weiss.]

"Q. Isn't it a fact that you knew when they took the deed from you they were going to cancel your indebtedness? A. No. I didn't know that.

"Q. Well, I will call your attention again to your deposition * * * I will ask you if these questions were asked you and these answers given?

"'Q. Now, was anything said about the disposition to be made of Mr. Weiss' notes during that conversation?

"'A. Well, it was to be that when I gave them the deed to the property, why, then they would cancel—well, that was automatically wiped out, the indebtedness that Mr. Weiss owed them. That was about all the discussion there was about that.'

"Q. Was that your testimony at the taking of your deposition? A. Yes, that was my testimony, because *I was assuming the indebtedness.*"

In summarization of the foregoing testimony, it may fairly be said that it shows that incident to the plaintiff's purchase of the ranch on July 28, 1937, and his assumption of his grantor's obligation to discharge the existing debt thereon, he had been attempting for some months to work out some feasible plan with the bank for a reduction of the loan; that the financial backing on which he relied to meet the terms of the bank's $55,000 cash discount proposition of June, 1937, did not materialize within the time scheduled; that in response to the bank's notice of default and election to sell under its deed of trust, served upon him on September 1, 1937, he visited the bank on September 22, 1937, to "make some other arrangement than the present arrangement of paying the indebtedness off in 55,000 dollars cash"; that he discussed his problem of carrying the loan and continuing with the ranch, with several officers of the bank, but principally with Mr. Kennedy, the vice-president in the real estate loan department, who offered as the only alternative to immediate foreclosure a refinancing scheme whereby the bank "could write off the loan on the books" by taking a deed of the property and giving plaintiff a one-year lease with the option to purchase the ranch at any time during that period; that plaintiff did not want the transaction handled that way, but the bank's officers insisted on this form of procedure as plaintiff's only recourse; that the indebtedness was thereupon fixed at $60,000 instead of the previous discount figure of $55,000 because of the time extension commensurate with the option provision, and the rental was set at an amount equivalent to 5 per cent interest per annum on the aforesaid $60,000, or $3,000, payable semi-annually; that as security for his payment of said interest and the taxes on the property for the ensuing year, plaintiff agreed to give the bank a chattel mortgage on certain equipment on the ranch, with the understanding that such mortgage would be returned to him upon his assigning to the bank a lease which he was then negotiating with respect to a portion of the ranch property; that plaintiff had a tract of land in Paradise, California, which he wanted the bank to consider as a basis for a reduction of the indebtedness in question; that Mr. Kennedy agreed to have an appraisal of the Paradise property made some time during the course of the year and according to the valuation so established, the bank would "take it in" either "to reduce the debt" or "as *additional* security."

Corroborative of the plaintiff's recital of the parties' negotiations as concerned only with the effectuation of some new security arrangement which the plaintiff could handle successfully is the testimony of a Mr. Brown, plaintiff's banker, who was present during most of the conference on September 22, 1937. This witness, when asked to give his recollection of what occurred at the meeting, testified as follows: "Well, it appeared that Mr. Beeler had acquired a piece of property on which the American Trust Company held a deed of trust. The American Trust Company had filed notice of breach and Mr. Beeler was there for the purpose of endeavoring to refinance it, get an extension or something of that sort, and all the time I was there it centered around this deed of trust."

A few days following this meeting between the parties, the bank forwarded to plaintiff for his execution a deed of conveyance, a bill of sale of certain personal property on the ranch in lieu of the chattel mortgage theretofore specified, and a lease and option agreement—all documents which the parties had discussed in their previous negotiations, and which the plaintiff admittedly signed without question. However, with these papers the bank also sent to the plaintiff for signature an affidavit certifying, according to the pertinent provisions thereof above quoted, the nature of the transaction as an absolute conveyance of title to property in complete satisfaction and cancellation of an existing indebtedness thereon. Nothing had previously been said by any of the bank officials indicating that the bank would ask for, or would require any such affidavit. The plaintiff testified that before signing this affidavit he telephoned to the bank and discussed the document with Mr. McIntyre, an assistant vice-president, who had prepared the necessary papers for the closing of the transaction, as follows: "I asked him what the meaning of the affidavit was, that there was nothing said about it before. He said, 'We have to have that to clear up the title, so it is all right and we can put it in the real estate department. The bank always takes those.' I didn't think anything about it. I said, 'If you have to have it, that is O. K. I will sign it.' So I did." At the trial upon both direct and cross-examination with respect to this matter, Mr. McIntyre admitted that he told the plaintiff at the time in question that the affidavit was needed to satisfy a requirement of the title company before it would issue a title policy upon the property free of exceptions and that the bank was acting only as "an intermediary in the matter." On its face the affidavit in part sustains this statement as to its purpose, for it expressly provides: "This affidavit is made * * * particularly for the benefit of the Title Insurance and Guaranty Company, which is about to insure the title to said property in reliance thereon."

Also bearing on this matter is the following testimony of the plaintiff as to a conversation he had with Mr. McGlynn, an officer of the title company, before the transaction was finally closed: "We discussed, I told him rather, that this land was clear and so on, that I was deeding it all to the bank to refinance the loan, the way they wanted to do it. He said, 'You have given this affidavit. That takes you out, doesn't it?' I said, 'Why, no, I have a lease and an option and it is a form of refinancing.' He asked, 'What about this revenue stamp on the deed, where you are giving them the deed to the property?' I said, 'There is no need of any revenue stamp on it at all, because it is just given to refinance the thing.' He said, 'You refuse to put the revenue stamp on?' I said, 'Certainly I do.' He said, 'I will have to take that up with the bank.' He said, 'You have your lease and option. I don't want to see them.' I said, 'Why?' He said, 'We can't write a policy of title insurance if you aren't moving off the place and giving possession and turning that place over to them, if you aren't selling it to them.' I said, 'I am not selling it to them.' He said, 'Then I will have to write to our attorneys in San Francisco and advise them to make an exception to the property.' I said, 'Well, that is the story. I am not moving off the property.' He said, 'Are they paying you any money for it?' I said, 'Absolutely not a cent. They don't have to because I am just doing it to refinance.'" Consistent with the tenor of this conversation the title company thereafter issued its policy expressly excepting "any rights of C. W. Beeler, who is in possession"—significantly without reference to his occupancy of the property as a lessee—and the bank accepted the policy in this form, although it had previously indicated it wanted the title certificate free of such exception.

[5-8] Other matters of some relevancy in considering the status of the parties as the result of their consummation of the presently disputed transaction appear from the record: While the testimony relative to the value of the property is in direct conflict, the estimate of the plaintiff and his witnesses supports the trial court's finding that the ranch was worth "in excess of $135,000." This accredited evidence indicating the extent of the inequality between the worth of the property and the consideration stated in the conveyance, to wit, $60,000, the amount claimed by the bank to accord with its appraisal figure, is a "strong circumstance" tending to show that the deed was intended to operate as a mortgage. Husheon v. Husheon, 71 Cal. 407, 12 P. 410; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1; Reynolds v. Hook, 109 Cal.App. 226, 292 P. 1000; see, also, annotation in 90 A.L.R. 953-963; 17 Cal.Jur. 788, § 88. Moreover, the yearly rental value of the property stands uncontroverted in the record as "in excess of $7,500" and the trial court so found, yet under the terms of the plaintiff's lease with the bank the sum denominated rental for the premises was but $3,000 per year —a disparity of some significance, particularly in view of the further evidence that such sum was fixed by the bank at an amount equivalent to the interest rate of 5 per cent per annum on the indebtedness at the reduced figure of $60,000 and payable semi-annually. This, too, constitutes a "strong circumstance" tending to show that the "rent" under the lease agreement was in reality an interest payment consistent with the character of the transaction as a loan. Couts v. Winston, 153 Cal. 686, 96 P. 357; 17 Cal.Jur. 786, § 86. Still another matter to be here noted is the fact that after the recordation of the deed from the plaintiff, the instrument purportedly given in extinguishment of the existing indebtedness, the bank continued to retain in its possession the two promissory notes —one for $60,000 and the other for $14,400—evidencing the debt secured by the aforementioned trust deed made by the plaintiff's grantor and expressly assumed by the plaintiff in the terms of his purchase of the property. While it appears that following said recordation the bank made certain entries and transfers on its records designed to indicate full payment of the debt, endorsed on the back of the $60,000 note "We have acquired title by deed. Note cancelled" and "wrote off" the $14,400 note as a loss, such bookkeeping procedure of itself is no more effectual to establish the discharge of the debt than would be the act of the payee in writing

the word "Paid" across the face of the note, without relinquishment thereof to the maker. There being no delivery of the notes either to Mr. Weiss, the plaintiff's grantor, or to the plaintiff himself, the mentioned notations of the bank in this regard have no force or effect here. Wittman v. Pickens, 33 Colo. 484, 81 P. 299; Hanna v. McCrory, 19 N.M. 183, 141 P. 996; First State Bank of Hilger v. Lang, 55 Mont. 146, 174 P. 597, 9 A.L.R. 1139.

[9, 10] As to the parties' conduct subsequent to the financial arrangement in question, the following evidence is pertinent: In December, 1937, a great flood occurred in the Sacramento River, as the result of which many permanent improvements on the property here involved were damaged or destroyed. The plaintiff testified that he communicated the magnitude of his loss to certain officers of the bank, that he asked them for a *loan*—not a contribution—of money to defray the expense of repair and reconstruction, that they declined to give him the financial assistance he requested, and that he expended approximately the sum of $3,000 in making the necessary structural replacements on the ranch. While the terms of the lease required the plaintiff during the term thereof to make ordinary repairs on the property, his undertaking a program of improvements on the scale intimated by the mentioned outlay of expense is a factor substantiating his claim of continued occupancy of the property as owner. The plaintiff further testified, that in the course of one of his conversations with the officers of the bank relative to the flood damage, he mentioned that he contemplated selling some 276 walnut trees growing on the ranch; that they agreed with him that the removal of such trees would improve the property and that he should keep the proceeds from such sale; that he consummated the sale for the sum of $1,800, which amount he retained without objection from the bank. This arrangement as detailed by the plaintiff was not contradicted by the bank, and it, too, reflects the plaintiff's exercise of the rights of an owner in relation to the ranch property. Also to be noted here is the fact that some few months after the negotiations of the parties on September 22, 1937, resulting in the financial plan now in controversy, the plaintiff made two leases of different portions of the property—one for $2,750 and the other for $4,500—the latter, in accordance with the parties' understanding on the date mentioned, being assigned by the plaintiff to the bank in payment of his aforesaid yearly rental charge of $3,000, and the second installment of the 1937–1938 taxes on the ranch. The plaintiff discussed both of these lease propositions with the officers of the bank at the meeting of September 22, 1937, and as ultimately concluded, they both were executed as leases, not as sub-leases, of a tenant in possession of property.

Also to be noted at this point is the plaintiff's testimony relative to a conversation had with a representative of the bank in January, 1938, regarding the appraisal of his Paradise property.

Direct Examination

"Mr. Carter: Q. State what the conversation was [with Mr. Kennedy]. A. I asked him, 'What did Mr. Elberg [the bank's appraiser] report on the valuation of the property, and would they still take it in to reduce the amount of money I owed them.' He said, 'The only way we can take it in is as additional security.' I said, 'I don't want to give you any additional security. I want to get rid of the place and pay it in on that property, *the loan that I owe you.*' He said, 'We can't do that but *we will take it in as additional security,*' which I refused to do.

"Q. *As additional security for the*— A. *Sixty thousand dollars.*

"Q. Was that subsequent to the 27th day of September, 1937? A. Yes, it was in January of 1938."

Cross-Examination

"Mr. Plant: Q. Now when you went down and talked to Mr. Kennedy, as you say, about this Paradise property you referred to 'the *loan which I owe you* and to my indebtedness to you,' did you? A. Again, Mr. Plant, I won't say those were the exact words but *in substance that is about it.*

"Q. *As a matter of fact, neither the word 'loan' or the word 'indebtedness' were ever used, were they?*

"A. *Yes, Mr. Plant, they were used and have been from the beginning,* until they decided they wanted to get it away from me."

[11, 12] While much of the foregoing recital is based upon evidence introduced on behalf of the plaintiff and in some important respects is flatly contradicted by witnesses for the defendant bank—particularly in regard to the purpose of the financial arrangement made by the parties at the

conference of September 22, 1937, as a cancellation of the existing indebtedness on the ranch rather than another loan transaction—it must be remembered that all questions of preponderance and conflict of evidence are for the trial court. That court had the right to accept the plaintiff's version of this controversial matter as true, and apparently did so. Thus accepted, it was plainly sufficient to justify the finding that the deed in question was intended as a mortgage to secure the antecedent debt as discounted by the bank in formulating the refinancing plan with the plaintiff. In view of this accredited evidence relative to a continuing, subsisting loan, the following language from the case of Chapman v. Hicks, 41 Cal.App. 158, 162, 163, 182 P. 336, 338, is pertinent: "The test of a mortgage is whether the relation of debtor and creditor continues so that there is a subsisting debt after the conveyance [citing cases]; and where a deed, absolute on its face, is given to secure a debt, it will be held to be a mortgage even though the parties stipulate it shall be an absolute conveyance. ([Citing] Hodgkins v. Wright, 127 Cal. 688, 60 P. 431 * * *.) The intention of the parties must govern, and it matters not what particular form the transaction may take. If the deed is made for the purpose of securing the payment of a debt, it is a mortgage, 'no matter how strong the language of the deed, or any instrument accompanying it, might be.' [Citing] Woods v. Jensen, 130 Cal. 200, 62 P. 473."

[13] Nor is a different principle applicable here because the plaintiff executed contemporaneously with his deed an affidavit declaring the transaction to be an absolute conveyance and not intended as a mortgage. While the authorities in this country are divided with reference to the question whether a deed and an accompanying memorandum of agreement, or option of resale to the grantor, may be shown by parol evidence to be a mortgage where the terms of the memorandum unambiguously negative the existence of an indebtedness (see elaborate annotation of cases on the subject in 111 A.L.R. 448), it is the settled law of this state not to hold such writing a conclusive criterion of the character of the transaction. In Vance v. Anderson, 113 Cal. 532, 538, 45 P. 816, 818 this court set forth the basic doctrine as follows: "A deed absolute on its face may be shown by parol to be intended as a mortgage. It may be stated, as a general proposition, that in this state, at least, every conveyance of real property made as security for the performance of an obligation is in equity a mortgage, irrespective of the form in which it is made. Equity looks beyond the mere form in which the transaction is clothed, and shapes its relief in such way as to carry out the true intent of the parties to the agreement; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, their relations to one another and to the subject matter, are subjects for consideration. [Citing cases.]" In thus regarding "*all* the facts and circumstances of the transaction" so as to execute the real intention of the parties, the rule prevents either of the parties to the disputed instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. "To insist on what was really a mortgage, as a sale, is in equity a fraud, *which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.*" (Italics added.) Peninsular Trading & Fishing Company v. Pacific Steam Whaling Company, 123 Cal. 689, 694, 56 P. 604, 606.

The defendant bank's citation of the early case of People ex rel. Ford v. Irwin, 1861, 18 Cal. 117, in support of its argument that in this jurisdiction parol evidence may not be received to vary or dispute the terms of a written instrument concerning the purpose of executing a deed, is of no avail here. That case involved a deed absolute and a contract to reconvey. One Arnold owed the plaintiff, Ford, the sum of $8,600. Arnold conveyed the real property in question by grant, bargain and sale deed to Ford, who, at the same time delivered to Arnold a written argeement to reconvey the property, in which it was stipulated: "This shall only be treated as a contract to convey, and not as an acknowledgment that said conveyance from Arnold and wife to myself was intended as a mortgage." The opinion does not refer to any ruling upon the admission or exclusion of parol evidence, but discusses the problem as one of the proper construction of the instruments in the light of the evidence which had been received. Thus, it was held that evidence that the actual consideration for the deed was a pre-existing indebtedness equal in amount to the sum required to be paid upon a reconveyance of the property was sufficient to impress upon the deed the character of a mortgage "unless controlled by the clause referred to in the contract" (that is, the stipulation above quoted); that the object of the clause was to "repel" any and all presumptions which the law would otherwise have indulged in relation to the deed, and that there was "no doubt that the parties could, by a provision for that purpose, exclude all extraneous circumstances" affecting the character of the transaction; that such clause in the contract did not take away or interfere in any respect with the efficacy of the contract, but simply repelled "any presumption from outside facts, giving to it an operation different from that intended by the parties."

[14] To the extent that the discussion in the Ford case would limit the court to the consideration of *only* the deed and the accompanying written instrument, without regard for other evidence in the case, in determining the real nature of the disputed transaction, it is inconsistent with the import of the subsequently adopted code provision on the subject and cannot be approved. Section 2924 of the Civil Code from the date of its original enactment in 1872 has provided that every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage. In accord with the implication of this statutory pronouncement, it was properly recognized in Vance v. Anderson, 1896, supra, that a collateral written agreement declaring that a contemporaneously executed deed should be treated as an absolute conveyance, and not as a mortgage, was not conclusive but only *one* of the facts and circumstances of the transaction worthy of consideration in determining the real intention of the parties. If by a separate writing the parties expressly agree, at the same time an absolute deed is executed, that it is what it purports to be, that is, an absolute sale, that would be no more than what the deed itself says. Therefore, if they could thus avoid its real effect as a mortgage, the true nature of such a transaction could never be shown, and the policy of the law never to permit a security to be converted by *any* contemporaneous agreement into a sale could be constantly evaded. Civ.Code, §§ 2924, 2925; Pierce v. Robinson, 13 Cal. 116; Wehle v. Price, 202 Cal. 394, 260 P. 878; Carlson v. Robinson, 7 Cal.2d 235, 60 P.2d 426. The right of a mortgagee to become the purchaser of the equity is unquestioned, but the relations of the parties are such that the transaction will be carefully scrutinized to prevent the effectuation of some device whereby the debtor under the force of necessitous circumstances is deprived of his right of redemption. Civ.Code, § 2889; Russell v. Southard, 12 How. 139, 53 U.S. 139, 13 L. Ed. 927; Peugh v. Davis, 96 U.S. 332, 24 L.Ed. 775; Bradbury v. Davenport, 114 Cal. 593, 46 P. 1062, 55 Am.St.Rep. 92; Jones on Mortgages, §§ 251, 1045. The rule in such a case is said to be substantially the same as that prevailing when the deed of a beneficiary to this trustee is questioned. Villa v. Rodriguez, 12 Wall. 323, 79 U.S. 323, 20 L.Ed. 406; Bradbury v. Davenport, supra.

A situation presenting considerations strikingly akin to those here involved was recently before the appellate court in the second decision in Davis v. Stewart, 53 Cal.App.2d 439, 127 P.2d 1014 and adjudicated in accordance with the views hereinabove expressed. There, as here, a deed absolute on its face was claimed to be only a mortgage. As a part of the transaction in which the deed was given, the grantor and grantee entered into an elaborate written agreement, which among other things provided: "It is understood and agreed that first party shall become, upon execution and delivery of said deed the absolute owner of said property, together with all improvements thereon and that this transaction does not constitute a mortgage, subject only however to said option for said five year period." See recital in Davis v. Stewart, 31 Cal.App.2d 574, 576, 88 P.2d 734, 735. Over objection, the trial court admitted oral testimony to the effect that notwithstanding the declarations of the contemporaneous writing, the deed was in fact intended as security for the payment of a debt. Thereafter findings were made in accordance with the oral evidence, and the judgment establishing the deed as a mortgage was affirmed. The defendant bank argues that the situation in the Davis case is distinguishable because the written agreement there did not expressly provide, as does the affidavit here, that the deed "was not and is not now intended * * * as security of any kind * * *" and hence evidence extrinsic to the writing was properly received to remove the uncertainty as to whether or not the disputed instrument was given in satisfaction of the antecedent indebtedness. That is but a tenuous distinction and will not bear close scrutiny. In both cases the import of the contemporaneous writing is the same—the negation of a security arrangement incident to the subsistence of the debt—and whether one writing amplifies by detailed recitals the purported purpose of the parties to execute an absolute transfer of title to the property involved is an immaterial consideration. Certainly, in neither instance is the language of the accompanying instrument so obscure as to require extrinsic evidence for its explanation or understanding. And, in one case as in the other, the declaration of the writing would not be held controlling unless it should appear upon *complete* evidence that it was in harmony with "*all* the facts and circumstances of the transaction." Vance v. Anderson, supra.

In concluding the discussion of this phase of the present appeal, it is sufficient to state that the circumstances of the whole case, as reflected by the evidence accredited in the trial court, are entirely consistent with the view that the defendant bank, while in fact agreeing on a loan to be secured by mortgage, was desirous, for reasons of certain interdepartmental requirements connected with its routine bookkeeping procedure, of giving the transaction a different appearance by recording it as an absolute transfer of title. Such cases cited by the defendant bank as Henley v. Hotaling, 41 Cal. 22; Farmer v. Grose, 42 Cal. 169; Woods v. Jensen, 130 Cal. 200, 62 P. 473; Wehle v. Price, 202 Cal. 394, 260 P. 878; and Goodfellow v. Goodfellow, 219 Cal. 548, 27 P.2d 898, wherein an absolute deed was sustained as such in the face of the claim that it was intended by the parties as a mortgage, merely rest upon an affirmance of the trial court's judgment as based upon substantial evidence and thus do not conflict with the fundamental premise of this opinion as to an appellate court's function in reviewing the record to determine whether challenged findings lack evidentiary support.

[15, 16] There is no force here to the contention of the defendant bank that there was no consideration for the agreement for the reduction of the indebtedness as claimed by the plaintiff to have been made between the parties at the basic conference of September 22, 1937, as aforesaid. In the first place, the record discloses that the trial court found on substantial evidence that at said meeting the parties concluded with respect to various phases of the contemplated financial arrangement a number of reciprocal agreements, of which *one* concerned the understanding as to the discount of the existing debt; that as the result of these integrated negotiations the deed in question was executed and the parties have acted thereunder, though in dispute as to the real purpose of the conveyance. But regardless of this observation, the record further shows that this matter of lack of consideration was not pleaded in the trial court, that the cause was tried on other issues entirely and as if such point did not enter into the case; consequently, such objection may not properly be raised for the first time on appeal. 2 Cal.Jur. 234-235, § 67; Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193.

[17] Two additional questions presented by the record require some discussion. The first of these relates to the payment of taxes on the property involved. As above stated, the lease agreement expressly placed this obligation upon the plaintiff during the one-year period therein specified—October 1, 1937, to September 30, 1938. With regard to the first installment of the 1937–1938 taxes, the record discloses that the plaintiff on November 30, 1937, received from the bank a letter enclosing the bill for the taxes covering the real property and stating that the bill covering a separate assessment with respect to certain personal property on the ranch had been forwarded to the plaintiff's grantor, Mr. Weiss, who was responsible therefor; that on December 3, 1937, the plaintiff gave the tax collector his check for the amount of the real property taxes; that subsequently the tax collector notified the bank as to the receipt of the plaintiff's check, but stated that such segregable amount of the entire tax bill could not be accepted until payment of the personal property assessment was made; that the bank suggested to the plaintiff by letter that he pay the balance of the tax bill and deduct that amount from a certain sum he then owed to Mr. Weiss in connection with the purchase of the ranch; that the plaintiff did nothing further in the matter and on April 25, 1938, his check for the real property taxes was returned to him by the tax collector; that the bank on May 16, 1938, served on the plaintiff a notice to quit the premises for breach of his lease, and subsequently commenced unlawful detainer proceedings. The plaintiff testified that in

June, 1938, he called at the defendant bank and offered to pay the delinquent taxes, including those on the personal property in question, if the bank would not prosecute the eviction proceedings; that he then had sufficient money in his bank account to substantiate his offer of payment; and that the officers of the defendant bank refused to accept his proposition. As previously noted, the unlawful detainer action resulted in a judgment in favor of the plaintiff herein because of the defect in the notice of breach with respect to the amount of his tax liability. In view of this evidence the trial court properly concluded that the defendant bank should be reimbursed to the extent of its payment of the first installment of the real property taxes, $477.88, but that the running of interest on such sum was stopped by virtue of the plaintiff's offer of payment made in good faith and with ability to perform. Civ. Code, § 1485.

[18] As to the second installment of the 1937-1938 taxes, there arises the question of the effect of the plaintiff's assignment of a certain lease to the bank in discharge of this obligation. The plaintiff testified that at the aforesaid conference of September 22, 1937, he agreed to assign to the bank "to pay the interest [rent] and the taxes" a lease he was then negotiating with respect to a portion of the ranch; that such assignment was accordingly made "to pay up all of the three thousand dollars and the second half of the taxes in full"; that following the bank's acceptance of the assignment he was given a "receipt for all the payments, the interest payments" that he owed it. While certain witnesses for the defendant bank stated at the trial that the assignment was taken only as security for the amount of the rental charge and the specified tax installment, the instrument itself purports to be absolute on its face and apparently the court so construed it in accordance with the plaintiff's positive testimony in the matter. Accordingly, the trial court's finding to the effect that the assignment was in full payment of the aforesaid second installment of taxes, as well as for the rental charge of $3,000 under the terms of the lease agreement, is binding on this appeal, and the defendant bank's claim that the plaintiff is indebted to it in the amount of said tax installment cannot be sustained.

[19] However, the record further establishes, and the plaintiff so concedes, that pending the trial of this action the defendant bank paid the first installment of the 1938-1939 taxes amounting to $430 on the real property here involved. Apparently the trial court inadvertently failed to make any finding as to this matter. Since there is no question as to the validity of the bank's claim for reimbursement for this expenditure, we are authorized under section 956a of the Code of Civil Procedure to supply the missing finding. We, therefore, find "That the defendant, American Trust Company, paid the first installment of the 1938–1939 taxes on said real property, amounting to the sum of $430, and that pursuant to the agreement of the parties, it was the duty of the plaintiff to pay said first installment, and said defendant should be reimbursed for its payment thereof; that there is now due and owing from the plaintiff to the defendant, American Trust Company, the sum of $430, but without interest thereon because of said defendant's refusal of the offer of payment hereinafter in these findings referred to." Finding to be numbered XXVIIIa.

The defendant, having paid the sum of $430 on account of the taxes due for the year 1938–1939, as well as the sum of $477.88 on account of the taxes for the previous year, is entitled to be reimbursed in the aggregate amount of $907.88.

For the purpose of making the findings harmonize, it is further necessary to modify Finding XXXIV by striking out subdivision 2 thereof and inserting in its place the following:

"2. The sum of $907.88, being the amount of taxes on said real property for the years 1937–1938 and 1938–1939 paid by the said defendant, American Trust Company, together with legal interest upon said amount from the date of entry of the decree in this action."

The conclusions of law are also modified so as to meet these changes in the findings of fact.

The second and final point presented for determination relates to the proper allowance of interest to be made to the defendant bank with reference to the adjudicated mortgage indebtedness of $60,000. It is claimed by the plaintiff and found by the trial court that a tender of this amount was made to the defendant bank some few months before due under the parties' agreement and that because of such tender and refusal thereof, the bank is not entitled to interest from that date. Civ.Code, § 1504. The defendant bank contends that the tender, if in fact made, was insufficient to stop the running of interest.

[20] The finding of the trial court upon the matter of tender is substantially as follows: That on June 20, 1938, at the defendant bank the plaintiff offered to pay his indebtedness in good faith, and was ready, willing and able to do so; that prior to that date plaintiff had entered into an arrangement with one MacArthur whereby the latter had agreed to advance to plaintiff the amount of money necessary to pay the indebtedness; that said MacArthur was financially able to make the requisite advancement, and was ready and willing to do so; that this offer was made to Mr. Kennedy, vice-president of the bank; that said Kennedy refused that offer without specifying any objection to its form, and refused to deal with the plaintiff in the matter in any way, but demanded that the plaintiff vacate the property within thirty days; that by virtue of its said officer's actions the defendant bank waived objection to the mode of the offer and waived tender or other offer; that such offer of performance suspended the running of interest upon the indebtedness.

This finding is in strict accord with the plaintiff's evidence on the subject. In regard to his interview with Mr. Kennedy on the day mentioned, the plaintiff testified as follows: "Well, I went into the bank. He [Kennedy] was sitting at his desk, * * * He apparently—well, he was sore because I came in. He told me before he didn't want to deal with me. I said, 'I will come in. I have a man by the name of Roderick MacArthur that will give me enough money that I can liquidate this indebtedness and I want to talk to you about it and see what we can do to get it closed up.' He said, 'I don't want to talk to you. You get out of this bank. We have had nothing but trouble with you and all these leases and everything and I don't want to talk to you at all. We want you to get off of that ranch and if you are not off in thirty days we will put you off.' I tried to talk further. I tried to say something, and he walked off and said, 'I don't want to talk to you. You get out of here.'" Mr. MacArthur corroborated the plaintiff's statement with respect to their prior arrangement for the necessary advance of money, and added that he was financially able to discharge the indebtedness at the time he so agreed to assist the plaintiff. While Mr. Kennedy on behalf of the bank gave an entirely different account of the conversation had with the plaintiff on the day in question, the trial court in its findings expressly denied credence to the substance of his testimony. Since, as aforestated, the credibility of witnesses is a matter wholly within the province of the trial court, its discretion as here exercised will not be disturbed on appeal.

[21] The evidence accredited by the trial court supports not only its finding as to the fact of the offer of payment, but also its sufficiency to prevent the running of interest on the plaintiff's obligation. Thus, it appears that Mr. Kennedy as representative of the defendant bank declined absolutely to negotiate with the plaintiff in the matter and, without making any objection as to the form of the tender or questioning the plaintiff's ability to perform his offer, he simply refused to consider the proposition that the plaintiff had the right to protect his interest in the property involved. Upon this basis the trial court was warranted in concluding that any further action by the plaintiff in this respect would have met with like rebuff by the bank, and that a valid offer having once been made and refused, the indebtedness ceased to bear interest as of that date. Civ.Code, §§ 1496, 1501, 1504; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1.

In accordance with the views above expressed, the judgment is modified by striking therefrom the figures $477.88, and inserting in their place the figures $907.88, and as so modified, the judgment is affirmed. Neither party to recover costs on appeal.

GIBSON, C. J., SHENK, and SCHAUER, JJ., and SPENCE, Justice pro tem., concur.

TRAYNOR, Justice (dissenting).

The evidence in this case is insufficient, in my opinion, to uphold the trial court's finding that defendant, with a deed of trust on real property worth over $135,000 securing an indebtedness of $81,232.90, entered into an agreement to reduce the indebtedness to $60,000 and to accept an inarticulated mortgage in place of its deed of trust.

Since a mortgage secures an obligation it cannot be proved that a conveyance is intended as a mortgage if there is no liability "independent of the conveyance and contract of conveyance, which the grantee can enforce against the grantor." 4 Pomeroy, Equity Jurisprudence, Symons' fifth Ed., 1941, § 1195, p. 579; Holmes v. Warren, 145 Cal. 457, 78 P. 954; Chapman v. Hicks, 41 Cal.App. 158, 182 P. 336; see 17 Cal. Jur. 783. The only debt in the present case was that represented by Weiss's promissory notes, and no relation was established between these notes and the deed, option, and lease. The amount payable by plaintiff to exercise the option was different from the amount due on the notes, and the rent payable until the exercise of the option was different from the interest prescribed by the notes. The only evidence regarding the notes in the disputed transaction shows that they were to be cancelled when plaintiff executed his deed to defendant. Both defendant's officers and plaintiff testified to that effect. When plaintiff's deposition was taken before the trial, plaintiff was asked, "Now, was anything said about the disposition to be made of Mr. Weiss's notes during that conversation?" and answered, "Well, it was to be that when I gave them the deed to the property, why, then they would cancel—well, that was automatically wiped out, the indebtedness that Mr. Weiss owed them." Plaintiff also testified, "As far as the notes, I know when they took a deed to the property and reconveyed it that these notes and the mortgage would be wiped out, if the deed was standing in the bank's name."

Plaintiff testified unequivocally on that occasion that the notes were to be cancelled. His later testimony was inconsistent. At times he did not recall clearly what, if anything, was said about the notes. When asked whether there was a discussion as to the satisfaction or cancellation of the notes, he replied, "Well, there might have been some little discussion but it didn't impress me very much at all that I can remember. There might have been some." At times he adhered to his earlier testimony that the notes were to be cancelled or satisfied. He was asked, "Wasn't the substance of that discussion this, that when you gave them the deed to the property they would cancel, that is, wipe out, the indebtedness that Mr. Weiss owed them?" He replied, "That was my impression. It would be, naturally. When they took it, they would have to wipe that out in order to give me a new mortgage. That was probably said, yes." He was also asked, "They were going to take that deed in lieu of the indebtedness?" and answered, "I said that voluntarily, Mr. Plant, that I assumed that is what they were doing it for and I still assume that is why they would take the deed." Yet, when asked, "Isn't it a fact that you knew when they took the deed from you they were going to cancel your indebtedness?" plaintiff replied, "No, I didn't know that."

Plaintiff, in taking the position that the notes were to be cancelled but that somehow the debt was not, appears to have been influenced by the belief that some obligation against him existed apart from the notes. When confronted with his earlier testimony, he did not repudiate it but said, "Yes that was my testimony, because I was assuming the indebtedness." Plaintiff's brief suggests that the assumption agreement with Weiss created "an independent contract obligation that was to continue," and that "the Weiss indebtedness was to be satisfied and his own continued."

The only liability plaintiff agreed to assume, however, was the indebtedness represented by Weiss's promissory notes and secured by the deed of trust. There was but one indebtedness, and while plaintiff became primarily liable therefor and Weiss secondarily liable under the assumption agreement, its satisfaction would necessarily end both liabilities. Plaintiff's testimony cannot be construed to suggest that this indebtedness was to be satisfied as to Weiss, but continued as to plaintiff, for in his answer to a suit brought by Weiss he declared that "he did fulfil and carry out the terms of his agreement regarding the payment of said obligation against said property and did procure the same to be released and satisfied in full." What the trial court found, moreover, was not that the deed was taken as security for some independent obligation arising from the assumption agreement but that it was executed pursuant to an agreement that the "trust deed indebtedness and interest" i.e., the Weiss indebtedness, should be reduced and the deed taken as security for the reduced indebtedness. The contention that the Weiss indebtedness was to be satisfied and the deed taken as security does not support the finding but impeaches it. The finding cannot be sustained unless it can be concluded that plaintiff and defendant's officers understood that the Weiss notes were to continue in effect.

The evidence establishes without contradiction that it was intended that these notes be cancelled. Pursuant to that understanding plaintiff executed the deed to defendant.

Defendant marked the large note cancelled and wrote off the smaller note at a loss, insisted upon receiving plaintiff's affidavit that the deed was executed in full satisfaction of the indebtedness, and recorded the reconveyance reciting full satisfaction of the indebtedness. Once these steps were taken the bank was powerless to enforce payment of the notes. The only reason in the majority opinion for holding that the debt survived this operation is that the notes could not be cancelled without delivery to Weiss or to plaintiff. It is settled, however, that the parties to a note can extinguish the obligation thereof by accepting something other than the performance promised. Civ.Code, §§ 1521, 1522; Silvers v. Grossman, 183 Cal. 696, 192 P. 534; B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 137 P. 624; see Brannan's Negotiable Instrument's Law, Beutel's sixth Ed., 1938, § 119(4), pp. 963, 964. It has always been clear that the obligation of a note can thus be terminated without delivery. (See cases cited in Brannan, pp. 962, 964, supra.) Plaintiff's obligation was terminated when defendant accepted the deed in satisfaction of the notes. The Colorado (Wittman v. Pickens, 33 Colo. 484, 81 P. 299), the New Mexico (Hanna v. McCrory, 19 N.M. 183, 141 P. 996), and the Montana (First State Bank of Hilger v. Lang, 55 Mont. 146, 174 P. 597, 9 A.L.R. 1139), cases which constitute the sole authority cited for a contrary conclusion, actually establish only that delivery of the notes is essential if the creditor proposes as a gift to free the debtor.

Thus, even if this were an ordinary civil case where only a preponderance of evidence is required, the evidence is insufficient to support the finding that the trust deed indebtedness, i. e., the Weiss indebtedness, should be reduced and the deed taken as security for the reduced indebtedness, and is likewise insufficient to support the contention that Beeler's agreement to assume the Weiss indebtedness created an independent contract obligation or that the cancelled notes remained in effect. This is not an ordinary civil case, however, for, as the majority opinion concedes, it was incumbent upon plaintiff to support his contention by evidence, "clear, satisfactory and convincing; explicit, unequivocal and indisputable." Wehle v. Price, 202 Cal. 394, 397, 260 P. 878, 879; Goodfellow v. Goodfellow, 219 Cal. 548, 554, 27 P.2d 898. While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence "the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule." Sheehan v. Sullivan, 126 Cal. 189, 193, 58 P. 543, 544; see, also Moultrie v. Wright, 154 Cal. 520, 98 P. 257. In such cases it is the duty of the appellate court in reviewing the evidence to determine, not whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, as in the ordinary civil case where only a preponderance of the evidence is required, but whether the trier of facts could reasonably conclude that it is highly probable that the fact exists. When it holds that the trial court's finding must be governed by the same test with relation to substantial evidence as ordinarily applies in other civil cases, the rule that the evidence must be clear and convincing becomes meaningless. There is a contradiction in thus destroying the vitality of the rule while affirming its soundness. If, as in my opinion, the rule is sound, this court has erred in its pronouncements (see 25 Cal.Jur. 248; 2 Cal.Jur. 921) declining to accept responsibility for its enforcement. See my dissenting opinion in Stromerson v. Averill, 22 Cal.2d 808, 817, 141 P.2d 732.

The doctrine that a deed may be shown to be a mortgage was originally an equitable one. It is also to be recalled that in equity cases the appellate court would review the facts de novo. Although the question whether the evidence establishes that a deed was intended as a mortgage is now decided by the jury in this state (Locke v. Moulton, 108 Cal. 49, 41 P. 28, see contra, Reilly v. Cullen, 159 Mo. 322, 60 S.W. 126) the jury's determination must be supported by clear and convincing evidence. It is doubtful whether the rule that it is a question for the jury whether a deed was intended to be a mortgage would have been adopted without the protection afforded by the rule requiring the evidence to be clear and convincing. Thus, in considering a similar problem with respect to the reformation of contracts, Judge Cardozo, for the New York Court of Appeals, declared: "Juries may find it difficult to apply the presumption that preliminary treaties are merged in the written contract if they are permitted to consider such treaties as evidence of mistake. Against these and like dangers, there are two methods of relief. One is suggested by the provision of the statute that 'the court, in its discretion, may order one or more issues to be separately tried * * *.' The other is to be found in a strict enforcement of the rule that reformation must be refused unless the case in support of it is 'of the clearest and most satisfactory character.' * * * Judgments for reformation have been reversed even in this court for failure to obey it." Susquehanna S. S. Co. v. A. O. Andersen & Co., 239 N.Y. 285, 296, 146 N.E. 381, 385.

So grave is the danger that deeds will be erroneously found to be mortgages that some states have refused to apply the doctrine that a deed may be shown to be a mortgage except upon proof of fraud or mistake (see Jackson v. Maxwell, 113 Me. 366, 368, 94 A. 116, Ann.Cas.1917C, 966), while others have held that the doctrine will not be applied unless the grantor's testimony is corroborated by independent testimony. Stitt v. Rat Portage Lumber Co., 96 Minn. 27, 32, 104 N.W. 561. The solution adopted in this state of requiring clear and convincing evidence requires not simply that the appellate courts go through the form of recognizing the rule, but that, like the appellate courts of many other states, they accept responsibility for its enforcement. Susquehanna S. S. Co. v. A. O. Andersen & Co., 239 N.Y. 285, 296, 146 N.E. 381; Allison Bros. Co. v. Allison, 144 N.Y. 21, 33, 38 N.E. 956; Nevius v. Dunlap, 33 N.Y. 676, 680; Baird v. Baird, 48 Colo. 506, 517, 111 P. 79; Rasch v. Rasch, 278 Ill. 261, 271, 115 N.E. 871; Jackson v. Maxwell, 113 Me. 366, 368, 94 A. 116; Frohlich v. Aikman, 194 Mich. 569, 573 [161 N.W. 867], Ann.Cas.1917C, 966; Baum v. Ward, 131 Ark. 593, 199 S.W. 529; Nicolls v. McDonald, 101 Pa. 514; Pancake v. Cauffman, 114 Pa. 113, 7 A. 67; Jeffcoat v. Wingard, 110 S.C. 482, 96 S.E. 908; Page v. Page, 132 Va. 63, 110 S.E. 370; Salas v. Olmos, 47 N.M. 409, 143 P. 2d 871, 874. The United States Supreme Court recently reaffirmed its responsibility for enforcement of the rule in Schneiderman v. United States, 320 U.S. 118, 124, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796, where it declared: "For though we assume, without deciding, that in the absence of fraud a certificate of naturalization can be set aside under § 15 as 'illegally procured' because the finding as to attachment [to the principles of the Constitution] would later seem to be erroneous, we are of the opinion that this judgment should be reversed. If a finding of attachment can be so reconsidered in a denaturalization suit, our decisions make it plain that the Government needs more than a bare preponderance of the evidence to prevail. The remedy afforded the Government by the denaturalization statute has been said to be a narrower one than that of direct appeal from the granting of a petition. Tutun v. United States, 270 U.S. 568, 579, 46 S.Ct. 425 427, 70 L.Ed. 738; cf. United States v. Ness, 245 U.S. 319, 325, 38 S.Ct. 118, 121, 62 L.Ed. 321. Johannessen v. United States states that a certificate of citizenship is 'an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land * * *.' 225 U.S. 227, 238, 32 S.Ct. 613, 615, 56 L.Ed. 1066. See, also, Tutun v. United States, supra. To set aside such a grant the evidence must be 'clear, unequivocal, and convincing'—'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.' Maxwell Land-Grant Case (United States v. Maxwell Land-Grant Co.) 121 U. S. 325, 381, 7 S.Ct. 1015, 1029, 30 L.Ed. 949; United States v. San Jacinto Tin Co., 125 U.S. 273, 300, 8 S.Ct. 850, 864, 31 L.Ed. 747; cf. United States v. Rovin, D.C., 12 F.2d 942, 944. See Wigmore, Evidence, 3d Ed., § 2498. This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted. The Government's evidence in this case does not measure up to this exacting standard."

One searches the record in vain for clear and convincing evidence that the deed in this case was intended to be a mortgage. The majority opinion relies largely on plaintiff's testimony. That testimony was impeached, however, because of the interest of the plaintiff, and because it was inconsistent with his sworn affidavit. The story told was, moreover, an incredible one; that purely for bookkeeping purposes the bank entered into an agreement to accept an inarticulated mortgage in the sum of $60,000 in lieu of a deed of trust on real property worth over $135,000 securing an indebtedness of $81,232.90.

Plaintiff's contention rests upon inferences that he seeks to elicit from evidence relative to the circumstances under which the deed was delivered and to the subsequent conduct of the parties. This evidence does not warrant plaintiff's inferences. It is described in the majority opinion as "entirely consistent with the view that defendant bank, while in fact agreeing on a loan secured by a mortgage, was desirous, for reasons of certain interdepartmental requirements connected with its routine bookkeeping procedure, of giving the transaction a different appearance by recording it as an absolute transfer of title." It is not enough for the evidence merely to be consistent with plaintiff's contention, however, for it is wholly consistent with the agreement set forth in the writings. The burden was on plaintiff to prove that it was highly probable that the deed was not what it purported to be. He did not sustain this burden by evidence that at best is simply consistent with the deed's being something else, but which is just as consistent with its being what it purports to be. Goodfellow v. Goodfellow, supra; Wehle v. Price, supra; Woods v. Jensen, supra.

Plaintiff infers from the fact that the $3,000 rental specified in the lease was equivalent to 5 per cent of the option price of $60,000, that the rental was actually interest, and the option price actually an indebtedness. Such a rental is bound to be a percentage of the option price and is apt to fall within the normal range of interest returns on investments equivalent to that price. It would be as arbitrary, however, to transmute a rental into an interest charge because it produced the same return as to transmute a dividend from stock into interest from a bond. There is nothing in the mathematical relation between the two figures that gives any clue to what they represent; the substance of the relationship is not found in the sums. It is to the terms of a transaction that one must look, and not to the sums involved, since transactions may differ widely in nature, however alike may be the sums they involve.

Plaintiff contends that Mr. Kennedy, the bank's representative, agreed to have an appraisal made of a tract of land that plaintiff owned in Paradise, California, to guide the bank in taking it in either "to reduce the debt" or "as additional security," and infers that if the security was "additional" the deed in question was a mortgage. By plaintiff's own testimony, however, the conversations regarding the Paradise property were concerned with the possibility of defendant's taking it as part of the option price. In the negotiations of September 22nd he asked if defendant would take the Paradise property to reduce the indebtedness. Kennedy replied that the bank could not do so, but that if plaintiff gave the bank the deed and took back a lease and option, the latter would examine the property to determine whether it would be acceptable as part payment of the option price or as additional security for a part thereof. This suggestion obviously contemplated the possibility that the parties might later enter into an arrangement enabling plaintiff to exercise his option by paying only part of the price in cash. Following Elberg's visit to the property Kennedy told the plaintiff that the bank could not take it outright, but might take it as additional security. It cannot reasonably be inferred even from plaintiff's own testimony that defendant regarded the indebtedness as subsisting and contemplated the Paradise property as additional security for that indebtedness rather than for the option price.

Plaintiff relies upon the testimony of his banker, Mr. Brown, for support for his contention. Brown merely testified, however, that he was present during the first part of the conversation of September 22nd, but left before its conclusion; that respondent asked for another extension of time; that Kennedy replied that back-interest would have to be paid up "before any discussion of that sort"; that there was some discussion as to whether the deed of trust covered all of the property to which plaintiff had title, and that "just as I left they had sent for the certificate or for the deed of trust." There is nothing in this testimony to suggest that defendant agreed to reduce the indebtedness and accept the deed as security for the lower amount.

The exception in the title policy of "any rights of C. W. Beeler who is in possession" is invoked to uphold the contention that the deed was simply a mortgage. It was defendant's lease and option, however, that necessitated this exception. Before the transaction was closed, defendant was advised by Mr. McGlyn, an officer of the Tehama County Title Company, that plaintiff's affidavit put an end to his interest in the property. Plaintiff replied that he had an option. McGlyn later advised the Title Insurance and Guarantee Company by telephone that defendant had a lease and option and would remain in possession of the property, and that company thereupon obtained defendant's confirmation of these facts and its consent to the exception in the title policy.

No support for plaintiff's contention can be found in the discussion regarding the sixty-dollar internal revenue stamp. The stamp was already on the deed and the title company had been instructed to bill defendant for its cost so there is no reason why McGlyn should have asked plaintiff whether he refused to put the stamp on. In any event whatever views plaintiff may have expressed to McGlyn about the deed's being merely a means of refinancing, there is no claim that he communicated his views to defendant. See Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13.

Plaintiff relies heavily upon the finding of the trial court that when the deed in question was executed, the property had a market value of more than $135,000, and a rental value of more than $7,500, figures that substantially exceeded the option price and the rental fixed in the lease. Such an excess in conjunction with other circumstances is often indicative of a security transaction, for the greater the valuation in relation to the indebtedness, the more unlikely the owner is to sell the property to cancel the indebtedness. In this case, however, the parties themselves, whose valuations alone are pertinent (Tetenman v. Epstein, 66 CalApp. 745, 226 P. 966), did not attach so high a value to the property. Even if they had, it is inconceivable that the bank would voluntarily have reduced an indebtedness so amply secured, and relinquished, to its own disadvantage, a deed of trust for such a mortgage. See Robinson v. Barnard, 5 Cal.App.2d 396, 400, 42 P.2d 711.

There is nothing in the evidence of conduct subsequent to the transaction to establish that the deed was taken as security rather than in satisfaction of the indebtedness, or that plaintiff had anything more than a lease and an option. Plaintiff's repair of the fences and removal of the walnut trees following the flood of the Sacramento River in 1937 do not signify that the bank regarded him as the owner of the property. He was bound by the terms of his lease to repair the fences, and he removed the walnut trees only after obtaining defendant's consent. Even if the improvements were more extensive than the lease required they do not signify ownership, for they would redound to the advantage of the plaintiff if he exercised the option. The evidence of the leases by the plaintiff likewise fails to establish him as the owner of the property, for his lease from the bank permitted him to make subleases, and it was a matter of indifference to the bank whether the instruments executed by the plaintiff and his lessees took the form of leases rather than subleases.

Even assuming that a debt still existed, and that the deed was intended to secure it, there is no evidence that the debt was $60,000 and not $81,232.90, the amount due when the deed was executed. It is contended that it was agreed that the debt should thus be reduced at the conference between plaintiff and the bank officials. Plaintiff, however, testified without contradiction that it was then agreed that the notes be cancelled. Following the conference, the deed, the lease containing the option, and the affidavit were executed as formal memorials of the agreement then made. While parol evidence is admissible to show that a deed is a mortgage, it is not admissible to vary the terms of a written contract so as to transform it from a complete to a partial cancellation. Cal. Code Civ.Proc. § 1856; see 10 Cal.Jur. 916, 924. The majority opinion holds that the notes were not discharged, because they were not delivered to Weiss or to plaintiff. Yet the larger note was cancelled, the smaller one was written off as a loss, and satisfaction of both was recorded pursuant to the understanding of plaintiff and defendant. Despite these facts it is held that without delivery of any note, the debt is reduced to $60,000, the amount of the larger note. It is pertinent to inquire how the smaller note is then discharged without delivery.

Moreover, the supposed agreement to release plaintiff from a liability of over $21,000 was clearly without consideration and is unenforceable. Scheeline v. Moshier, 172 Cal. 565, 158 P. 222; see 6 Cal.Jur. 179. If the deed was given merely as security it represented less than defendant already had. The deed of trust contained the usual power of sale and other provisions for defendant's protection and was not subject to the 1933 amendments restricting the right to judgment for a deficiency. Cal. Civ.Code, § 2924½; Cal.Code Civ.Proc. § 580a. Regarded as security, the deed was less advantageous to defendant, less burdensome to plaintiff. It conferred no power of sale and would have to be foreclosed by court proceedings, thereby leaving plain tiff with a right to redeem. It contained no provisions for defendant's protection and was subject to the 1933 amendments. As security, therefore, the deed, far from being of advantage to the defendant, was of advantage to plaintiff. Since the alleged agreement was oral, and it appeared upon the face of the complaint that there was no consideration, a special plea by defendant of lack of consideration was unnecessary. Acheson v. Western Union Tel. Co., 96 Cal. 641, 31 P. 583; see 2 Cal.Jur. 257.

24 Cal.2d 81

LAWLESS v. CALAWAY et al.

L. A. 18736.

Supreme Court of California.

April 6, 1944.

1. Physicians and surgeons 🔑14(4)

A physician or surgeon is required only to have the degree of learning and skill ordinarily possessed by practitioners of medical profession in same locality and to exercise ordinary care in applying such learning and skill to treatment of patient.

2. Physicians and surgeons 🔑14(1)

The law imposes upon a physician or surgeon the same degree of responsibility in making a diagnosis as in prescribing and administering treatment.

3. Physicians and surgeons 🔑18(8)

Ordinarily, a physician's failure to possess or exercise requisite learning or skill can be established only by testimony of experts.

4. Physicians and surgeons 🔑18(8)

Where a physician's negligence is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required under rule that scientific enlightenment is not essential for determination of an obvious fact.

5. Physicians and surgeons 🔑18(8)

In malpractice action to recover for death of plaintiff's son, evidence that defendant physician diagnosed ailment as ptomaine poisoning and prescribed accordingly would not have authorized finding of negligence on theory that defendant, after correctly diagnosing ailment as appendicitis, administered treatment for ptomaine poisoning.

6. Physicians and surgeons 🔑14(1)

The fact that another physician or surgeon might have elected to treat case differently or use methods other than those applied by defendant does not of itself establish negligence.

7. Evidence 🔑571(3)

Physician's testimony as to function of blood count in diagnosing appendicitis did not establish that standard practice in community required a blood count to be taken when appendicitis was suggested so as to warrant finding of negligence from physician's failure to take blood count for a period of four days, in view of symptoms of ptomaine poisoning.

8. Physicians and surgeons 🔑18(8)

Evidence was insufficient to establish that customary practice in community required taking of X-rays in connection with an examination for appendicitis so as to authorize a finding that physician's failure to take X-rays constituted negligence warranting a recovery for death of patient.

9. Physicians and surgeons 🔑18(8)

In malpractice action against physician for death of plaintiff's son, expert testimony was necessary in determining whether physician's failure to positively diagnose illness as appendicitis at an earlier date resulted from negligence.

10. Physicians and surgeons 🔑18(8)

The proper method to be employed in diagnosis of an internal abdominal ailment, as well as merits of such diagnosis, are peculiarly within the knowledge or province of experts.

11. Physicians and surgeons 🔑18(8)

The use of X-rays in diagnosis of internal abdominal ailment, such as appendicitis, is not so well established that jury could have determined, of its own knowledge, that failure to take X-rays constituted negligence of physician.

12. Physicians and surgeons 🔑18(6)

In malpractice action for death of plaintiff's son, predicated on theory that physician negligently failed to diagnose son's ailment as appendicitis, plaintiff had burden to prove a mistake in diagnosis and that mistake was due to failure to exercise ordinary care in making diagnosis, and mere proof that treatment was unsuccessful was not sufficient.

13. Physicians and surgeons 🔑18(9)

In malpractice action for death of plaintiff's son where there was no evidence showing that physician was negligent in diagnosis or treatment, a nonsuit was proper.

14. Witnesses 🔑276

The statute permitting examination of adverse party as on cross-examination was enacted to enable a party to call his adversary and elicit adversary's testimony without making adversary party's own witness and is remedial in character and should be liberally construed. Code Civ. Proc. § 2055.

15. Witnesses 🔑276

Any relevant matter in issue in a case is within scope of examination of witnesses called pursuant to statute authorizing a litigant to examine adverse party as on cross-examination. Code Civ.Proc. § 2055.

16. Trial 🔑53

The plaintiff in a malpractice action may establish his case by testimony of defendant therein.

17. Witnesses 🔑276

In action for malpractice, where defendant physician is called under statute authorizing a litigant to examine adversary as on cross-examination, defendant may be examined with regard to standard of skill ordinarily exercised by doctors in community under like circumstances and with respect to whether his conduct conformed thereto, even though such matters call for expert testimony. Code Civ.Proc. § 2055.

18. Appeal and error 🔑205

Where an entire class of evidence has been declared inadmissible, or trial court has clearly intimated that it will receive no evidence of a particular class, or upon a particular issue, an offer of proof is not a prerequisite to complaint on appeal.

19. Appeal and error 🔑205

In malpractice action, where plaintiff called defendant physician under statute authorizing a litigant to examine adversary as on cross-examination, and defendant was only physician plaintiff called, and trial court stated that defendant could not be interrogated as an expert, thereby foreclosing examination on issues which could be proved solely by expert testimony, plaintiff's failure to make an offer of proof did not preclude plaintiff from complaining of ruling. Code Civ.Proc. § 2055.

20. Appeal and error 🔑1048(6)

In malpractice action where plaintiff called defendant physician as a witness under statute, cutting off in limine of all inquiry on a subject with respect to which plaintiff was entitled to examine defendant, thereby resulting in plaintiff's failure to establish a necessary element of case, was prejudicial. Code Civ.Proc. § 2055.

21. Appeal and error 🔑854(2)

Ordinarily, reviewing court will uphold judgment if it is right, although reasons relied upon or assigned by court are wrong.

22. Trial 🔑163

A motion for nonsuit must specify ground upon which motion is based in order to afford losing party an opportunity to remedy defects in proof.

23. Appeal and error 🔑241, 854(5), 856(4)

An appellate court, in reviewing a judgment of nonsuit, will consider grounds not specified in motion for nonsuit only if it is clear that defect is one which could not have been remedied had it been called to attention of plaintiff by the motion.

24. Appeal and error 🔑882(20)

In malpractice action for death of plaintiff's son, where defendant, before court ruled on motion for nonsuit, withdrew as a ground for nonsuit contention that plaintiff, who was separated from her husband, failed to establish her right to maintain action for failure to show that plaintiff had custody of son, such ground was not available to defendant on appeal since claimed defect might have been corrected by further proof. Code Civ.Proc. § 376.

In Bank.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Vera Lawless against A. A. Calaway and others for the death of plaintiffs' minor son resulting from alleged mal-

practice. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Prior opinion 135 P.2d 606.

Julius Hansen and Rae B. Carter, both of Fresno, for appellant.

Hadsell, Sweet, Ingalls & Carroll, of San Francisco, and Chester O. Hansen, of Fresno, for respondents.

GIBSON, Chief Justice.

This is an appeal from a judgment of nonsuit entered in an action for malpractice which, it is claimed, resulted in the death of plaintiff's minor son. In stating the facts we shall, in accordance with the settled rule in cases of nonsuit, disregard conflicts and consider the evidence most favorable to plaintiff.

On March 1, 1939, plaintiff's twelve-year-old son, Donald, suffered abdominal pains with attendant vomiting and diarrhea. The boy was then living with plaintiff's aunt, Mrs. Lashley, and on the following morning he was taken by her for treatment to defendant, a physician who had attended Donald since his birth. The defendant took the case history, which included a statement by Donald that he had eaten moldy bologna the previous day, examined the boy's abdomen by palpation and percussion, took his temperature and examined his chest and lungs. Defendant informed Mrs. Lashley that the boy probably had an attack of ptomaine poison, but he also stated "it sounds like we might have an attack of appendicitis." He recommended a diet, prescribed medicine for ptomaine poisoning and ordered the boy put to bed with an ice bag on his abdomen. On March 3 Mrs. Lashley informed defendant that the patient seemed better, but the next day he was removed to a hospital where blood and urine analyses were taken. The hospital record dated March 3, 1939, contained the following entry labeled working diagnosis: "After physical examination, ptomaine, due to eating molded biloni —Possible appendicitis involved." Defendant visited Donald once or twice a day while he was in the hospital. On March 7, defendant consulted Dr. Sciaroni, his office associate, who, after examining the patient, stated it looked like appendicitis and advised the continued use of ice packs. Due to a change in the boy's condition on March 9, defendant informed the family that an operation for appendicitis was advisable. Dr. Morgan, a surgeon, was then consulted. He examined the patient, diagnosed his condition as "Peritonitis, possibly due to appendicitis, retrocecal," and performed an operation with defendant's assistance. The boy died a few hours after the operation which disclosed that he had a ruptured appendix.

Plaintiff contends that (1) sufficient evidence was introduced to warrant a finding that defendant was negligent in his diagnosis and treatment of her son's illness, and that (2) the trial court committed prejudicial error in limiting the scope of the examination of defendant who was called as an adverse witness pursuant to the provisions of section 2055 of the Code of Civil Procedure.

[1-4] The law demands only that a physician or surgeon have the degree of learning and skill ordinarily possessed by practitioners of the medical profession in the same locality and that he exercise ordinary care in applying such learning and skill to the treatment of his patient. Trindle v. Wheeler, 23 Cal.2d 330, 333, 143 P.2d 932; Engelking v. Carlson, 13 Cal.2d 216, 220, 88 P.2d 695; Callahan v. Hahnemann Hospital, 1 Cal.2d 447, 458, 35 P.2d 536. The same degree of responsibility is imposed in the making of a diagnosis as in the prescribing and administering of treatment. Patterson v. Marcus, 203 Cal. 550, 552, 265 P. 222; Ries v. Reinard, 47 Cal.App.2d 116, 119, 117 P.2d 386; Donahoo v. Lovas, 105 Cal.App. 705, 712, 288 P. 698. Ordinarily, a doctor's failure to possess or exercise the requisite learning or skill can be established only by the testimony of experts. Trindle v. Wheeler, supra; Engelking v. Carlson, supra; Callahan v. Hahnemann Hospital, supra; Bellandi v. Park Sanitarium Ass'n, 214 Cal. 472, 480, 6 P.2d 508. Where, however, negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact. Ales v. Ryan, 8 Cal.2d 82, 100, 64 P.2d 409; Barham v. Widing, 210 Cal. 206, 214, 291 P. 173; McCollum v. Barr, 38 Cal.App. 411, 427, 176 P. 463; see McBride v. Saylin, 6 Cal.2d 134, 138, 56 P.2d 941; Rankin v. Mills, 207 Cal. 438, 441, 278 P. 1044.

[5] Plaintiff first contends that the jury could have found defendant was negligent

on the theory that after correctly diagnosing the ailment as appendicitis he failed to treat the patient therefor but instead treated him for ptomaine poisoning. The evidence does not substantiate plaintiff's premise. It clearly appears that although defendant at all times considered the possibility of appendicitis, he concluded, as a result of his examination, the presence of certain symptoms including diarrhea, and the history of the boy having eaten moldy bologna, that his patient was suffering from ptomaine poisoning, and prescribed accordingly.

[6] Plaintiff next contends that the jury could have found that defendant was negligent in failing to positively diagnose the case as appendicitis at an earlier date, and that such a finding could have been based on expert testimony as well as the common knowledge of the jurors. No expert testimony was introduced to show that in light of the case history of the patient, the symptoms manifested, and the facts disclosed by the examination, defendant was negligent in failing to diagnose the ailment as appendicitis at an earlier date. The only witnesses who appeared and could have qualified as experts were Dr. Morgan and the defendant. Dr. Morgan's testimony did not indicate or intimate that defendant's diagnosis was not consistent with what other doctors in the community would have arrived at under similar circumstances in the exercise of reasonable care. He testified principally as to his own conduct or course of action at a time when the defendant had diagnosed the case as appendicitis. Furthermore, the fact that another physician or surgeon might have elected to treat the case differently or use methods other than those employed by defendant does not of itself establish negligence. Jensen v. Findley, 17 Cal.App.2d 536, 545, 62 P.2d 430.

[7] Plaintiff argues that Dr. Morgan's testimony showed that the standard practice in the community required a blood count to be taken when appendicitis was suggested, that defendant failed to take a blood count, and that these facts would warrant a finding of negligence. The argument, however, does not find support in the record. In response to the question "In any case, Doctor, suggesting the presence of appendicitis, in the exercise of that standard of degree of care in this community, is a blood count indicated?" the witness replied: "I cannot answer that yes or no; but I can answer it. Let me explain a few things. When we think of blood count as something which will indicate to us whether there is a pus condition somewhere or reaction to the system of an infection, it does not of itself indicate appendicitis. We take those counts just to verify our idea that there is an infection process in the system, but we do not depend upon it to say that we have appendicitis. I have tried to explain when we take counts and I will * * * also state a great majority of us do when some of us do not." Dr. Morgan did not say that a blood count should be taken for the purposes of diagnosis in all cases of possible appendicitis. Moreover, as previously noted, the patient's blood count was taken on March 4, when he entered the hospital, and certainly there is no suggestion in Dr. Morgan's testimony that the exercise of ordinary care in this case required the taking of a blood count before March 4, in view of the facts disclosed by the examination.

[8] It is also argued that defendant's own testimony showed that the customary practice in the community required the taking of X-rays and that, therefore, defendant's failure to take X-rays would support a finding of negligence. The argument is based upon defendant's statement that Dr. Morgan made a "regular routine examination" and ordered X-rays to be taken. Even if we assume that in referring to the "regular routine examination" defendant was testifying to the methods ordinarily employed in the exercise of due care by medical practitioners in the community, the record does not show that the taking of X-rays was a part of the examination referred to. After testifying that Dr. Morgan made a "regular routine examination," defendant was asked to tell what Dr. Morgan did. He explained that Dr. Morgan examined the patient's eyes, throat, chest, that he palpated and percussed his abdomen, and that he performed a rectal examination. In response to the further question "What other examination did Dr. Morgan make at that time * * * ?" defendant stated "He didn't make any more examination." The taking of X-rays was considered and identified by defendant as a separate or distinct examination. Moreover, Dr. Morgan made his examination after defendant had determined that an operation for appendicitis was necessary and had so informed plaintiff. There is

no evidence that the symptoms which might have required the taking of X-rays as an aid to careful diagnosis on March 9, when Dr. Morgan was called in on the case, existed at an earlier date. On the contrary, the testimony showed that the patient's condition had taken a turn for the worse immediately prior to the time defendant concluded that an operation was necessary.

[9, 10] We are of the opinion that medical learning was necessary to guide the mind of the unskilled in determining whether failure to positively diagnose the illness as appendicitis at an earlier date resulted from negligence. The proper methods to be employed in the diagnosis of an internal abdominal ailment, as well as the merits of such a diagnosis, are peculiarly within the knowledge or province of experts.

[11] It is plaintiff's theory, however, that laymen are so familiar with the use of X-rays that the jurors would have been justified in drawing upon their common knowledge as a basis for a finding that defendant was negligent in failing to take X-rays. While it has been intimated in some cases that the use of X-rays as an aid to careful diagnosis of traumatic injuries is a matter of common knowledge (see McBride v. Saylin, 6 Cal.2d 134, 138, 56 P.2d 941; Rankin v. Mills, 207 Cal. 438, 441, 278 P. 1044; Reynolds v. Struble, 128 Cal.App. 716, 725, 18 P.2d 690), we cannot say that the use of X-rays in the diagnosis of an internal abdominal ailment such as revealed by the facts in this case is so well established that the jury could have determined, of its own knowledge, that failure to take X-rays constituted negligence. As stated in McCollum v. Barr, 38 Cal.App. 411, 427, 176 P. 463, 469, which is relied upon by plaintiff, "A broken or dislocated member of the body * * * presents an entirely different problem from internal disorders whose manifestations are obscure and often misleading."

[12, 13] It was not only necessary for plaintiff to prove a mistake in diagnosis, but also that the mistake was due to failure to exercise ordinary care in making the diagnosis (Patterson v. Marcus, 203 Cal. 550, 552, 265 P. 222), and mere proof that the treatment was unsuccessful is not sufficient to establish negligence. Nicholas v. Jacobson, 113 Cal.App. 382, 386, 298 P. 505. We are satisfied there is no evidence in the record before us showing that defendant was negligent in the diagnosis or treatment of his patient's ailment.

It follows that on a consideration of the evidence introduced the trial court could have properly granted a nonsuit. The judgment must, nevertheless, be reversed because the court committed prejudicial error in limiting the scope of the examination of defendant who was called as an adverse witness pursuant to the provisions of section 2055 of the Code of Civil Procedure. During the course of his examination defendant was asked the following questions: (1) "From what you saw there, Doctor, you would say that that condition [ruptured appendix] had persisted for at least three days?" (2) "Doctor, the normal leucocyte count in a boy 12 years of age is between eight and ten thousand?" (3) "Doctor, do you know what the normal leucocyte count in the blood stream of a boy about 12 years of age is?" Objections were sustained to these questions on the ground they called for expert testimony and that an adverse party called as a witness under section 2055 cannot be examined as an expert.

[14-17] Statutes such as section 2055 were enacted to enable a party to call his adversary and elicit his testimony without making him his own witness. Smellie v. Southern Pacific Co., 212 Cal. 540, 556, 299 P. 529; Waller v. Sloan, 225 Mich. 600, 196 N.W. 347, 348; Langford v. Issenhuth, 28 S.D. 451, 134 N.W. 889, 892. They are remedial in character and should be liberally construed in order to accomplish their purpose. Smellie v. Southern Pacific Co., supra. Any relevant matter in issue in a case is within the scope of the examination of witnesses called pursuant to the provisions of such statutes. Langford v. Issenhuth, supra; Waller v. Sloan, supra; Pfefferkorn v. Seefield, 66 Minn. 223, 68 N.W. 1072, 1073; cf. Cioli v. Kenourgios, 59 Cal.App. 690, 697, 211 P. 838; Good v. Brown, 51 Cal.App. 199, 201, 196 P. 299. The opinion in Langford v. Issenhuth, supra [28 S.D. 451, 134 N.W. 892], states: "It is said that the widest and freest scope is to be given the examination. * * * The whole case may be fully and minutely investigated. * * * It appears to us that the main purpose of this statute is to permit an adverse party to be called as a witness to prove or to be interrogated concerning facts material to the case of the party calling him, and that such a witness may be called to prove

a single material fact, or any number of material facts, even the whole case. The facts as to which the party calling such witness may desire to examine him are wholly within his discretion." It is well settled that a plaintiff in a malpractice action can establish his case by the testimony of the defendant therein. Scott v. Sciaroni, 66 Cal.App. 577, 582, 226 P. 827; cf. Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825; Bolles v. Kinton, 83 Colo. 147, 151, 263 P. 26, 56 A.L.R. 814; Jacobs v. Grigsby, 187 Wis. 660, 666, 205 N.W. 394. It is equally well settled that expert testimony is ordinarily required to prove the material or relevant issues in an action for malpractice. Neither the letter nor the spirit of the statute suggests any reason why the defendant in such an action should not be examined with regard to the standard of skill and care ordinarily exercised by doctors in the community under like circumstances and with respect to whether his conduct conformed thereto. We are of the opinion that such examination should be permitted under section 2055 even though it calls for expert testimony. Anderson v. Stump, 42 Cal.App.2d 761, 765, 109 P.2d 1027; cf. Harnden v. Mischel, 63 N.D. 122, 246 N.W. 646, 648; Sax Motor Co. v. Belfield Farmers' Union Elevator Co., 62 N.D. 727, 245 N.W. 488, 489. There are cases which may support a contrary conclusion (Forthofer v. Arnold, 60 Ohio App. 436, 21 N.E.2d 869, 872; Wiley v. Wharton, 68 Ohio App., 345, 41 N.E.2d 255, 258; Osborn v. Carey, 24 Idaho 158, 132 P. 967, 970), but in our opinion a rule excluding such testimony is at variance with the theory underlying the statute.

[18-19] Defendant contends that plaintiff cannot complain of the trial court's rulings on evidence since she did not make an offer of proof. Where, however, an entire class of evidence has been declared inadmissible or the trial court has clearly intimated that it will receive no evidence of a particular type or class, or upon a particular issue, an offer of proof is not a prerequisite to arguing on appeal the prejudicial nature of the exclusion of such evidence. Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; Caminetti v. Manierre 23 Cal.2d 94, 100, 142 P.2d 741; People v. Duane, 21 Cal.2d 71, 81, 130 P.2d 123; Phillips v. Powell, 210 Cal. 39, 42, 290 P. 441; Grieve v. Howard, 54 Utah 225, 180 P. 423, 425; cf. Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal.App.2d 520, 525, 125 P.2d 113; Ballsun v. Star Petroleum Co., 105 Cal.App. 679, 689, 288 P. 437; San Joaquin L. & P. Co. v. Barlow, 43 Cal.App. 241, 243, 184 P. 899. In the present case the trial court stated that defendant could not be interrogated as an expert and thereby foreclosed examination on issues which could be proved solely by expert testimony. Further, the examination of a party under section 2055 is often exploratory and it would be unreasonable to require an offer of proof under such circumstances. In re Olson's Estate, 54 S.D. 184, 223 N.W. 41, 43; cf. Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 75 L.Ed. 624. Insofar as Thompson v. Buffums' Inc., 17 Cal.App.2d 401, 405, 62 P.2d 171, and In re Claire, 9 Cal.App.2d 749, 753, 50 P.2d 1070, suggest a different rule, they are hereby disapproved.

[20] Plaintiff failed, although it was incumbent upon her, to establish by expert testimony the standard of skill and care ordinarily exercised by practitioners in the community under like circumstances and that defendant's conduct in this instance was not consistent therewith. While it may be true that favorable answers to the questions propounded would not have supplied the deficiency in proof in this case, plaintiff was precluded, by virtue of the trial court's ruling, from continuing with the examination of the witness and developing further the line of inquiry which might have elicited the essential expert testimony. The record shows that plaintiff's counsel asked and then withdrew certain questions in order to comply with the court's ruling. The questions to which objections were sustained were appropriate preliminaries to a more complete examination of the witness, and prejudice ensued from the cutting off in limine of all inquiry on a subject with respect to which plaintiff was entitled to examine defendant. Cf. Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624; People v. Duane, 21 Cal.2d 71, 81, 130 P.2d 123; San Joaquin L. & P. Co. v. Barlow, 43 Cal.App. 241, 243, 184 P. 899.

Defendant also contends the record does not show that plaintiff (who at the time the action was commenced was living separate and apart from the boy's father) had custody of the boy and that, therefore, she cannot maintain the action or prosecute this appeal. Code Civ.Proc. § 376. The motion for nonsuit was based upon the ground, among others, that the boy's father alone had the right to maintain the action. Before the court ruled on the motion, however, defendant withdrew the objection based on that ground. The objection was not again made in the trial court and plaintiff contends that it is not, therefore, available on this appeal.

There is a conflict of authority in this state regarding the practice to be followed by appellate courts in reviewing an order granting a nonsuit. It has been held in a long line of cases that on appeal from an order granting a nonsuit, the court will ordinarily consider only the grounds specified in the motion at the trial. Moore v. Moffatt, 188 Cal. 1, 5, 204 P. 220; Glidden v. Diamond 66 Cattle, etc., Co., 178 Cal. 562, 565, 174 P. 667; Brown v. Sterling Furniture Co., 175 Cal. 563, 564, 166 P. 322; Warner v. Warner, 144 Cal. 615, 619, 78 P. 24; Durfee v. Seale, 139 Cal. 603, 604, 607, 73 P. 435; Fontana v. Pacific Can Co., 129 Cal. 51, 55, 61 P. 580; Harper v. Gordon, 128 Cal. 489, 491, 61 P. 84; Bronzan v. Drobaz, 93 Cal. 647, 650, 29 P. 254; Flynn v. Dougherty, 91 Cal. 669, 671, 27 P. 1080, 14 L.R.A. 230; Palmer v. Marysville Dem. Publishing Co., 90 Cal. 168, 169, 27 P. 21; Daley v. Russ, 86 Cal. 114, 117, 24 P. 867; Shain v. Forbes, 82 Cal. 577, 582, 23 P. 198; Raimond v. Eldridge, 43 Cal. 506, 508; Sanchez v. Neary, 41 Cal. 485, 487; Rovegno v. San Jose K. of C. Hall Ass'n, 108 Cal.App. 591, 598, 291 P. 848; Ross v. Tabor, 53 Cal. App. 605, 616, 200 P. 971; Potts v. Mehrmann, 50 Cal.App. 622, 628, 195 P. 941; Breidenbach v. M. McCormick Co., 20 Cal. App. 184, 193, 128 P. 423; Christenson Lumber Co. v. Buckley, 17 Cal.App. 37, 43, 118 P. 466; Stanton v. Carnahan, 15 Cal. App. 527, 530, 115 P. 339; De Leonis v. Hammel, 1 Cal.App. 390, 396, 82 P. 349; see Moore v. Steen, 102 Cal.App. 723, 725, 283 P. 833; Dawson v. Tulare Union High School, 98 Cal.App. 138, 140, 276 P. 424; Scott v. Sciaroni, 66 Cal.App. 577, 581, 226 P. 827; cf. Coulter v. Hensen, 204 Cal. 337, 340, 268 P. 332. On the other hand, almost an equal number of cases support the rule that a judgment of nonsuit will be upheld on appeal if it can be justified on any ground, whether made a ground of the motion or not. Anchester v. Keck, 214 Cal. 207, 213, 4 P.2d 934; Wilson v. Wilson, 55 Cal.App.2d 421, 432, 130 P.2d 782; Wood v. Powers, 50 Cal.App.2d 581, 584, 122 P.2d 564; Balian v. Balian's Market, 48 Cal.App.2d 150, 154, 119 P.2d 426; Estate of Velladao, 31 Cal.App.2d 355, 362, 88 P.2d 187; Hanrahan-Wilcox Corp. v. Jenison M. Co., 23 Cal.App.2d 642, 644, 73 P.2d 1241; Elliott v. Haskins, 20 Cal. App.2d 591, 595, 67 P.2d 698; Jackson v. Underwriters' Report Inc., 21 Cal.App.2d 591, 594, 69 P.2d 878; see Gilliam v. Brown, 126 Cal. 160, 162, 58 P. 466; Snell v. Payne, 115 Cal. 218, 222, 46 P. 1069; Miller v. Wade, 87 Cal. 410, 412, 25 P. 487; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 469, 12 P.2d 744; 13 P.2d 905, opinion of Supreme Court in denying hearing; Estate of Rabinowitz, 58 Cal.App.2d 106, 109, 135 P.2d 579; Knecht v. Lombardo, 33 Cal.App.2d 447, 450, 91 P.2d 917; D'Alessandro v. Pickford, 22 Cal.App.2d 239, 241, 70 P.2d 646; Ezmirlian v. Otto, 139 Cal.App. 486, 488, 34 P.2d 774; Bailey v. Brown, 4 Cal.App. 515, 516, 88 P. 518.

[21-23] In resolving this conflict we should bear in mind that ordinarily the reviewing court will uphold the judgment or order of the trial court if it is right, although the reasons relied upon or assigned by the court are wrong. The doctrine is sound and salutary in most situations since it prevents a reversal on technical grounds where the cause was correctly decided on the merits. But this is not true as applied to nonsuits, for such a doctrine would frequently undermine the requirement that a party specify the ground upon which his motion for nonsuit is based in order to afford the opposing party an opportunity to remedy defects in proof. It seems obvious that the doctrine intended solely to uphold judgments correct on the merits should not be permitted to produce the opposite result. The correct rule is that grounds not specified in a motion for nonsuit will be considered by an appellate court only if it is clear that the defect is one which could not have been remedied had it been called to the attention of plaintiff by the motion. This rule is complementary to the requirement that a party specify the grounds upon which his motion for nonsuit is based. The decisions and dicta in cases which support a contrary rule are hereby overruled and disapproved.

[24] The defendant having withdrawn as a ground for nonsuit the contention that

plaintiff failed to establish her right to maintain the action, which claimed defect might have been corrected by further proof, the ground is not available to defendant here.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

BOLLINGER v. NATIONAL FIRE INS. CO. OF HARTFORD, CONN.*

S. F. No. 16780.

Supreme Court of California.

March 28, 1944.

Rehearing Granted April 26, 1944.

1. Limitation of actions 🔑14

The parties to a contract may agree upon a limitation period less than that provided by statute, but a reasonable time must be allowed for bringing of an action.

2. Insurance 🔑622(2)

Limitation period contained in fire policy which allowed insured a period of approximately 10 months after date of fire within which to bring action on policy was reasonable. St.1935, p. 596, §§ 2070, 2071.

3. Insurance 🔑622(3)

A fire policy provision requiring insured to bring action on policy within 15 months "next after the commencement of the fire" did not disclose by quoted phrase intent to give insured 15 months after cause of action accrued within which to bring action, but fixed a maximum time beyond which he could not sue. St.1935, p. 596, §§ 2070, 2071.

4. Insurance 🔑622(3)

Where, under terms of fire policy, cause of action accrued upon compliance with policy requirements regarding proof of loss, Code section providing that time during which commencement of an action is stayed by injunction or statutory prohibition is not part of time limited for commencement of action did not extend time for commencement of an action on policy by time allowed for preliminary proof of loss and agreement on amount of loss and for payment by insurer. Code Civ.Proc. § 356; St.1935, p. 596, § 2071.

5. Estoppel 🔑95

Silence alone does not create an estoppel in absence of a duty to speak.

6. Insurance 🔑623(3)

In action on fire policy, in absence of allegation that insurer affirmatively indicated that it would not rely on defense of premature filing, fact that insurer caused delay of trial until limitation period expired before asserting such defense did not estop insurer from asserting bar of limitation in new action. St.1935, p. 596, §§ 2070, 2071.

7. Insurance 🔑623(3)

In action on fire policy where insurer and insured were entitled to deal with each other at arm's length and insured was charged with notice of provisions of policy and legal effect thereof, insurer was not obligated to warn insured that insured's rights would be forfeited if he did not commence a proper action within time limited by policy or to reveal its strategy by disclosing that it would raise de-defense of prematureness at trial. St.1935, p. 596, §§ 2070, 2071.

8. Insurance 🔑622(6)

The bringing of an action on fire policy within time provided in policy does not prevent application of limitation provision thereof to a subsequent suit brought after expiration of period limited if earlier action was dismissed or discontinued. St. 1935, p. 596, §§ 2070, 2071.

9. Insurance 🔑623(3)

In action on fire policy, in absence of contention that continuances and extensions of time in earlier action obtained by insurer were improper, fact that insurer obtained such continuances and extensions of time did not estop insurer from asserting running of limitation period in subsequent action. Gen.St.1935, p. 596, §§ 2070, 2071.

10. Insurance 🔑623(4)

Where limitation period had not run when insurer first denied liability under fire policy or when insured commenced earlier action on policy, denial of liability was not a waiver of limitation clause. Gen.St.1935, p. 596, §§ 2070, 2071.

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* Subsequent opinion 154 P.2d 399.

11. Limitation of actions ⇨15

A contract limitation is not waived by denial of liability on other grounds, unless defense that limitation period has expired is available at time of denial.

12. Insurance ⇨623(4)

Where insured's first action on fire policy was still pending when limitation period expired, insurer's subsequent claim therein that action had been filed prematurely was not a denial of liability under policy so as to preclude reliance in subsequent action upon running of limitation period. St.1935, p. 596, §§ 2070, 2071.

13. Appeal and error ⇨948

In action on fire policy where demurrer to complaint was sustained without leave to amend and there was nothing in record before trial court to indicate that plaintiff could plead sufficient facts or to indicate changes sought to be made, and there was no showing on appeal that if changes were made a cause of action would be stated, plaintiff failed to discharge burden resting on him to show that trial court abused discretion in sustaining demurrer. Code Civ.Proc. § 472c.

14. Bankruptcy ⇨151

In enforcing a bankrupt's chose in action, trustee ordinarily has no greater right than bankrupt and is subject to any defense that might have been raised against bankrupt.

15. Limitation of actions ⇨16

The applicability of a statute of limitations depends upon whether its framers have provided that cause of action should be governed by it.

16. Bankruptcy ⇨298

That subdivision e provides that a trustee may institute "proceedings" within two years of bankruptcy adjudication, while subdivision d provides that "suits" against trustee shall not be brought subsequent to two years from closing of estate, and that the phrase "after the estate has been closed" in subdivision d has been supplanted in subdivision e by "by subsequent to date of adjudication" does not indicate an intention to extend the scope of subdivision e beyond that of subdivision d which has been construed as not applying to causes of action arising after bankruptcy. Bankr.Act, § 11, subs. d, e, 11 U.S.C.A. § 29, subs. d, e.

17. Bankruptcy ⇨298

Where fire occurred after date of adjudication of insured as a bankrupt and after appointment of trustee but before trustee filed his bond and qualified, subdivision e authorizing trustee to institute proceedings within two years of bankruptcy adjudication, construed as not applying to cause of action arising after bankruptcy, had no application so as to extend the statutory 15 months' period of limitation provided for in the policy within which suit thereon was required to be brought. St.1935, p. 596, §§ 2070, 2071; Bankr.Act, § 11, sub. e, 11 U.S.C.A. § 29, sub. e.

CARTER, SHENK, and SCHAUER, JJ., dissenting.

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In Bank.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Fred M. Bollinger, as trustee in bankruptcy, etc., against the National Fire Insurance Company of Hartford, Conn., to recover for fire loss under fire policy issued by defendant to bankrupts. From a judgment for defendant, following an order sustaining defendant's demurrer without leave to amend, plaintiff appeals.

Affirmed.

Prior opinion, 124 P.2d 676.

Fred M. Bollinger, of Stockton, in pro. per., and Jack J. Miller, of Stockton, and Kenneth M. Johnson, of San Francisco, for appellant.

Long & Levit and Bert Levit, all of San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiff, as trustee in bankruptcy, brought this action to recover on a policy of fire insurance issued to the bankrupt, Kwan Tow. The policy follows the standard form prescribed by the California statutes, Insurance Code, §§ 2070, 2071, St. 1935, p. 596, and contains the following clause: "No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after commencement of the fire." The policy requires the insured to submit preliminary proof of loss to the company within sixty days after the fire and gives the company twenty days thereafter to approve or disapprove the amount of loss claimed. If that amount is ascertained either by agreement or arbitration, it is payable thirty days thereafter; if not ascertained within sixty days after the company receives the preliminary proof of loss, it is payable ninety days thereafter. Provision is made for arbitration in the event the insured and the company cannot agree upon the amount of loss, to be completed within ninety days after the preliminary proof of loss has been received. The policy also provides that the words "the time of loss or damage" are equivalent to "the time of the commencement of the fire."

The complaint incorporates the policy by reference and alleges that on September 27, 1939, property insured by this policy was partially destroyed by fire; that on November 18, 1939, plaintiff and the insured furnished the defendant insurer with proof of loss as required by the policy; and that on December 22, 1939, plaintiff and defendant's agent entered into an agreement fixing the amount of loss at $1,160.25. Defendant denied all liability, and on January 15, 1940, plaintiff brought suit in the Superior Court of San Joaquin County to recover on the policy. On defendant's motion the action was transferred to the Municipal Court of the City and County of San Francisco and brought to trial on January 8, 1941. After plaintiff presented his evidence, defendant moved for a nonsuit upon the ground that the action had been filed prematurely because it was commenced within thirty days after the loss was ascertained, and before it became payable under the policy. The motion was granted and judgment upon the nonsuit entered on February 21, 1941. On February 25, 1941, about eighteen months after the date of the fire, plaintiff filed the present action in the Superior Court of Contra Costa County.

The complaint also alleges that on January 8, 1941, the day of the trial of the first action, plaintiff learned for the first time that defendant was relying upon the defense that the action was premature and that had he known this earlier he would have dismissed that action and filed a new one within the time permitted by the policy; that this defense was not set up or disclosed in defendant's demurrer or answer in that action, and that while it was pending defendant requested and obtained numerous continuances and extensions of time. Plaintiff alleges that by this conduct and by its denial of all liability under the policy defendant waived the requirement that suit be commenced within fifteen months after the fire. Defendant demurred, claiming that the action was barred, since it was commenced more than fifteen months after the fire. The trial court sustained the demurrer without leave to amend and entered judgment for defendant. Plaintiff appeals, contending that under a proper construction of the policy his action was filed in time, that the facts pleaded in the complaint are sufficient to estop defendant from relying upon the limitation clause, and that he should be allowed to amend his complaint if it does not allege a cause of action.

[1] Plaintiff contends that the fifteen months' limitation is inconsistent with the prohibition against any action before the loss becomes payable under the provisions of the policy, since a limitation period cannot run while the right to sue is suspended, and that the ambiguity must be construed against the defendant. Plaintiff argues that the words "after the commencement of the fire" mean "after the loss becomes payable" and that viewed in its entirety the provision gives the insured fifteen months after his cause of action accrues in which to file an action on the policy. Plaintiff relies principally upon Case v. Sun Insurance Co., 83 Cal. 473, 23 P. 534, 8 L.R.A. 48, which held that a similar clause limiting the period for suit to "twelve months next after the fire" did not bar an action brought more than thirteen months thereafter. Under the facts in that case, however, "no right of action accrued until more than 3 months after it was barred by the 12-months limitation clause." Although parties to a contract may agree upon a limitation period less than that provided by statute, a reasonable time must be allowed for the bringing of an action. Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501; Fitzpatrick v. North American Accident Ins. Co., 18 Cal.App. 264, 123 P. 209; Harlow v. American Equitable Assur. Co., 87 Cal.App. 28, 261 P. 499; Beeson v. Schloss, 183 Cal. 618, 192 P. 292; Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 117 P.2d 669. While the court relied upon cases from other states that support plaintiff's contention, it distinguished Garido v. American Cent. Ins. Co. of St. Louis, 2 Cal. Unrep. 560, 8 P. 512, on the ground that the plaintiff there had ample time after his right of action accrued to commence the action within twelve months after the loss

occurred. Any doubt as to what rule was applied in the Sun Insurance Company case is dispelled by the unequivocal holding in Tebbets v. Fidelity & Casualty Co., supra. The life-accident policy involved in the latter case provided that proof of death must be furnished within two months of its occurrence, and that action could not be brought until three months after filing such proofs or "brought at all unless begun within six months from time of death." [155 Cal. 137, 99 P. 502] The action was not brought until seven months from the date of death, and the trial court sustained the demurrer to the complaint on this ground. This court affirmed the judgment, stating: "The six months' period was not in itself unreasonable. It began to run from the date of the death, and was not affected by the provision that legal proceedings could not be brought before the expiration of three months from the date of filing proofs." See, also, Fitzpatrick v. North American Accident Insurance Co., supra; Bennett v. Modern Woodmen of America, 52 Cal.App. 581, 199 P. 343.

[2] In the present case the policy allowed the plaintiff ample time within which to bring an action. It requires that a certain time elapse before the insured can bring an action, not exceeding approximately 150 days or five months from the date of the fire. The insured is given 60 days from the date of the fire to submit his preliminary proof of loss, and the loss becomes payable not later than 90 days after the receipt by the company of this preliminary proof. There remains, therefore, a period of approximately ten months within which the insured may bring his action, unquestionably a reasonable length of time. Tebbets v. Fidelity & Casualty Co., supra; Beeson v. Schloss, supra; Rechtsteiner v. National Surety Co., 44 Cal. App. 774, 776, 187 P. 34; Fageol T. & C. Co. v. Pacific Indemnity Co., supra; see note 121 A.L.R. 758, 772-774.

[3] The reference to fifteen months is qualified by the phrase, "next after the commencement of the fire" and conveys no intention to give the insured fifteen months after the cause of action accrued within which to bring the action. The policy delimits a period in which suit cannot be brought, not to exceed approximately five months from the fire, the time allowed for preliminary proof of loss, agreement upon amount of loss, and the period allowed the company within which to pay it. There is also delimited the period in which suit must be brought, terminating fifteen months after the fire. The policy thus clearly provides for a period of fifteen months within which to perform all preliminary conditions and commence the action. The provision does not give the insured a specified time during all of which he may sue, but simply fixes a period beyond which he may not sue. This interpretation has been adopted by the courts of many states. Daly v. Concordia Fire Ins. Co., 16 Colo.App. 349, 65 P. 416; Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510, 51 A. 545; State Ins. Co. of Des Moines v. Stoffels, 48 Kan. 205, 29 P. 479; Travelers' Ins. Co. v. California Ins. Co., 1 N.D. 151, 45 N.W. 703, 8 L.R.A. 769; Wever v. Pioneer F. Ins. Co., 49 Okl. 546, 153 P. 1146, L.R.A. 1918F, 507; Egan v. Oakland Home Ins. Co., 29 Or. 403, 42 P. 990, 54 Am.St.Rep. 798; State Ins. Co. v. Meesman, 2 Wash. 459, 27 P. 77, 26 Am.St.Rep. 870; Hart v. Citizens' Ins. Co., 86 Wis. 77, 56 N.W. 332, 21 L.R.A. 743, 39 Am.St.Rep. 877; King v. Watertown Fire Ins. Co., 47 Hun, N.Y., 1; Appel v. Cooper Ins. Co., 76 Ohio St. 52, 80 N.E. 955, 10 L.R.A.,N.S., 674, 10 Ann. Cas. 821; Virginia Fire & Marine Ins. Co. v. Wells, 83 Va. 736, 3 S.E. 349; Western Coal & Dock Co. v. Traders' Ins. Co., 122 Ill.App. 138; Dahrooge v. Rochester-German Ins. Co., 177 Mich. 442, 143 N.W. 608, 48 L.R.A.,N.S., 906; Rottier v. German Ins. Co., 84 Minn. 116, 86 N.W. 888; Grigsby v. German Ins. Co., 40 Mo.App. 276; Gibraltar Fire & Marine Ins. Co. v. Lanier, 64 Ga.App. 269, 13 S.E.2d 27; Ignazio v. Fire Ass'n of Philadelphia, 98 N.J.L. 602, 121 A. 456; Carraway v. Merchants' Mut. Ins. Co., 26 La.Ann. 298; see Provident Fund Soc. v. Howell, 110 Ala. 508, 18 So. 311.

[4] Plaintiff contends that under section 356 of the Code of Civil Procedure the period allowed for the commencement of the action must be extended by the time allowed for preliminary proof of loss and agreement upon amount of loss and for payment by the insurer. This section provides, "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." The time limited for the commencement of the action must be ascertained before it can be determined whether this section applies. Plaintiff assumes that in the present case the time limited for the

commencement of the action is fifteen months from the date of the fire. Under section 2071 of the Insurance Code, however, fifteen months from the date of the fire marks, not the period of limitation, but only the date on which the period of limitation expires. The period commences when the cause of action accrues, namely, upon compliance with the requirements of the policy regarding proof of loss and agreement upon amount of loss and expiration of the time allowed the insurer to make payment. The period between that date and the date fifteen months after the fire is the time limited by the specific provisions of the Insurance Code for the commencement of the action. Since the action was not stayed during that period, section 356 of the Code of Civil Procedure has no application.

[5-8] Plaintiff contends that defendant is estopped from contending that the action is barred by its failure in the first action to claim in its demurrer or answer that the suit was filed prematurely or to disclose this defense before the expiration of the fifteen-month period, and by the delays it caused in obtaining repeated continuances and extensions of time. No estoppel arises, however, from the mere failure to assert the defense of premature filing before the trial of the action. Plaintiff does not allege that defendant affirmatively indicated that it would not rely upon the defense, and silence alone does not create an estoppel in the absence of a duty to speak. See 10 Cal.Jur. 631; 19 Am.Jur. 662-664; Paul v. Fidelity & Casualty Co., 186 Mass. 413, 71 N.E. 801, 104 Am.St.Rep. 594. Plaintiff and defendant were adversaries in an action at law and as such entitled to deal with each other at arm's length. Not only was defendant under no duty to warn plaintiff that his rights would be forfeited if he did not commence a proper action within the time limited by the policy (Fleishbein v. Western Auto. S. Agency, 19 Cal.App.2d 424, 428, 65 P.2d 928; Wilhelmi v. Des Moines Ins. Co., 103 Iowa 532, 72 N.W. 685, 686; Howard Ins. Co. v. Hocking, 130 Pa. 170, 18 A. 614; Travelers' Ins. Co. v. California Ins. Co., supra; see Arthur v. Homestead Fire Ins. Co., 78 N.Y. 462, 34 Am.Rep. 550), but as an adversary, defendant was not compelled to reveal its strategy of action to plaintiff by disclosing that it would raise the defense of prematureness at the trial. Plaintiff is charged with notice of the provisions of his policy (Madsen v. Maryland Casualty Co., 168 Cal. 204, 206, 207, 142 P. 51; Rice v. California-Western States Life Ins. Co., 21 Cal.App.2d 660, 670, 70 P.2d 516) and of the fact that his action was filed prematurely (see 10 Cal.Jur. 760, 761). He is also charged with notice that defendant might raise this defense at any time that the court allowed, and if the court erred in permitting defendant to delay the plea until the time of trial, plaintiff's remedy lay in an appeal in that action. State Ins. Co. of Des Moines v. Stoffels, supra. Bringing an action within the time provided in the policy does not prevent application of the limitation provision to a subsequent suit brought after the expiration of the period limited if the earlier action was dismissed or discontinued. Chichester v. New Hampshire Fire Ins. Co., supra; State Ins. Co. of Des Moines v. Stoffels, supra; Travelers' Ins. Co. v. California Ins. Co., supra; 5 Joyce, The Law of Insurance, 5th Ed., 5371, § 3204, and cases there cited.

[9] Similarly, no estoppel arises from the fact that defendant obtained continuances and extensions of time in the earlier action, for there is no contention that they were improper. They followed the common practice, and are not a basis for an estoppel against asserting the running of the limitation period in a subsequent action. Arthur v. Homestead Fire Ins. Co., supra.

[10-12] Plaintiff contends that defendant waived the limitation clause by denying liability under the policy upon grounds other than that it was barred. There was no occasion, however, for defendant to assert this defense earlier than in the present action. The limitation period had not run when defendant first denied liability under the policy or when plaintiff commenced his earlier action. A contract limitation is not waived by a denial of liability on other grounds unless the defense that the limitation period has expired is available at the time of the denial. Hansell-Elcock Co. v. Frankfort M. A. & P. G. Ins. Co., 177 Ill.App. 500, 504. Although the first action was still pending when the period expired, the defense was inapplicable to that action, and defendant's subsequent claim therein that it had been filed prematurely did not preclude reliance upon the running of the limitation period, for it was not a denial of liability under the

policy but a defense to the particular action. See Travelers' Ins. Co. v. California Ins. Co., supra.

[13] Plaintiff contends finally that he should be allowed to amend the complaint to set forth the reasons for the delay that occurred between the dates of the fire and the agreement as to loss, as well as the circumstances surrounding the requests for continuances of the first action. These reasons and circumstances are not disclosed nor were they presented to the trial court. The allegations of the complaint show that the agreement on the amount of loss was reached within the period fixed in the policy and without unusual delay. No offer was made in the court below to amend the complaint although ample opportunity was afforded to do so. Plaintiff relies on section 472c of the Code of Civil Procedure providing: "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." The plaintiff has the burden of showing that the trial court abused its discretion (Wixon v. Devine, 91 Cal. 477, 483, 27 P. 777; Vilardo v. County of Sacramento, 54 Cal.App.2d 413, 417, 129 P.2d 165) in order to avail himself of this section. That burden is not sustained if, as in the present case, there is nothing in the record before the trial court to indicate that plaintiff could plead sufficient facts, or to indicate the changes sought to be made, and there is no showing on appeal that if the changes were made a cause of action would be stated. See Wennerholm v. Stanford University, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358; Rose v. Ames, 53 Cal.App.2d 583, 589, 128 P.2d 65; Ehlen v. Burrows, 51 Cal.App.2d 141, 144, 124 P.2d 82.

Since plaintiff instituted this proceeding in his capacity as trustee in bankruptcy, the question has arisen whether the applicable statute of limitations is section 11, sub. e of the federal Bankruptcy Act of 1938, 11 U.S.C.A. § 29, sum. e, which provides: "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *"

[14] It is well settled that in enforcing a bankrupt's chose in action, the trustee ordinarily has no greater rights than the bankrupt and is subject to any defense that might have been raised against the latter. See 8 C.J.S., Bankruptcy, § 194, pp. 656, 657; Bankruptcy, § 194, n. 91, § 199; 4 Collier on Bankruptcy, 14th Ed., 1160. The policy suit limitation therefore governs unless the special limitation in the Bankruptcy Act applies.

Provisions similar to section 11, sub. e of the 1938 act, have been in the federal bankruptcy laws for more than a century. Section 8 of the Bankruptcy Act of 1841, 5 U.S.Stats. 446, provided: "* * * No suit at law or in equity shall, in any case, be maintainable by or against such assignee * * * in any court whatsoever unless the same be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued." In the first case construing this section, In re Conant, C.C.N.Y. Fed.Cas.No. 3086, the court declared: "It is obvious * * * that the limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt which came to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment. * * * The limitation has no reference to suits growing out of the dealings of the assignee with the estate after it comes into his hands. These are matters for which he may be made personally responsible, and no reason existed for changing the general period of limitation any more than in the case of any other trustee dealing with trust property * * *."

The Bankruptcy Act of 1867, 14 Stat. 518, as later substantially incorporated into section 5057 of the United States Revised Statutes, provided: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed." The United States

Supreme Court, following the doctrine of In re Conant, supra, held that this section did not apply to causes of action arising after the estate came into the hands of the assignee. Dushane v. Beall, 161 U.S. 513, 515, 16 S.Ct. 637, 40 L.Ed. 791; Hammond v. Whittredge, 204 U.S. 538, 550, 27 S.Ct. 396, 51 L.Ed. 606; Yazoo, etc., R. Co. v. Brewer, 231 U.S. 245, 248, 34 S.Ct. 90, 58 L.Ed. 204; see, also, Bowen v. Delaware, etc., R. Co., 153 N.Y. 476, 47 N.E. 907, 60 Am.St.Rep. 667; 8 C.J.S., Bankruptcy, 346, p. 1133. These cases supersede the earlier cases upon which plaintiff relies: Bailey v. Glover, 21 Wall. (U.S.) 342, 22 L.Ed. 636; Norton v. De La Villebeuve, Fed.Cas. 10, 350, 1 Woods 163; Phelan v. O'Brien, C.C., 13 F. 656; Harvey v. Gage, C.C., 31 F. 275; Rock v. Dennett, 155 Mass. 500, 30 N.E. 171.

In 1898 the limitation provision was given the form in which it remained until the 1938 act. It then read: "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." 11 U.S.C.A. § 29 sub. d. Like its predecessors this provision was held not to apply to causes of action existing before bankruptcy. Stanolind Oil & Gas Co. v. Logan, 5 Cir., 92 F.2d 28, 31, certiorari denied, 302 U.S. 763, 58 S.Ct. 409, 82 L.Ed. 592; Logan v. Stanolind Oil Co., 303 U.S. 636, 58 S.Ct. 522, 82 L.Ed. 1097; Tuffy v. Nichols, 2 Cir., 120 F.2d 906, 909, certiorari denied, 314 U.S. 660, 62 S.Ct. 113, 86 L.Ed. 528.

Plaintiff contends that the foregoing authorities are not controlling on the ground that they were concerned with subdivision d, which remains in the act, and that subdivision e is a new provision having an entirely different purpose. Before the enactment of the 1938 act, subdivision d provided not only for suits by but for suits against a trustee. In the 1938 act, subdivision d covers only suits against the trustee, whereas subdivision e covers suits by the trustee. No reason appears why the authorities cited, all of which applied to suits by trustees under former subdivision d or its predecessors, do not apply to suits by trustees under subdivision e. They can be held inapplicable to subdivision e only if its language is so different from that formerly used in subdivision d as to indicate an intention to avoid their application and to change the rule. As it formerly read with respect to suits by a trustee, subdivision d provided: "Suits shall not be brought by * * * a trustee of a bankrupt estate subsequent to two years after the estate has been closed." The fact that subdivision e provides affirmatively that the trustee may institute proceedings within two years, while subdivision d provided negatively that suits shall not be brought subsequent to two years, does not indicate an intention to extend the scope of subdivision e beyond that of former subdivision d, any more than the fact that subdivision e refers to "proceedings" instituted while subdivision d referred to "suits" brought. Nor is there any indication of such an intention in the fact that the phrase "after the estate has been closed" in subdivision d has been supplanted in subdivision e by "subsequent to the date of adjudication." This change removes any uncertainty as to the time of the commencement of the two-year period, for the "date of adjudication" is defined in section 1 of the act as the date of the entry of the decree in bankruptcy. 11 U.S.C.A. § 1. The phrase "or within such further period of time as the Federal or State law may permit" appearing in subdivision e simply codifies the rule of the cases cited above, for in each of them the trustee was allowed to bring suit after the two-year period because that period was not applicable and the claim was not barred under the statute of limitations that was applicable. The words "upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy" expressly set forth a rule that was also set forth in the 1867 act and that would exist independently of such language. See In re Dunavant, D.C., 96 F. 542; Sheldon v. Parker, 66 Neb. 610, 92 N.W. 923, 95 N.W. 1015.

[15] Plaintiff contends that the cases cited are not controlling if the application of a different period of limitation from that in the Bankruptcy Act would bar the suit, for in all of these cases the trustee was allowed to bring suit. The applicability of a statute of limitations, however, depends, not on the fortuitous circumstance that it would or would not bar the action but on whether its framers have provided that the cause of action should be governed by it. As the federal cases had held, Congress did not intend the special limitation in the Bankruptcy Act to apply to a cause of action that accrues after the adjudication

in bankruptcy, and it is immaterial whether the applicable statute of limitations bars or permits the action.

[16] In view of the many decisions of the Supreme Court of the United States and other federal and state courts that the special limitation in the Bankruptcy Act does not apply to claims and causes of action arising after bankruptcy, and in the absence of any expression of intention to change the rule of these cases, the conclusion is inevitable that no change in the rule was intended. See 1 Collier on Bankruptcy, 14th Ed., 1187.

Plaintiff relies on Hansen v. California Bank, 17 Cal.App.2d 80, 61 P.2d 794; Isaacs v. Neece, 5 Cir., 75 F.2d 566; Sproul v. Gambone, D. C., 34 F.Supp. 441; Banister v. Solomon, 2 Cir., 126 F.2d 740; Devoy v. Superior Fire Ins. Co., 239 App.Div. 28, 265 N.Y.S. 432. The claim in each of these cases, however, arose before the date of adjudication in bankruptcy.

[17] The fire in the present case occurred one week after the plaintiff was appointed but two days before he filed his bond and qualified as trustee. He invokes section 11, sub. e, on the ground that the claim existed before he was legally able to act. The fire, however, admittedly occurred after the "date of adjudication" as provided in the act. There was moreover, no enforceable cause of action until compliance with the requirements of the policy regarding proof of loss, agreement upon amount of loss, and expiration of the time allowed the insurer to make payment. It was held in Tuffy v. Nichols, 2 Cir., 120 F.2d 906, 909, that the rule that the limitation in the Bankruptcy Act applies only to actions existing at the time of bankruptcy "is not avoided here merely because the origin of the adverse claim predated bankruptcy. * * * There was no cause of action to enforce until * * * after bankruptcy." A fortiori the rule is not avoided where the origin of the claim follows bankruptcy.

The judgment is affirmed.

GIBSON, C. J., and CURTIS and EDMONDS, JJ., concur.

CARTER, Justice (dissenting).

I dissent. The insured in a fire insurance policy suffered a loss covered by his policy on September 27, 1939. Proof of loss was given on November 18, 1939. The insured and an agent of the insurer entered into an agreement fixing the amount of the loss on December 22, 1939, but the insurer denied any liability under the policy, and action was commenced thereon on January 15, 1940. On February 21, 1941, a nonsuit was granted on the insurer's motion on the ground that the action was premature because it was commenced less than 30 days after the loss was ascertained. Thereafter on February 25, 1941, about 18 months after the fire, but within 15 months after his cause of action accrued, the insured commenced the instant action on the policy. The insured learned for the first time on January 8, 1941, after the lapse of the 15 months since the fire, that the insurer was relying upon the prematurity of the action. The insurer's demurrer in the last-mentioned action on the ground that said action was barred by the 15 months' limitation period specified in the policy was sustained. The insured claims that he relied upon the insurer's conduct in delaying the first action and not raising the issue of prematurity until after the 15 months had expired and that thereby the insurer waived that limitation period and was estopped to urge it in the instant action.

First, with regard to estoppel, the majority decision rests upon the ground that there is no estoppel because the insurer could raise the defense of prematurity in the first action *at any time* and the insured must have known that; that therefore it had no duty to speak or mention that defense until the motion for a nonsuit was made, and the insured could not rely upon its failure to raise the defense before that time. The foundation upon which that argument rests is clearly erroneous and contrary to the authorities. There was a clear legal duty on the part of the insurer to raise its defense of prematurity in its *answer* in the first action. The complaint in the instant action alleges that that defense was not pleaded in the first action by way of demurrer *or answer*. A defense of prematurity is a dilatory plea in abatement and is not favored in the law. Seches v. Bard, 215 Cal. 79, 8 P.2d 835; California Thorn Cordage, Inc. v. Diller, 121 Cal.App. 542, 9 P.2d 594; Verbeck v. Clymer, 202 Cal. 557, 261 P. 1017; 1 C.J.S., Abatement & Revival, § 85. If that defense is not specially and promptly pleaded it is waived. Seches v. Bard, supra; Verveck v. Clymer, supra; Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 P. 1024; Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561; see S. W. Towle Lumber Co. v. Anderson, 208 Cal. 371, 281 P. 500. It must be pleaded in the answer as was said in Bemmerly v. Woodward, supra, 124 Cal. page 574, 57 P. page 563:

"It has been held, however, that this [a defense of prematurity] is a mere matter of abatement, which is waived unless pleaded. Formerly such pleas could only be interposed before a plea to the merit. Under our Code all defenses may be included in one answer, but, if a defense which is mere matter of abatement *is not made by that time, it should be deemed waived.*" (Emphasis added.) Obviously, the insured had the right to and did rely upon that *waiver* by the insurer. The insurer did not raise the defense by answer as the law required presumably because it intended to mislead the insured, lull him into security, until the 15 months' period had expired, and then invoke the abatement on a motion for a nonsuit. Such conduct estops it from now relying upon the limitation period of 15 months. The reason underlying the requirement of pleading prematurity is stated in Bemmerly v. Woodward, supra, 124 Cal. page 575, 57 P. page 563, in discussing failure to present a claim in probate before an action thereon was commenced.

"In this case, if the defense had been *promptly* made, plaintiffs [claimants] could have dismissed their suit and brought another. But if, after three months [the time to present claims] had elapsed after the claim was rejected, the point could be *successfully* urged, plaintiffs would have lost their right of action." (Emphasis added.) Therefore, a clear duty rested upon the insurer to *promptly* plead prematurity and thus enable the insured to dismiss and commence another action within the limitation period. Its failure to do so estops it from now relying upon the limitation period. The reason behind the requirement of promptness in a plea in abatement is also stated in 1 C.J.S., Abatement & Revival, § 193:

"To guard plaintiff against surprise; to save the time of the court and avoid unnecessary court expenses; to save litigants from the expenses of needless litigation; and to guard against the bar of the statute of limitations, in the event of abatement on some technical ground." In Isaac v. Donegal & Conoy Mut. Fire Ins. Co., 308 Pa. 439, 162 A. 300 the court held that a defense of plea in abatement was waived by an insurer where the limitation in the policy had run on a new action. It recognized the injustice that would result and invoked the doctrine of estoppel. It is said at page 302 of 162a:

"The insurer also contends that as the policy insured three persons whose interest in most of the property was joint and several, but as this is a joint action, it cannot be sustained because part of the property was owned in severalty. The amended pleadings which raised this question were not filed until after the first trial and *after the time had expired for instituting suit under the policy, though defendants knew when the statement was filed that a small part of the property was owned in severalty;* yet they waited, as stated above, until the limitation in the policy would have defeated a separate action for this insurance; the laches of the company prevents such claim from being now raised. As the parties elected to include all the property, owned jointly and severally, in one policy, as the suit is on that policy, since the company knew that a small part of the property was owned individually, we cannot say at this late date that the court below committed error in refusing to separate the action." (Emphasis added.) In the instant case the insurer by its tactics must similarly be said to have waived the 15 months' limitation.

But assuming there is no estoppel, I am convinced that the action was timely brought as the time during which plaintiff was precluded from commencing the action must be excluded from the 15 months' period provided in the policy pursuant to section 356 of the Code of Civil Procedure which provides:

"When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." The Legislature has fixed four years, Code Civ.Proc. § 337, as being ordinarily the reasonable period within which an action founded upon an instrument in writing shall be brought, but the provisions of sections 2070 and 2071 of the Insurance Code have prescribed "fifteen months next after the commencement of the fire" as the period within which an action for the recovery of a claim upon a fire insurance policy must be instituted. This special limitation is required to be set forth in every policy and, by reason of such statute, it is to be deemed included in every policy, regardless of whether it is actually written therein. It derives its effectiveness from the statute. The same statute also prescribes certain requirements as to notification, proof, ascertainment of loss, and lapse of time, which must be met *before* an action can be "sustained." It specifically provides that "No suit or action * * * for the recovery of any claim shall be *sustained, until after* full compliance by the insured with all of the foregoing requirements, nor unless *begun* within fifteen months next after the commencement of the fire." (Italics added.) This section, on its face, would seem to mean that an action on the policy could be *commenced at any time* "within fifteen months next after the commencement of the fire" but that it could not be "sustained," as by a judgment for plaintiff, until the lapse of the required time before the commencement of the action.

The meaning of the word "sustained," and the effect of the clause in which it appears, might be open to argument if the defendant here had not already committed itself to its understanding of a definite meaning for that word and the clause, and enforced that meaning on the plaintiff. The meaning so attributed to the clause by defendant is not merely that an action assertedly prematurely brought can be abated during the incompetent period and until the specified requirements have been met, but is, rather, that such an action must be dismissed. In other words, the position of the defendant, as invoked in the preceding action, is that the provision in question amounts to a *statutory prohibition staying the commencement of the action.* Defendant cannot be permitted to invoke the benefits of a statutory prohibition against the commencement of an action on the policy without also bearing the burden of such statutory prohibition. Section 356 of the Code of Civil Procedure is a general law of the state, applicable under the circumstances shown. The majority opinion seeks to escape that section by arguing that: "The time limited for the commencement of the action must be ascertained before it can be determined whether this section applies. Plaintiff assumes that in the present case the time limited for the commencement of the action is fifteen months from the date of the fire. Under section 2071 of the Insurance Code, however, fifteen months from the date of the fire marks, not the period of limitation, but only the date on which the period of limitation expires. The period commences when the cause of action accrues, namely, upon compliance with the requirements of the policy regarding proof of loss and agreement upon amount of loss and expiration of the time allowed the insurer to make payment. The period between that date and the date fifteen months after the fire is the time limited by the specific provisions of the Insurance Code for the commencement of the action." The fallacy of that position is apparent on the face of the opinion. The time limited clearly means the fifteen months from the date of the fire. The opinion so states in the forepart in quoting from Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 139, 99 P. 501, 502, as follows: "The six months' period was not in itself unreasonable. It *began to run from the date of the death, and was not affected by the provision that legal proceedings could not be brought* before the expiration of three months from the date of filing proofs." (Emphasis added.)

The period which commences running at the date of death or the fire can be none other than the period limited for the commencement of the action. It is not the period after the preliminary steps have been taken. Hence the time during which suit cannot be prosecuted must be added to the fifteen months' period by virtue of the provisions of section 356 of the Code of Civil Procedure. In other words plaintiff was prohibited by statute, §§ 2070 and 2071, Insurance Code, for a period of approximately four months from commencing an action on the policy of insurance, and under the provisions of said section 356 "the time of the continuance of the * * * prohibition is not part of the time limited [15 months] for the commencement of the action." This language is too clear to justify any other interpretation, and I am forced to conclude that the present action was commenced in time and the judgment of the trial court should therefore be reversed.

SHENK and SCHAUER, JJ., concur.

HEINTZ et al. v. SOUTHERN PACIFIC CO. et al.

Civ. 3119.

District Court of Appeal, Fourth District, California.

April 5, 1944.

Rehearing Denied May 3, 1944.

Hearing Denied June 1, 1944.

1. Railroads 🔑328(8)

Motorist colliding with loaded fruit car standing on railroad street crossing at night had duty to use ordinary care to look and avoid colliding with visible objects in front of him and a special duty in approaching and crossing familiar railroad tracks.

2. Railroads 🔑348(9)

Evidence showing that deceased motorist collided with railroad car standing on main street at night near well-lighted intersection, that other motorists traveling on same street at about the same time saw the railroad car, and that deceased did not swerve to right or left or leave brake marks on pavement showed contributory negligence as matter of law precluding recovery by parents for death.

3. Death 🔑58(1)

Presumption of due care by deceased killed in accident disappears when fact which is wholly irreconcilable with it is proved by uncontradicted testimony produced by party relying on the presumption.

4. Railroads 🔑346(5)

Presumption that deceased motorist colliding with railroad car standing on street at night was using due care was dispelled by facts proved by plaintiff parents suing for death.

GRIFFIN, J., dissenting.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Emanuel Heintz and wife against the Southern Pacific Company and others for damages for the death of plaintiffs' son, resulting from a collision of an automobile with a loaded fruit car standing on a street crossing. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Rae B. Carter and John D. Chinello, both of Fresno, for appellants.

W. H. Stammer and Galen McKnight, both of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for the death of Robert Heintz who was killed about 3:45 A. M. on November 11, 1941, when an automobile being driven by him collided with a loaded fruit car standing on one of the main streets of Sanger. He was 25 years old, and married. His wife was killed in the same accident and this action was brought by his parents as his sole heirs at law.

The accident happened a short distance south of the intersection of M Street and 11th Street, in Sanger. M Street is a continuation of the main highway into the city and runs north and south. It is 59 feet wide from curb to curb north of 11th Street and 56 feet wide from curb to curb south of 11th Street. It was paved for its entire width, but the pavement of a strip 20 feet wide along the center of the street was of a different color and substance from that on either side of that strip. At the time in question there was no white line down the center of this street. South of 11th Street there were some sycamore trees on each side of M Street, the foliage being red or brown or yellow at the time. M Street came to a dead end about a block and a half south of 11th Street and at that end there was a large advertising signboard. 11th Street was 52 feet wide from curb to curb. Near the center of the intersection of M and 11th an arc light of 250 candle power, which was burning at the time, was suspended 25 feet above the pavement. A similar arc light, also burning at the time, was suspended over the intersection of M Street and 12th Street, a block to the south of 11th Street.

On the east side of M Street and extending down to the north line of 11th Street there was a large fruit packing house. On the west side of M Street and beginning 170 feet north of 11th Street there was another building, known as the "Frankenthal" packing house. Between this building and the west curb of M Street were two sets of parallel railroad tracks, the easterly rail being 10 inches from the pavement on M Street. These two tracks were known as the "drill track" and the "house track", the "house track" being the one to the west. These tracks ran parallel to the west side of M Street to a point 96 feet from the north side of 11th Street. From that point they curved at a slight angle southeasterly and diagonally across the intersection and passed beyond the east side of M Street, a short distance south of 11th Street. There were the usual cross-arm "railroad crossing" signs to the south, east and west of this intersection but there was no such sign to the north of the intersection, where the railroad tracks were close to the curb.

On the occasion in question, the defendants were engaged in some switching operations in order to take out a loaded fruit car from in front of the Frankenthal packing house. A switch engine moved that car and some empty cars southerly and across M Street to a switch a short distance east of that street and then pushed the cars back along the house track to a point where it was thought the car in question would clear cars passing along the drill track. The loaded fruit car was then disconnected and left standing on the house track diagonally across the center of M Street, its northwest corner being 20 feet from the west curb line of M Street and its southeast corner being 20 feet west of the east curb line of M Street. In this diagonal position it stood across the 20-foot strip of different colored pavement in the center of the street, leaving about 20 feet of pavement clear on either side. The other cars were then pulled southerly to the switch, the intention being to push these cars along the drill track, easterly from the house track, to put them back at the Frankenthal packing house. Accepting the evidence most favorable to the plaintiffs, no men were left with the loaded fruit car thus standing in the street and no lights or additional warning were provided. This loaded fruit car weighed about 50 tons, was about 42 feet long, about 10 feet wide and about 13½ feet high. Its ends were painted a dull red and its sides a dull yellow.

The loaded fruit car remained in this position some three or four minutes before the accident occurred. There were no eyewitnesses to the accident but it appears beyond question that Robert Heintz was driving south on M Street somewhere near the center of that street and his automobile collided with the loaded fruit car at or near its northwest corner as it stood in the center of the street and on the westerly of these two parallel tracks. His automobile had passed over the drill track and struck the fruit car as it stood on the house track. The front end of the automobile was wedged under the box of the fruit car and against the running gear of that car. The front end of the automobile was badly damaged, there was some damage to the lower front end of the fruit car, and a traffic officer testified that the wheels of the fruit car at the point where the impact occurred seemed to be "bent back a little bit" and that this automobile was "jammed in there pretty hard."

The point of the impact was about 89½ feet south of a point on the pavement directly under the arc light at the intersection of M and 11th Streets. It appears, without conflict, that the night was dark but clear and that there was no fog. The deceased had lived for eight months about one and one-half blocks southerly from this intersection, and he had driven over this railroad crossing many times.

At the conclusion of plaintiffs' case the court granted a motion for a nonsuit made upon the grounds that there was no proof of negligence on the part of the defendants which was a proximate cause of the accident, and that the evidence produced by the plaintiffs disclosed contributory negligence, as a matter of law, on the part of Robert Heintz. The plaintiffs have appealed from the judgment which followed. It is their contention that there was sufficient evidence to go to the jury both on the question of the defendants' negligence and on the issue of contributory negligence. While that matter is not entirely free from doubt we will assume, for the purposes of this opinion, that the question of whether the respondents were negligent in not taking further precautions to warn approaching motorists of the presence of this fruit car on this street was one of fact for the jury.

On the question of contributory negligence, in addition to the situation indicated by the facts above stated, certain witnesses, all called by the appellants, gave testimony which is material. Mr. Goodwin passed this loaded fruit car shortly before the accident, while he was driving an automobile north on M Street in a direction opposite to that in which the deceased had traveled. He testified that he entered M Street about half a block south of 12th Street and proceeded north; that as he approached 11th Street he saw the fruit car; that he was within 6 or 8 feet of it before he saw it; that he had headlights and fog lights; and that when he saw the fruit car 6 or 8 feet away he swerved to his right and went around it. He further testified that after he entered M Street and "got straight on the street" he took out a cigarette and lit a match, that there was a flare in putting the match to the cigarette and for a short time he could not see too clearly, and that when he threw the match out "I looked and I was facing a box car." He also testified that he had told a representative of the railroad company "maybe the reason I didn't see the box car as soon is that I just lit a cigarette and the flare from the match upon the wind shield made considerable glare" and that this may have been the reason "why I didn't see the box car until I was within six or eight feet of it."

Mr. Ward testified that on this morning he was coming into Sanger in an automobile and driving south on M Street; that he was driving about 30 or 35 miles an hour up to the time he started to stop; that when he was about 8 blocks north of the point of impact he heard a bump or crash which came from the railroad tracks to the south of him; that the first thing he noticed was an automobile coming toward him; that this automobile did not pass him but turned off to his right; that he saw no other moving automobile; that he drove to the scene of the wreck and stopped; that he stopped because of "curiosity"; that when he was 2 or 2½ blocks north of the wreck he saw a light coming along the side of the fruit car, moving from the southeast to the northwest; that this was the only light he saw until he parked; that this light seemed to be carried by an individual; that after he parked he saw a second man with a light around the fruit car although he did not know where he came from; that when he was back 2 or 3 or more blocks he could see the arc light over the intersection of M Street and 11th Street; that he saw the wreck and stopped; that he saw the automobile jammed underneath the fruit car; that he came to a normal stop; that he could see that there was a wreck or something there when he was 300 feet north of it; that at that point he was able to see the fruit car and the automobile jammed underneath it; that having at that point seen the fruit car and the automobile he came slowly to a halt and stopped at a point which is about 6 feet north of the north curb line of 11th Street. He was then asked "And during all of this time you only saw this one lantern, is that right" He answered: "That is all I saw up to the time I stopped." That until he stopped there were no flares and no lighting of any kind except the one lantern and the street light above 11th Street; that there were two men at the scene of the wreck when he got there; that he did not know where the other one came from; that when he stopped his car he saw one man with a light but did not see the other; that he was about 2½ blocks north when he first saw the moving lantern; and that he was then traveling about 30 miles an hour. The final question asked of this witness was, "Had you seen any portion of the automobile which was in contact with the fruit car before you parked your automobile?" His answer was: "Yes". The place he parked was 121 feet north of the point of impact.

A traffic officer testified that he investigated this accident in response to a radio call, that he traveled about 60 miles an hour where possible, that it was a dark clear night, that he drove south on M Street, and that when he reached a point a little north of 11th Street he could see the fruit car, could see the automobile jammed under it, and could see people walking around. He testified as to the manner in which the automobile was wedged into the fruit car and that he found no visible skid marks behind that automobile. He further testified, "We could see the cars because we had lights on. We could naturally see it, and we pulled off and parked on the east side of the road, and the difference on seeing the car and putting on our brakes and stopping the car, we had to see it someplace north of 11th Street."

The appellants introduced in evidence four flashlight photographs taken by a deputy sheriff at about 5:15 A. M. on this morning, before the fruit car and automobile had been removed. Two of them show the demolished condition of the front end of this automobile and the manner in which it was wedged under the corner of the fruit car, and some of the bent ironwork on the fruit car. One of them, taken from a point to the north of the fruit car and looking south along the center of M Street, clearly shows that the fruit car would be plainly visible to anyone driving south on this street, and that the trees to the south of the fruit car would not interfere with that view. There is also testimony that the car driven by the deceased had good brakes and good lights.

[1,2] A duty rested upon the deceased to use ordinary care to look and to avoid

colliding with visible objects in front of him, and a special duty of care rested upon him in approaching and crossing these railroad tracks, which were in themselves a warning of danger, and with the presence and location of which he was thoroughly familiar. Koster v. Southern Pac. Co., 207 Cal. 753, 279 P. 788. It appears from the evidence introduced by the appellants that this accident occurred near a well-lighted intersection on a main street. It was also a blind intersection to a person driving south, as was the deceased. The railroad tracks crossed 11th Street partially within the intersection and almost under the arc light. The fruit car stood some 60 feet south of the intersection where it must have been lighted up to some extent by the arc light. There was a similar arc light less than a block to the south of it. Not only do the surrounding circumstances indicate that this fruit car must have been visible to anyone traveling south on M Street, but the testimony of two of appellants' witnesses demonstrates that this was true. One of them came south on M Street only a matter of seconds after the deceased did so and he was able to see the entire situation at least 300 feet away. The traffic officer did the same thing a short time later and his testimony indicates that the objects were rather clearly visible at what would be a safe distance. The only possible inference from appellants' own evidence is that the deceased drove along the center of this street at a very considerable speed. The manner in which he struck the fruit car, the fact that he did not swerve to the right or to the left, and the fact that he left no brake marks on the pavement indicate either that he did not see the car at all or that he did not see it until he was right upon it. The appellants argue that it might be inferred that the fruit car, painted a dull red and dull yellow, so blended with the trees behind it that it could not be seen; that the lights of the deceased's automobile may have shown under the center of the side of the car, illuminating the pavement beyond but not showing the presence of the car; and that the deceased may have seen the fruit car and thought it was the advertising signboard a block and a half farther south. No such inferences are reasonably possible in view of the evidence and the rather complete demonstration that the fruit car was visible. The fruit car was diagonally across the center of the street, there was no rise in the ground, and as the deceased approached from the north his lights, even if they were depressed, could not have gone under the center of the side of the fruit car but would have shown the running gear of the fruit car even if they had not been high enough to show the superstructure. The deceased, being familiar with the location, could hardly have mistaken the car for the signboard down near his home for if he had done so he would not have crashed into it, knowing that it was at the end of the street. Insofar as the evidence which was introduced is concerned we think it leads to but one conclusion, and one about which reasonable minds could not differ. It is not sufficient to justify an inference that the deceased used a reasonable degree of care under the existing circumstances.

[3, 4] The appellants, however, rely on the presumption that the deceased exercised due care for his own safety and argue that this presumption is sufficient to raise a question of fact for the jury. They go so far as to argue that this presumption "declares that whatever the decedent may or may not have done he was not negligent." This argument overlooks the well-established rule that this presumption of due care is dispelled and disappears from the case when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony produced by the party relying on the presumption. In Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590, 593, the court said:

"In the case of Mar Shee v. Maryland Assur. Corp. [supra], 190 Cal. 1, 210 P. 269, 273, this court had before it the question as to whether the presumption in favor of one of the parties to said action has been 'overcome by satisfactory evidence.' In that case the rule was announced that 'a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.'"

This rule was applied in Friddle v. Southern Pac. Co., 126 Cal.App. 388, 14 P.2d 568, and in Martz v. Pacific Electric R. Co., 31 Cal.App. 592, 161 P. 16, and was recognized in Brewer v. Southern Pac. Co., 29 Cal.App.2d 251, 84 P.2d 230, although the facts in that particular case were such as to distinguish it from railroad crossing cases, as pointed out by the court. We find nothing in Peri v. Los Angeles Junction Ry., 22 Cal.2d 111, 137 P.2d 441, Harper v. Northwestern Pac. R. Co., 34 Cal.App.2d 451, 93 P.2d 821, and Nichols v. Southern Pac. Co., 58 Cal.App.2d 91, 136 P.2d 332, relied upon by the appellants, which in any way changes the long established rule that any presumption of due care is dispelled by facts which are inconsistent with such due care and which are proved by the party relying on the presumption. The facts of those cases are clearly distinguishable from those of the case now before us, where the appellants' own evidence clearly establishes that the deceased was familiar with this crossing, that the fruit car was visible and should have been seen by any driver who was exercising any care at all, and where there was ample room to pass on either side of the fruit car, even if reasonable care was belatedly used. Under the circumstances here appearing, we think any presumption of due care was dispelled by the facts clearly proved by the appellants, that under those facts the deceased was guilty of contributory negligence as a matter of law, and that the trial court correctly so held.

The judgment is affirmed.

MARKS, J., concurs.

GRIFFIN, Justice (dissenting).

I dissent.

I agree with the majority opinion, if we accept the testimony of plaintiffs in its most favorable light, that there is sufficient evidence shown to establish negligence on the part of defendants in leaving, unattended and unlighted, a box car without warnings parked diagonally across and in the middle of a paved and fairly well traveled street in the night time under the circumstances described. The conclusion that defendants were negligent is supported by the decision in the case of Peri v. Los Angeles Junction Ry., 22 Cal.2d 111, 137 P.2d 441. The question of defendants' negligence, under the evidence here presented, however, is one of fact to be determined by the jury, and not one of law.

I also agree with the main opinion that there is substantial evidence to indicate that the deceased driver was guilty of negligence in many respects, and if the jury determined that such negligence was a proximate cause of his death, plaintiffs would be barred from a recovery. This, however, is not the question here presented. The question is whether the evidence conclusively shows that the driver was guilty of contributory negligence as a matter of law, which negligence contributed proximately to his death. I will concede that the question is a close one. On a motion for nonsuit this court is bound to assume that all evidence received in favor of the plaintiff, relevant to the issues, is true. All presumptions, inferences and doubtful questions must be construed most favorably to the plaintiff. Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724. In Gray v. Southern Pacific Co., 23 Cal.2d 632, 145 P.2d 561, 566, it was stated:

"In determining the disputed questions of fact presented at the trial of the case it was the province of the jury to disbelieve any testimony which appeared to them to lack verity. They were the exclusive judges of the credibility of the witnesses and the weight to be given their testimony. They could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding." (Citing cases.) See, also, Whitechat v. Guyette, 19 Cal. 2d 428, 434, 122 P.2d 427.

There can be no question but that plaintiffs were, at the outset, entitled to the benefit of the presumption "that a person takes ordinary care of his own concerns" and "that the law has been obeyed". Such presumptions are evidence until rebutted. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, 530. As long as this presumption remained in the case a nonsuit should not have been granted. Smellie v. Southern Pacific Co., supra. The question is, then, can it be fairly said in this case that the presumption "faded out", "disappeared and vanished from the case" as a matter of law because of evidence, adduced by plaintiff which, it is claimed, contradicted or controverted such presumption. There were no eye witnesses to the accident. There was no testimony respecting the acts and conduct of the decedent leading up to the collision. The cases cited plainly declare that under such circumstances a presumption existed that the decedent was not guilty of contributory negligence. Although it might be inferred, from plaintiffs' evidence, that other motorists, under varying conditions, saw the parked refrigerator car in time to avoid it, this court cannot declare as a matter of law, in the absence of evidence as to what the decedent saw or did, that the decedent should have seen the parked refrigerator car in time to have avoided it. Respondents lay considerable stress upon the fact that a strong light (250 candlepower arc light) was suspended over the street 89½ feet north of the refrigerator car, and that visibility "was such that the refrigerator car could be seen by persons driving south on M Street for a distance of 491 feet". It may be well reasoned that the glare from such a strong light as contended by respondent may have blinded the deceased to the extent that he was unable to see the refrigerator car until it was too late to avoid striking it. Such an inference would not be unreasonable. Nichols v. Southern Pacific Co., 58 Cal.App.2d 91, 136 P.2d 332; Scoville v. Keglor, 27 Cal.App.2d 17, 33, 80 P.2d 162.

One witness (Goodwin), who was driving north on M Street, testified that before he got to Eleventh Street he saw a freight car on the railroad track; that he "was within six or eight feet of it before he saw it" (which was approximately under the same lighting conditions); that he swerved his car to the right and went around it; that he saw no lights of any kind on the roadway or any individual holding or signaling any light; that he had his lights burning on his car; that he was traveling about 20 miles per hour. On cross-examination he testified that somewhere in the last block approaching the refrigerator car he took out a cigarette and lit a match. He was then asked the following questions and gave the following answers:

"Q. And the flare of that match in your car and against your windshield blinded you for a while? A. It didn't blind. There is a flare after you strike a match to the cigarette.

"Q. And for a short time after you can't see out very clearly? A. Not too clearly.

"Q. And when that flare went out you saw that freight car ahead of you? A. Yes.

"Q. And you were about 40 feet away from it? A. I was about 6 or 8 feet away."

It is true that other witnesses gave testimony which indicated that they could see the parked refrigerator car from a greater distance as outlined in the main opinion. It would have been competent for a jury to decide the issue of visibility on circumstantial evidence and determine from the testimony and circumstances of the case within what distance the dark refrigerator car, blended with its dark surroundings, should have been visible to the decedent as he approached it. On the motion for nonsuit appellants were entitled to the full weight and benefit of Goodwin's testimony and to have such other testimony as might be opposed to it disregarded.

The results of the impact did indicate that the deceased driver was traveling at an excessive speed. In Peri v. Los Angeles Junction Ry. supra, 22 Cal.2d at page 127, 137 P.2d at page 450, it was said: "Ordinarily it is not negligence as a matter of law for a motorist to drive at such a speed that he cannot stop within the range of his vision; it is a factual question." (Citing cases.)

In this case I am not particularly impressed from the evidence before us, that plaintiff should ultimately recover a judgment. In case of such a recovery the trial court, on a motion for new trial based on the ground of insufficiency of the evidence, may weigh and consider the evidence adduced under different rules from those applicable to a motion for nonsuit. Frost v. Los Angeles Railway Co., 165 Cal. 365, 132 P. 442; 20 Cal.Jur. 117, § 75.

In view of the cases above mentioned, keeping in mind that the testimony of witnesses called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered (the main opinion rightfully omits from consideration such testimony); that the jury has a right to reject positive testimony and accept circumstantial evidence as proof of the facts; and assuming that all evidence received in favor of the plaintiffs and relevant to the issues is true, I am inclined to believe that it cannot be said here, as a matter of law, that the presumption of due care vanished and disappeared from the case. I am convinced that a question of fact arose for the determination of the jury as to whether the driver was guilty of contributory negligence and that the question was not one of law. Peri v. Los Angeles Junction Ry., supra; Nichols v. Southern Pacific Co., supra; Hinkle v.

Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Harper v. North Western Pac. R. Co., 34 Cal.App.2d 451, 93 P.2d 821; Brewer v. Southern Pacific Co., 29 Cal.App.2d 251, 84 P.2d 230.

Rehearing denied; GRIFFIN, J., dissenting.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

63 Cal.App.2d 724

STANLEY et al. v. COLUMBIA CASUALTY CO.

Civ. 3125.

District Court of Appeal, Fourth District, California.

April 6, 1944.

Rehearing Denied May 3, 1944.

Hearing Denied June 1, 1944.

1. Insurance 🔑665(2)

In action against insurance company to recover amount of plaintiffs' judgment against truck driver for death of passenger in automobile struck by truck on theory that defendant orally agreed to insure truck owner and his agents driving truck against such liability, evidence showed that one alleged to have made such agreement had authority to bind defendant thereby.

2. Insurance 🔑665(2)

In action against insurance company to recover amount of plaintiffs' judgment against truck driver for death of passenger in automobile struck by truck, evidence was sufficient to prove oral agreement by defendant to insure truck owner and person driving truck as such owner's agent against liability for another's death caused by operation of truck.

3. Insurance 🔑635

In action against insurance company to recover amount of plaintiffs' judgment against truck driver for death of passenger in automobile struck by truck on theory that defendant orally agreed to insure truck owner and his agents driving truck against such liability, allegation that truck owner was operating truck through his authorized agent was not allegation of operation thereof by owner himself within clause of previous canceled policy excluding coverage of automobile while being operated by such owner.

4. Insurance 🔑131(1)

The Insurance Code does not forbid oral insurance contracts, especially where application is made and at least part of premium accepted some days before policy can be delivered, and policy issued is dated back to time of application in usual course. St. 1935, p. 498, § 22.

5. Insurance 🔑131(1)

The provision of Insurance Code that covering notes may be issued to bind insurance temporarily, pending issuance of policy, does not show that such code contemplates only written insurance contracts, so that it does not preclude action against insurer under oral insurance agreement contemplating issuance of formal policy to become effective immediately on consummation of such agreement. St.1935, p. 507, § 382.

6. Insurance 🔑668(2)

In action against insurance company on alleged oral agreement to insure truck owner against liability for death of passenger in automobile struck by truck, instruction submitting to jury question whether defendant's agent had authority to bind defendant by such agreement was not erroneous, in view of evidence on such issue before jury.

7. Appeal and error 🔑1064(2)

In action against insurance company on alleged oral agreement to insure truck owner against liability for death of passenger in automobile struck by truck, where truck owner's son and defendant's agent, who made agreement, testified as to conversations between them, instruction referring incidentally to time when such agent had conversation with insured's son was not prejudicial to defendant, if erroneous as assuming that agent had such conversation.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Gloria Stanley and another against the Columbia Casualty Company to recover the amount of a judgment for plaintiffs against one Lanotti for the death of Leo Stanley as the result of an automobile collision. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Ray W. Hays and Wm. M. Miles, both of Fresno, and Redman, Alexander & Bacon, of San Francisco, for appellant.

G. L. Aynesworth, of Fresno, and Frank W. Creely and Harry M. Gross, both of Oakland, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment based upon an oral contract of insurance.

In February, 1940, the defendant issued a policy of automobile liability insurance to Sergio Delecce of Fresno which ran for one year and expired on February 15, 1941. It insured a Chevrolet 1½ ton truck for property damage liability, and for bodily injury liability limited to $5,000 for each person and $10,000 for each accident. The policy covered Delecce and any other person using the automobile, but excluded coverage "while the automobile is used for the towing of any trailer not covered by like insurance in the company" and also while the automobile "is being driven and/or operated by Sergio Delecce." The policy was countersigned by Marie Gable as authorized agent of the company. The insurance was renewed and a new policy with like terms issued to expire on February 15, 1942, but the new premium not being paid that policy was canceled on May 20, 1941. In August, 1941, negotiations were had between the parties which led to the alleged agreement on which this action was based. In the meantime this 1½ ton truck had been converted by Delecce into what is known as a truck and semi-trailer, being one vehicle.

The truck and semi-trailer was used in the business of Sergio Delecce in transporting produce between Fresno and San Francisco, and other points. On August 29, 1941, while the truck was so being used and driven by one Lanotti, an agent of Sergio Delecce, Sergio's son Joe being also on the truck, it collided with an automobile in which one Leo Stanley was riding as a passenger. Stanley suffered injuries causing his death. His wife and daughter, the plaintiffs herein, recovered a judgment against Lanotti for $10,000, with costs. The present action was brought to recover the amount of that judgment from this defendant on the theory that it had orally agreed to insure Sergio Delecce and his agents against such a liability. The complaint alleged that on or about August 16, 1941, Sergio Delecce was the owner of an automobile truck; that on or about that date the defendant, through its agent Marie Gable, and upon Sergio Delecce's promise to later pay the regular premium therefor and which he did pay, made and entered into an oral agreement wherein and whereby the defendant agreed for a period of one year to indemnify Delecce and any person driving his truck as his agent against liability not exceeding $10,000 for one person and $20,000 for one accident, with costs and interest; and that this agreement was in force at the time of this collision on August 29, 1941. A jury returned a verdict in favor of the plaintiffs and the defendant has appealed.

It is first contended that the respondents did not prove that Marie Gable had authority to bind the appellant by an agreement of insurance. This contention is without merit. She had been associated for some years with an insurance agency in Fresno known as "Roberts Insurance Agency." Delecce had dealt with her and taken insurance from her for years. The policies in the appellant company were written in San Francisco and sent to Fresno where they were countersigned by Miss Gable and delivered. The policy issued to Delecce in 1940 was thus countersigned by her. In August, 1939, the appellant had filed with the insurance commissioner of this state a document appointing Miss Gable to act as its agent within this state and this authorization remained in force up to the time of the trial. Another document had been filed also appointing the Roberts Insurance Agency as its agent. Miss Gable was also licensed by the insurance commissioner to write lines of insurance other than life, and a full authority to bind the appellant was shown.

[2] It is next contended that the evidence is not sufficient to prove an oral agreement of insurance between Sergio Delecce and the appellant. Joe Delecce testified that he was the son of Sergio Delecce; that his father spoke very little English; that he transacted his father's business, including the insurance business; that in August, 1941, he had a telephone conversation with Marie Gable about insuring the truck; that he told her he wanted full coverage on it and she said "I will cover it fully from today"; that she said to come up and make a payment on it as quickly as possible; that he and his Uncle, Pete Delecce, went to her office on August 23, 1941; that they told her they "wanted insurance, wanted full coverage"; that they "wanted 10 and 20" and also wanted fire and theft; that the question of premium came up and she wanted some money; that they said they would give her what they could; that they gave her a check for

$150; that Miss Gable said the insurance would be effective from the date he phoned her; that she asked what company they wanted the insurance in; that it had previously been in the Columbia Casualty Company, and they told her they wanted it in the same company; that they wanted it in the "old company"; that she said she would try to get it for us; that they had had insurance with her for some years and their transactions were always with Miss Gable; that they never got their policies at the time they applied for them but got them two or three days later; that they would go in, she would ask what they wanted, they would tell her what they wanted and she would say it would go into effect as soon as we would leave the office; that he reported these conversations to his father; that after the accident he called Miss Gable on the phone and told her they would need an adjuster; that she said she would get one as fast as she could; that later, on the morning of August 20, they went to the office and Miss Gable asked them for more money; that they gave her another check for $100; that they asked her about the policy and she said it should be in on the eleven o'clock mail or would be on Monday; that Miss Gable made no statement at any time that they did not have insurance with the Columbia Casualty Company; that she sent them to an attorney's office where they gave a statement about the accident; that later he got a letter from this attorney dated September 10, 1941, denying liability; that this was the first information they had received that it was claimed there was no insurance; that later they got a letter dated September 27, 1941, written by the Roberts Insurance Agency; and that his father did not owe for any policies other than the one written by the appellant in February, 1941, and which was canceled on May 20, 1941.

Pete Delecce testified that he went to Marie Gable's office on August 23, 1941, with his nephew Joe Delecce; that he told them to put the insurance on the truck to Sergio Delecce; that he told them to put in full coverage in the old company and told them the amount was to be $10,000 and $20,000; that they said all right and that Miss Gable said: "All right. I got it"; that after the accident he again went to the office with Joe Delecce; that Miss Gable told him the policy should have been in before and that if it did not come that day "it may come tomorrow"; that she asked him for another $100 and he gave her a check for that amount. The respondents introduced in evidence a check for $150 dated August 23, 1941, payable to "Roberts Ins. Agcy," which check was paid on August 29, 1941; also a receipt for $150 dated August 23, 1941, marked "on acct" and signed by Roberts Insurance Agency by Miss Gable; also a check for $100 dated August 30, 1941, payable to "Roberts Ins. Agcy" which was paid on August 30, 1941, and a receipt of the same date for $100 "on acct" signed by Roberts Insurance Agency, by Miss Gable. A letter from the Roberts Insurance Agency to Sergio Delecce, dated September 27, 1941, was introduced in evidence which begins:

"Inasmuch as we are unable to place the Public Liability and Property Damage Insurance; as well as the fire, theft and $25.00 Deductible Collision Insurance on your Chevrolet Truck and Trailer, requested by you from our Fresno Branch Office, we are enclosing herewith our check in the amount of $104.84."

The letter then states that this represents the proceeds of the $250 paid on August 23 and August 30, and that they had deducted $145.16 to cover an earned premium on a Columbia policy in the sum of $66.25 and $78.91 for premiums on two policies in other companies. However, Joe Delecce testified that they owed no amounts to this agency other than the earned premium on the Columbia policy canceled in May, 1941.

While Marie Gable denied most of the material testimony given by Joe and Pete Delecce, she testified that Joe Delecce phoned to her in June, 1941, and asked about insurance, and that at that time and on August 23, 1941, she had told them that if they would pay up all back amounts and the full cost of a policy she would attempt to secure a policy for them, but that she had never agreed that a policy would be issued or told them that insurance was effective. She also admitted that she had some conversation with Joe and Pete on August 23, 1941. While she also testified that nothing had been said about a coverage of $10,000 to $20,000 in place of $5,000 or $10,000 or full coverage or about fire and theft, the testimony of the other witnesses is somewhat confirmed by the letter from the Roberts Insurance Agency dated September 27, 1941, which starts out by referring to public liability and property damage insurance, as well as fire, theft and collision insurance on a Chevrolet truck and trailer. This includes most of full coverage and the term "full coverage" is pretty well understood. The jury had a right to believe these other witnesses and their testimony, with the documentary evidence and the rather complete proof that $250 was demanded and accepted, part of which was paid after the accident occurred, is sufficient to show all the material elements of a binding contract insofar as the liability in question is concerned. It appears beyond question that Miss Gable collected much more than was due even under the contentions of the Roberts Insurance Agency, and the amount collected corroborated the testimony of Joe and Pete Delecce to the effect that they asked for an increase in coverage from $5,000 and $10,000 to $10,000 and $20,000. Miss Gable seems to have been in no doubt as to what company the insurance was to be in since she testified that she took the matter up with the appellant and that she wrote a second letter to them on August 28, 1941, inquiring as to what was being done in the matter.

[3] The appellants further contend in this connection that the parties could not have had in mind the old policy which was canceled in May, 1941, for some of the details, otherwise the purported oral contract would have been void because that policy contained clauses excluding any insurance while the vehicle was towing a trailer, and also while it was being driven or operated by Sergio Delecce. It is argued that the vehicle in question, which was involved in the accident, was a truck and semi-trailer and violated that provision. It was one vehicle and was not towing a trailer and the evidence justifies the inference that Miss Gable understood the full situation and that a larger premium was charged on that account. It is also argued that because the complaint alleged that on August 29, 1941, Sergio Delecce was, through his agent Lanotti, operating and driving this truck upon a highway the case is brought within the clause in the former policy excluding insurance while the automobile "is being driven and/or operated by Sergio Delecce." The accident happened in Stanislaus County and Sergio Delecce was then in Fresno County. While it was alleged that Sergio Delecce was operating the car through his authorized agent this was such an operation as was insured against, and was not an operation within the exclusion clause above mentioned. Not only was an oral contract of insurance shown, but more of the details appear than is usual in such cases and no material element appears lacking.

[4, 5] It is next contended that the court erred in giving some twelve instructions to the jury and in refusing to give an instruction requested by the appellant to the effect that the law which permits the bringing of such an action as this against an insurer applies only to a "policy" of insurance, does not apply to an oral contract of insurance, and that if no policy was issued in this case the verdict must be in favor of the appellant. The appellant concedes that oral contracts of insurance were formerly valid in this state and that there is now no express statute forbidding such contracts. It is argued, however, that the adoption of the Insurance Code in 1935 had the effect of putting all the insurance law in that code and that it contemplates only written contracts of insurance. It may first be observed that while the Insurance Code may have been intended as a codification of all the statutory law in that connection no attempt was made to codify all of the established law, as found in the decisions of the courts and as long applied to previous statutes. In Section 22 of the Insurance Code, St.1935, p. 498, insurance is defined as a contract without specifying that it must be written, and the definition of insurance and of a policy of insurance had not been substantially changed since 1872. While many of the provisions of the Insurance Code relate to written contracts of insurance, and to what must be done in that connection, none of these discloses an intention that an oral contract of insurance should no longer be recognized in this state. In view of the former established rules and the common practice of insurance companies in dating policies when issued back to the time when application therefor was made to their agents, it is hardly reasonable to suppose that the Legislature, in adopting the Insurance Code, intended to forbid oral contracts of insurance, especially in such a case as this where an application is made and at least a part of the premium is accepted some days before a policy can be delivered and where, in the usual course, the policy if issued will be dated back. If that is the law, insurance companies are continuing to

collect large amounts of premiums covering periods of time when there is no insurance in force. In view of the situation which exists and the long established, and still continued, practice we think any such drastic change in the law is one that not only should be made by the Legislature and not by the courts, but is one that should be clearly expressed and not left to implication. It would serve no useful purpose to review the various sections of the Insurance Code relied upon by the appellant in this connection and which we think are not susceptible to the construction it places upon them. It particularly relies upon section 382, which provides that covering notes may be issued to bind insurance temporarily pending the issuance of a policy. The provision is that such notes may be issued but not that they must be issued in such cases. This section seems to indicate an intention to cover a situation where it is fully understood that the policy itself is not to be issued and not to take effect until a later date, and where it is desired to provide a separate and distinct coverage for the interim. We think that it has no application in a case such as this where it was clearly contemplated that while the formal policy had not yet been issued it was to become effective immediately and the period of the policy, which was to be later issued, was to begin to run at that time.

[6, 7] What we have already said disposes of most of the objections raised to the instructions. It is further argued that one instruction was erroneous in that it was left to the jury to say whether or not Miss Gable had authority to bind the appellant by an oral agreement of insurance. The evidence on this issue was before the jury and we see no error in the instruction. It is argued that in another instruction in the same connection the court assumed and flatly declared that Miss Gable had a conversation with Joe Delecce. In this instruction the court incidentally referred to "the time she had the conversation with Joe Delecce." Joe Delecce had testified that he had two conversations with Miss Gable in August, 1941. Miss Gable first denied that either conversation had occurred, then admitted there was such a conversation on August 23rd, and finally admitted a further telephone conversation with him but said she thought it occurred in June. Assuming that the instruction could have been more happily worded no possible prejudice appears. We can find no prejudicial error in connection with any of the instructions which are criticised.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

64 Cal.App.2d 16

LEITCH v. GAY.

Civ. No. 12577.

District Court of Appeal, First District,
Division 2, California.
April 20, 1944.

1. Trusts 🔑44(3)

Plaintiff seeking to establish a trust was bound to establish his claim by clear, satisfactory and convincing evidence.

2. Appeal and error 🔑1008(1)

Whether plaintiff established a trust by convincing evidence was a fact for trial court whose determination was conclusive on appeal.

3. Witnesses 🔑199(2)

An attorney representing two clients was a competent witness on trial of action between first client and the second client or his representative.

4. Evidence 🔑77(6)

In action against administratrix to establish trust in moneys, failure to call as witness an attorney who was presumptively informed as to when material documents were executed and purpose thereof required plaintiff's testimony regarding such facts to be viewed with distrust under statute. Code Civ.Proc. § 2061, subd. 7.

5. Trusts 🔑371(4)

In action to establish trust based on documents, plaintiff, in absence of charge of fraud, was required to allege performance of conditions precedent to creation of the trust.

6. Trusts 🔑44(1)

In action against administratrix to establish trust in moneys received by intestate in settlement of a suit regarding mining claims owned by intestate and plaintiff, which trust was based on written contracts pleaded, evidence warranted judgment for administratrix for failure to show existence of such contracts and to prove performance of conditions precedent to creation of trust under the contracts.

◆

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by E. H. Leitch against Dorothy Wilson Gay, as administratrix of the estate of Homer Wilson, deceased, to obtain a decree enforcing a trust as to certain moneys alleged to be held by the administratrix. From a judgment for defendant, plaintiff appeals.

Affirmed.

Harold H. Price, of San Francisco, for appellant.

Robert W. Harrison and Abraham Setzer, both of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff commenced this action to obtain a decree enforcing a trust as to certain moneys alleged to be held by Dorothy Wilson Gay as the administratrix of the estate of her father, Homer Wilson. The trial court made findings in favor of the defendant. From the judgment entered thereon the plaintiff has appealed.

The controversy arose out of the following facts: Heretofore Jeanne Queirolo was the owner of some quartz mining claims in Mariposa County known as Lafayette and Lafayette Extension. She entered into a contract with Homer Wilson under the terms of which the latter was entitled to enter and operate said mines and, according to the terms of the contract, to purchase said mines. That contract was made on the 5th day of October, 1935. Thereafter Homer Wilson transferred to this plaintiff, E. H. Leitch, an undivided one-half interest in said contract. It soon transpired that they did not have sufficient moneys to operate the mine and they entered into negotiations with Mrs. Irene Van de Carr. Later she, together with C. L. Duncan, agreed to take over the claims and operate the same. A formal contract was made with her. She failed to keep her agreement and the plaintiff and Wilson were compelled to commence legal proceedings to set aside the contract and obtain possession of the mines. They employed Luther Elkins, Esq., to act as attorney for both of them.

To maintain said action both Leitch and Wilson served on Mrs. Van de Carr notices of rescission alleging certain fraudulent representations on her part. Leitch assigned his rights to Wilson. The latter commenced an action in Mariposa County asking that the said contract between Leitch and Wilson on the one hand, and Mrs. Van de Carr, be rescinded and that damages be awarded against Mrs. Van de Carr. In that action Wilson recovered a judgment for $6,000 as damages. Later in the superior court of Alameda County he filed an action in the nature of a creditor's bill against Mrs. Van de Carr attacking certain transfers made by her. In the meantime Wilson assigned a one-fourth interest in the judgment rendered in the superior court of Mariposa County to his attorneys. Later said controversy was settled by a compromise by the terms of which Mrs. Van de Carr agreed to pay and did pay $3,000 in settlement of the claim of the plaintiff in the Mariposa action.

Before commencing said action in Mariposa County, the plaintiff alleges that he and Wilson entered into a formal contract which the plaintiff set forth in his complaint as "Exhibit A, Agreement", hereinafter called Exhibit A. It provided:

"This memorandum of agreement made at San Jose, California, this ——— day of April 1938, by and between Homer Wilson, first party, and E. H. Leitch, second party.

"Witnesseth:

"In consideration of the mutual and reciprocal covenants hereinafter contained, it is agreed between the parties hereto as follows:

"(1) The parties hereto shall forthwith commence and prosecute to final determination a suit against Irene Van de Carr, Gold Valley Mining Corporation (a California corporation) and C. L. Duncan (and possibly others) to compel the assignment to the parties hereto by said Irene Van de Carr, Gold Valley Mining Corporation and C. L. Duncan of contracts now held by said Gold Valley Mining Corporation to purchase what are known as the Lafayette, Lafayette Extension and Geneva Lode Claims situate in Mariposa County, California, which claims constitute what is commonly known as the Lafayette Mine. That the principal ground upon which said suit shall be based will be the false and fraudulent representations made by said Irene Van de Carr as to her ability to finance the purchase, development, equipment and operation of said claims as a gold mine, and the breach by her of her promise to furnish moneys with which to purchase, develop, equip and operate said claims, etc.

"(2) The undersigned agree to share equally the expenses of said suit, which expenses are estimated to be not to exceed $1000 for the prosecution of said suit to judgment in the Superior Court, and an additional $500 in the event any of the parties of said suit shall appeal from the judgment rendered in the Superior Court in said suit.

"(3) The parties hereto have retained Luther Elkins, Esq., having offices in the Mills Building, San Francisco, California, as their attorney and counsellor at law to represent them generally in their controversy with Mrs. Van de Carr, and to commence for them and to prosecute to final judgment for them their contemplated suit against Mrs. Van de Carr and others, and they agree to contribute equally to the payment of the fees and expenses of said Elkins in connection with his said employment, also the costs and expenses in connection with said suit to be incurred on their behalf; and they agree to pay to said Elkins even date herewith the sum of $250.00 as a retainer.

"(4) Each of the parties hereto in addition to making the payments above referred to agree to pay as required one-half of any sums payable on account of the purchase price of the said lode claims in the event said Irene Van de Carr, or said Gold Valley Mining Corporation shall fail to pay the same, and it is agreed that the first party hereto shall, within the next ten days, call upon the owners of said claims and attempt to arrange with them for thirty days' extension of time within which to pay any installment payments falling due upon the contracts to purchase said mining claims in the event said Irene Van de Carr or said Gold Valley Mining Corporation shall fail to pay any such installments falling due."

(Here follow paragraphs about matters not involved in this action.)

"In witness whereof, the parties hereto have hereunto subscribed their names the day and year before above written.

"Homer Wilson, First Party
"E. H. Leitch, Second Party."

In his complaint the plaintiff also pleaded a certain instrument, hereinafter called Exhibit B. It is in words and figures as follows, towit:

"Exhibit B

"Assignment

"For value received, I, the undersigned, E. H. Leitch, hereby assign and transfer to Homer Wilson, of Hornitor, California, temporarily residing at the Sequoia Hotel, San Francisco, California, all right, title and interest at any time owned or held by me in and to the Lafayette and Lafayette Extension Quartz Mining Claims situate in Sections 10 and 15, Township 4, Range 16 East, M.D.B. & M. Mariposa County, California, upon the understanding and agreement had by me with said Homer Wilson that he will commence a suit in the Superior Court of Mariposa County, California, against Irene Van de Carr of Oakland, California, the Gold Valley Mining Corporation, for a decree of court rescinding the contracts heretofore made by him and by the undersigned with said Irene Van de Carr in respect to said Lafayette and Lafayette Extension Quartz Mining Claims, and a certain tract of land known as the Geneva Claim adjoining said claims, and decreeing that he, the said Homer Wilson is the owner of all rights, now held by said Irene Van de Carr and said Gold Valley Mining Corporation, and each of them, to purchase said Lafayette, Lafayette Extension and Geneva Claims, and any water rights pertaining thereto, and will prosecute said suit to final judgment at his own cost.

"And in the event he, the said Homer Wilson, shall prevail in said suit, that he, the said Homer Wilson, will hold as Trustee for me a one-half (½) interest in said Lafayette, Lafayette Extension and Geneva Claims which shall be recovered by him in said suit, subject to the payment by me of one-half of any moneys which the court in such suit decrees shall be returned to said Irene Van de Carr or Gold Valley Mining Corporation, or either of them, as a condition for the reassignment and transfer by said Irene Van de Carr and said Gold Valley Mining Corporation, or either of them, of her or its contracts to purchase said claims and said water right, if any, to said Homer Wilson, and that said Homer Wilson shall have a right to purchase my rights in and to said mining claims, as specified in a certain letter written by Luther Elkins, Esq., attorney at law, to me under date of April 12, 1938, the terms, conditions and provisions of which letter have been approved, ratified and adopted by me in writing.

"Dated: April ——— 1938

"E. H. Leitch"

Basing his claims on the contents of the two documents, Exhibit A and Exhibit B, the plaintiff pleaded and attempted to prove his case.

[1, 2] The plaintiff contends that on the trial he introduced a prima facie case complete in all respects and that the trial court erred in rendering judgment for the defendant and in particular in making a finding that the defendant does not hold one-half of the proceeds obtained from Mrs. Van de Carr in trust for the plaintiff. The defendant replies by contending that none of said claims are sustained by the record. That reply we think is sound. The record shows that the parties wrote numerous documents. Some of them were signed. Which ones were delivered the record does not clearly disclose. Plaintiff's cause of action was to establish a trust. To make out a case he was bound to establish his claim by clear, satisfactory and convincing evidence. Harris v. Harris, 136 Cal. 379, 69 P. 23. Whether he made such proof was a fact to be determined by the trial court and its determination thereon will be accepted by this court as conclusive. Harris v. Harris, supra.

The original of Exhibit A was not produced nor was its absence accounted for. However, its terms do not tend to establish a trust and its absence does not in any manner prejudice the plaintiff's case. The plaintiff did not produce Exhibit B. However, he did produce a paper similar in form but having written thereon "I approve the above Homer Wilson". Mr. Leitch testified that Mr. Wilson wrote the words "I approve the above" and signed his name. Later Mr. Leitch signed his name. By someone, at some time, the date was completed by filling in a blank space with the figures "27" causing the date to read "April 27, 1938." Mr. Leitch also testified that when they were preparing the action to be filed in Mariposa County he delivered all of his papers to Mr. Elkins. That action was commenced May 6, 1938. He also testified that he had the assignment dated April 27, 1938 in his files. This action was commenced July 20, 1942. In this action Mr. Leitch did not plead the paper endorsed "I approve the above Homer Wilson," but he pleaded the form undated and not signed by Mr. Wilson. After said action was commenced the plaintiff received a bundle of papers from Mr. Elkins. Later plaintiff's attorney found among those papers the document having written thereon the words "I approve the above Homer Wilson" and the date April 27, 1938. The record is clear that Mr. Elkins was the attorney for both Mr. Leitch and Mr. Wilson. Whether the papers delivered by Mr. Elkins were the papers of Mr. Leitch, or Mr. Wilson, or both, does not appear. That Mr. Leitch did not make his assignment on April 27, 1938 was evidenced by the following facts. If he did, then why did he plead the wrong instrument? If he knew of the existence of the assignment approved and signed by Homer Wilson why didn't he plead it? On April 29, 1938 he served on Mrs. Van de Carr a notice of rescission of his contract with her. Certainly it cannot be assumed that he attempted to rescind a contract which he had already assigned. Furthermore the superior court of Mariposa County made a finding that Mr. Leitch assigned his rights on May 2, 1938. That finding is of much weight under the foregoing circumstances.

[3, 4] All of said papers were apparently prepared by Mr. Elkins. As recited above he acted as attorney for both parties. The record discloses that he maintains an office in the Mills Building in San Francisco. He was not produced as a witness. However, it is the settled law that he was a competent witness on the trial of an action between this plaintiff and Homer Wilson, or the representative of Homer Wilson. Harris v. Harris, 136 Cal. 379, 384, 69 P. 23; De Olazabal v. Mix, 24 Cal.App.2d 258, 262, 74 P.2d 787; Baldwin v. Commissioners of Internal Revenue, 9 Cir., 125 F.2d 812, 141 A.L.R. 548, 554. As Mr. Elkins was available as a witness and was presumptively informed as to when each document was executed and the purpose thereof, he should have been called as a witness. He was not called regarding the papers produced from his possession and the plaintiff attempted to testify regarding such facts. It is statutory that "if weaker and less satisfactory evidence is

offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." Code Civ.Proc. sec. 2061, sub. 7.

In the instant case the court made findings which, among other things, found as follows:

"That the proof of the execution by the decedent Homer Wilson, of that certain purported contract dated April ——— 1938, a purported copy whereof is appended to plaintiff's complaint and marked Exhibit A, is absent and insufficient, in fact and in law, and the Court rejects the same and finds said purported contract unexecuted as a matter of fact and law.

"That the proof of the delivery by the decedent Homer Wilson of said purported contract referred to hereinabove as Exhibit A, to the plaintiff E. H. Leitch, is absent and insufficient, in fact and in law, and the Court rejects the same and finds said purported contract, if executed, was not delivered to said plaintiff and undelivered as a matter of fact and law.

"That the proof of the acceptance by said decedent Homer Wilson, of that certain purported Assignment, a purported copy whereof is appended to plaintiff's complaint and marked Exhibit B, in the terms therein stated is absent and insufficient, in fact and in law, and the Court rejects the same and finds said purported Assignment unaccepted by the said decedent as a matter of fact and law.

"That the proof of the agreement by said decedent Homer Wilson, to the terms of said purported Assignment is absent and insufficient, in fact and in law, and the Court rejects the same and finds that said Homer Wilson, deceased, did not agree to the terms of said purported Assignment, as a matter of fact and law." In view of the facts hereinabove set forth we may not say the trial court erred in making said findings.

[5, 6] Exhibit A and Exhibit B are both dated the ——— day of April, 1938. Each contains a covenant as to the payment of court costs and expenses. The covenant contained in Exhibit A is that such expense will be paid by both parties in equal proportion. That contained in Exhibit B is that Homer Wilson would pay all costs. The original contract of purchase from Mrs. Queirolo provided for certain installment payments by the purchasers at stated times. Exhibit A provided that if Mrs. Van de Carr failed to make said payments Leitch and Wilson would each pay one-half of said installments. In maintaining against Mrs. Van de Carr a suit for rescission, Leitch and Wilson were bound to restore to Mrs. Van de Carr everything of value which they had received from her under their contract with her. One of the covenants contained in Exhibit B is that Leitch and Wilson promised to pay one-half of any moneys which the court in such suit decrees shall be returned to Mrs. Van de Carr. Both documents therefore contained certain conditions precedent. But, in plaintiff's complaint there is no allegation that the plaintiff has done and performed all those things to be done and performed by him. Because the plaintiff was suing on the covenant providing for a trust he claims he was not bound to make such allegations. He cites no authorities. In the absence of a charge of fraud we know of none so holding. 65 C.J. 727–729, 1020, 975; Robles v. Clark, 25 Cal. 317, 330, 332. Under the clear terms of his complaint he bases his claim on the two written contracts which he pleaded. He stands thereon. Before the amount of the trust fund was ascertained it was essential that all facts be presented to the court showing what balance, if any, was held in trust by the decedent. That proof was only partly made. The defendant frequently made the objection that for the foregoing reasons the complaint did not state a cause of action. The objection, under the facts, was well founded.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

63 Cal.App.2d 830

WILLMAN v. GUSTAFSON.

Civ. 12461.

District Court of Appeal, First District, Division 1, California.

April 19, 1944.

1. **Work and labor** ⚷4(3)

Where services are rendered by one person at request of another, and promisor and promisee are not related, a promise to pay reasonable value of such services will be implied, but no such promise can be implied if there is a special agreement to pay a fixed sum.

2. **Appeal and error** ⚷931(1)

On appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to support the judgment, if possible.

3. **Work and labor** ⚷28(5)

Evidence established that there was an agreement between parties for specific amount to be paid plaintiff for her services as defendant's housekeeper, which amount was fully paid, so as to preclude plaintiff from recovering reasonable value of her services.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by Anna Willman against Gus Gustafson to recover alleged reasonable value of plaintiff's services as a housekeeper for a period of four and a half years. From a judgment for defendant, the plaintiff appeals.

Affirmed.

W. Melville Holden, of San Francisco, for appellant.

Gus L. Baratry, of San Francisco, for respondent.

PETERS, Presiding Justice.

This appeal approaches the frivolous. The action was commenced by plaintiff, defendant's former housekeeper, to recover the alleged reasonable value of her services over a period of four and one-half years. The trial court found that plaintiff had been fully paid for her services, and, accordingly, gave judgment for defendant.

The theory of plaintiff, at the trial and on this appeal, is that she came to work for defendant on March 1, 1935, as his housekeeper; that she continued in defendant's employ for about four and one-half years; that neither at the time of the employment nor at any other time during the employment was any definite agreement entered into as to compensation; that under such circumstances, plaintiff having admittedly performed services for defendant at his request, defendant is now obligated to pay her the reasonable value of such services, which she claims to be $75 a month.

[1] It is no doubt the law that where services are rendered by one person at the request of another, and the promisor and promisee are not related, a promise to pay the reasonable value of such services will be implied. It is also the law, and admitted to be such by appellant, that no such promise can be implied if there is a special agreement to pay a fixed sum. It may be conceded that plaintiff testified to facts which, if believed by the trier of the facts, would have supported findings in her favor on her theory of the case. The difficulty is that her testimony was directly contradicted by defendant and others, and that this evidence supports the finding that plaintiff has been fully paid for all services rendered.

[2] On such an appeal all conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to support the judgment, if possible. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. Keeping this elementary rule in mind, and disregarding all conflicts in the evidence, the record shows the following in support of the judgment. In February of 1935 defendant advertised for a housekeeper. The advertisement was not produced, but it was admitted that it stated, among other things, "good home and small wages." Defendant's wife had died a short time before. He owned several pieces of rent-producing property, was crippled, and was the recipient of a small pension as a war veteran. He testified that plaintiff called in answer to the advertisement and agreed to come to work as his housekeeper; that at the first meeting nothing was said as to the amount of compensation that she was to be paid other than she was to receive her board and room, and some small sum; that after she had been working a couple of weeks he told her that he would pay her $10 a month; that during the

period she worked for him, on three or four occasions, she complained about the rate of compensation; that he told her that $10 a month was all that he could afford to pay, "and if you don't like it you can go away and get some more somewhere else"; that "if she didn't want to work for $10, she could leave"; that he paid her $10 a month, which she accepted.

Plaintiff admitted receiving the $10 each month, but testified that it was intended merely as spending money; that several weeks after she was employed she had a conversation with defendant about her compensation; that "he asked me how much I wanted a month, and I was busy and didn't answer right away, and so he says, 'Well, it doesn't matter. If you stay with me I will leave you everything I have and you will have a home with me as long as I live'"; that the $10 a month was not compensation for her services; that she "wasn't working for wages, because he had promised me I would have a home there as long as he lived, and when he passed away I was to have everything he had"; that this one conversation was the only conversation she ever had about compensation; that she had never made a demand for any sum in excess of $10 a month.

Defendant unequivocally denied this testimony. He testified that he had never promised her a home for life, and never promised to will her his property; that plaintiff had asked him to make a will in her favor, but that he had refused. A friend and a relative of defendant testified that, during plaintiff's period of employment plaintiff had several times complained about her rate of pay and asked them to intercede with defendant to secure higher compensation.

[3] If the testimony of defendant and his witnesses is to be believed (and it must be believed on this appeal), the case is simply one where the defendant offered plaintiff room and board and $10 a month to act as his housekeeper. This offer was accepted by plaintiff continuing to perform the services after she had been told that that was the salary, and that defendant could pay no more, and by accepting the $10 tendered each month pursuant to the offer. Under such circumstances no contract to pay the reasonable value of the services may be implied.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

DONAHOO v. KRESS HOUSE MOVING CORPORATION et al.*

Civ. 14051.

District Court of Appeal, Second District, Division 3, California.

March 30, 1944.

Rehearing Denied April 28, 1944.

Hearing Granted May 25, 1944.

1. Landlord and tenant 🔑164(3)
Master and servant 🔑304

A landlord, undertaking to make repairs on demised premises, is liable for injuries to tenant or any person whose use of premises under hiring is within parties' contemplation as result of landlord's or his servants' negligence in making repairs.

2. Landlord and tenant 🔑119(2)

A month to month tenant's holding over, with landlord's consent, while negotiating for reduction of rent because of change in condition of leased premises, after failure to pay month's rent on due date, did not change tenant's status to that of "tenant at sufferance". Civ.Code, § 1946.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant at Sufferance".

3. Negligence 🔑32(1, 2)

House moving contractors, permitting lot owner's tenant and her mother, living in house on lot, to remain on premises during removal of such house and another house thereon to rear of lot, accepted such occupants as "invitees" and owed them duty to exercise ordinary reasonable care to provide reasonably safe passageway for ingress and egress to and from house and guard openings or excavations made by contractors on such premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

4. Negligence 🔑134(1)

In action against house moving contractors for injuries to tenant's mother, occupying one of two houses moved from front to rear of lot as result of fall into hole dug by defendants, evidence justified trial court's finding that defendants left in hole timbers used as anchors, instead of removing them and filling hole with dirt, before leaving premises.

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* Subsequent opinion 153 P.2d 349.

5. Negligence ⚿63

The fact that house moving contractors' dirt filling of holes, left by pulling of timbers installed as anchors on lot after removal of houses from front to rear thereof, sunk because of heavy rains, did not relieve contractors from liability for injuries to occupant of one of such houses as result of fall into one of holes.

6. Negligence ⚿136(26)

A woman injured by fall into hole, left by house moving contractors on lot from front to rear of which they had moved house occupied by her, was not, as matter of law, guilty of contributory negligence, barring her recovery of damages from contractors, in taking path, over which her daughter and a friend had made frequent trips safely between house and place on lot to which injured woman went from house to meet such friend just before accident.

SHINN, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Lettie Donahoo against the Kress House Moving Corporation and another for personal injuries caused by a fall into a hole dug by defendants near a house occupied by plaintiff during defendants' operations in moving such house and another house on the same lot to the rear thereof. Judgment for plaintiff, and defendants appeal.

Affirmed.

Frank W. Woodhead, of Los Angeles, for appellants.

Irving E. Read, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

This is an appeal from a judgment entered in favor of the plaintiff, Lettie Donahoo, against Kress House Moving Corporation and its vice-president, Edwin O. Egnew, in an action tried before a court without a jury.

The locale of the accident resulting in the injuries for which judgment was awarded was the rear of a lot on the south side of Hollywood Boulevard a short distance east of Gower Street in the City of Los Angeles. This lot belonged to a man named Mark Hansen and was of sufficient depth to warrant the moving of two houses located thereon to the rear of the premises, thereby making available as a used car lot the front of the premises. Hansen, on February 1, 1941, entered into a written contract with defendant corporation to move the buildings, which were respectively occupied by his tenants, Dr. Taylor and Miss Juanita Donahoo, an artist, whose 77 year old mother, the respondent here, lived with her and kept house for her. The Donahoo house, smaller than the Taylor house, was moved first and placed upon a concrete foundation which had been prepared for it at the extreme rear of the property. The contract between the owner and the Kress House Moving Corporation contained as one of its provisions, the following: "(d) Uninterrupted Possession: To furnish and provide to the contractor at all reasonable times during the progress of the work whenever required in the performance of this contract by the contractor, an exclusive and uninterrupted possession of all the building or buildings and properties herein referred to, and to hold the contractor free and harmless at all times from any interference with such possession and occupation, as may be necessary to carry out the obligations of the contractor herein, and to hold the contractor free and harmless from all claims of third parties which may arise by reason of the doing by the contractor in a proper manner of the work herein agreed by him to be performed." The occupants of the Donahoo house were permitted by the defendant corporation to continue their occupancy of the house during the moving operations.

According to the defendant Egnew, who was in active charge of the work, his organization started moving the Taylor house on the 11th day of February, 1941, the Donahoo house having been lowered in the morning of that day upon its permanent foundation. Miss Donahoo testified that before the Taylor house was moved she saw the employees of the defendant corporation dig a ditch "near the northwest corner of our house, as it is now located." This ditch she described as being approximately 7 or 8 feet long and between 3 and 4 feet deep, located in an area immediately adjacent to the northwest corner of the Donahoo house. The court found that "this hole ran from east to west, and was approximately a foot north of the front of the Donahoo house." Miss Donahoo also testified that the workmen put some beams in the hole and a metal upright or stake to which a chain and cable were attached. Other testimony showed that the hole, timbers, and metal stake formed what was known as an "anchor" in house moving operations and the timbers, being buried in the ground, were known as "deadmen." A new foundation was also constructed for the Taylor house but the work of placing it permanently upon that foundation was interrupted by winter rains and for approximately a fortnight after February 18, 1941 it rested on heavy timbers immediately above the concrete foundation.

As the work progressed after February 1st, the front of the premises became littered with all kinds of equipment and machinery used in house moving and in concrete construction. Because of the great inconvenience involved in making her way out to Hollywood Boulevard by going to the north, Miss Donahoo resorted to a short cut by which she obtained an exit to a paved driveway a few feet to the southwest of the northwest corner of her house. At that point two boards had been removed from a fence abutting on the paved driveway by which easy access was had to Gower Street. Because of the muddy condition of the lot, the trip from the front of the Donahoo house to the paved driveway was made over small boards approximately one and a half feet long by six inches wide, laid end to end and bordering at one point upon the hole, above described, which, according to the findings of the court, the defendants "neglected and failed to cover up or place a guard over or around the hole * * * so that it would be reasonably safe for plaintiff and her daughter to either walk over or around the same and out to the passageway in question." The evidence does not disclose who laid the small boards in position but it appears clearly that Juanita Donahoo and a Miss Young, who was a close friend of her mother, frequently used the path formed by these boards. Mrs. Donahoo, however, had no occasion to use the path or to go to the driveway since she remained inside the Donahoo house during all the moving operations from February 1st until February 22nd, the night when she suffered her injuries, with the exception of a single instance when she "went out to get the mail, toward Hollywood." On the evening of February 22, she was expecting Miss Young to call upon her and undertook to light the way to and from the driveway by putting on the lights in two westerly bedrooms and the front porch. There were no back stairs available, the defendants having removed them when moving the house and not having replaced them. Mrs. Donahoo decided that she would make her way to the fence corner, greet her friend and return with her to the house. She had no knowledge whatever of the hole having been dug but, undoubtedly, was familiar with the fact that her daughter and Miss Young had made use of the short cut above described. On the night in question she went from the house to the paved driveway at about 7 o'clock and, meeting Miss Young at that point, turned about and preceded her toward the Donahoo house. She described her trip going from the house, as follows: "I walked—stepping on these small boards, I came to a white board, a little board painted white, and I stepped on that, and then up on a beam, and then over onto another beam, and then to a sort of a cement coating, and then down on the cement—on cement paving." On the trip back, toward the house, I stepped on the first beam with my right foot, after passing over the coping, and leaving the paving, I stepped on the beam—the first beam, with my right foot, and then over on the left beam with my left, and then down on this little white board with my right foot, which slipped into the hole or trench or whatever it was. I didn't see it before I slipped into it, or I never saw it afterwards; I never saw the hole." She also testified that the force of the fall "sent my body over the beam south, and the beam hit my knee, the sharp edge of the beam hit my knee, and I couldn't move." While the night was described as "dark" by certain of the witnesses, Mrs. Donahoo testified that she saw the beams and the little white board, saying, "I stepped down on that little white board, because I could see that plainly." Miss Young also testified that while she could not remember about the "moon" she could see very well. It was quite possible that the hole was in a shadow.

As a result of this accident Mrs. Donahoo was confined to her bed for a period of 8 or 9 weeks with her leg in a cast, then got about by means of crutches and a cane for a period of approximately a year after the date of her fall.

Appellants make no complaint with reference to the amount of the award made by the court, but contend that the evidence is insufficient as a matter of law to support the judgment; that it does not justify the findings of fact and conclusions of law made by the court, and that the plaintiff was guilty of contributory negligence as a matter of law. It is also claimed that the negligence, if any, of the defendants was not the proximate cause of the injuries sustained by the plaintiff.

As to the findings it may be said that many of the details covered in the foregoing recital appeared therein, and to us they furnish adequate support for the conclusions reached by the court, as follows: (1) That the defendants had uninterrupted possession of the property at the time of the accident and that the plaintiff was, both prior to and at the time of her accident, an invitee of the defendants. (2) That it was the duty of the defendants to provide a reasonably safe passageway on the said property for the plaintiff to walk upon and use as a means of ingress and egress to and from the house; that it was also the duty of the defendants to exercise reasonable care in guarding any openings or excavations it made on said property so that plaintiff and other invitees would not, in the exercise of reasonable care, fall into the same. (3) That the defendants dug the hole in question and failed to guard the same or provide a reasonably safe passage over or around the same and that by reason thereof were careless and negligent; that their carelessness and negligence was the sole proximate cause of the plaintiff's accident and injuries. (4) That the plaintiff was in the exercise of reasonable care and caution immediately preceding and at the time of the accident and there was no negligence on her part proximately contributing thereto. (5) That the plaintiff was entitled to recover the sum of $2496.50 from the defendants Kress House Moving Corporation, a corporation, and Edwin O. Egnew.

With the exception of the amount estimated by the court as a just award for the injuries suffered by Mrs. Donahoo, the appellant contends that all the foregoing conclusions are unwarranted under the testimony submitted. We, therefore, consider them each in order.

[1-3] Miss Donahoo was the tenant of Hansen, the owner of the property, before and during all the moving operations. As such, she was an invitee and so was her mother, a member of her household and acting as her housekeeper. As stated in 36 C.J., p. 217 [Landlord & Tenant], the rule reads: "Where the landlord undertakes to make repairs upon the demised premises, he is liable for injuries resulting from the negligence of himself or his servants in making such repairs. The liability of a landlord in such cases is not limited to the tenant personally, but includes all persons who, within the contemplation of the parties, were to use the premises under the hiring." See also 32 Am.Jur., Sec. 665, p. 529 [Landlord & Tenant], which states: "* * * It is the well-settled general rule that the duties and liabilities of a landlord to persons on the leased premises by the consent of the tenant are the same as those owed to the tenant himself. For this purpose they stand in his shoes. This rule applies to the tenant's wife or child." Since the defendants permitted Miss and Mrs. Donahoo to remain on the premises their status did not change; they remained invitees. Appellants argue that since Miss Donahoo was negotiating during the month of February for a reduction of rent because of the change in the condition of the premises which she occupied, she became a tenant at sufferance merely because her rent was not paid promptly on February 1st, the day when it was due. We do not think this reasoning is sound for Miss Donahoo stayed on with the consent of her landlord and, since she rented on a month to month basis, her holding over did not change her status to that of a tenant at sufferance. "In the case of a prior tenancy from month to month, a tenant, on the election of the landlord so to treat him, becomes or remains a tenant from month to month." 32 Am.Jur., Sec. 941, p. 793; see Sec. 1946, Civ.Code. Under this rule Miss Donahoo was still owed the same degree of care that was due her before the negotiation for the reduced rent began. The same, of course, is true of her mother. When the defendants permitted these two women to remain upon the premises, they accepted them as invitees to whom they owed ordinary and reasonable care since they continued as tenants, and the defendants, by the terms of the moving contract with Hansen, were given complete possession and control of the buildings and the property involved in the moving operations.

Appellants contend that the court erred in concluding that it was the duty of the defendants to provide a reasonably safe passageway on the Hansen lot for the plaintiff to use in going to and coming from her house, but under the circumstances of this case it clearly appears that some provision of this sort should have been made. The defendant Egnew testified that, while the moving operations were going on, the area between the Donahoo house and Hollywood Boulevard was "about like a pig pen in winter." Notwithstanding that, and with full knowledge that women were entering and leaving the house, neither he nor anyone by his order, according to his testimony, laid any boards or planks over the short distance, approximately 15 or 20 feet, from the front of the Donahoo house to the paved driveway leading to Gower Street, while the work was going on in the front part of the Hansen lot; nor did they provide means of entry or exit elsewhere on the premises. A witness, George Gray, describing the condition north of the Donahoo house, stated "it was strewn with brush and with timbers, with sand, with concrete, concrete mixers, and everything that a person would use in moving and building foundations;" also that when the Donahoo house was in its old location a cement sidewalk led from the front of their house around on the east side of the Taylor house, to the front of the Taylor house, and on to the walk, but that prior to February 22nd, 1941, "The biggest part of it had been broken up by the trucks, and then moved out completely." Plaintiff's Exhibit 4 vividly depicts the condition of the area between the Donahoo house and Hollywood Boulevard. We find the appellants, in their opening brief, mentioning that "there were concrete mixers, sand, cement, concrete forms and other paraphernalia connected with construction operations upon the premises. The cement contractor had dug trenches for the purpose of laying the foundations for both houses; the plumbing contractor had laid pipes on the ground in the vicinity of both houses; trees and shrubbery were uprooted all over the premises and timbers which were essential to the house moving operations and the construction work necessarily were lying on the ground surrounding both houses." Instead of providing a reasonably safe means of ingress and egress the defendants, according to the finding of the court, dug the hole, which we have heretofore described, at the northwest corner of the Donahoo house and immediately adjacent to it. Having complete control of the property, they stood in the same position as a landlord and, in our opinion, violated the rule stated in 15 Cal.Jur., p. 741: "Where a landlord retains or has control of a portion of the leased premises, the responsibility rests with him to see that no injury results to those having rights there because of the way in which that portion is occupied or used." See Davis v. Pacific Power Co., 1895, 107 Cal. 563, 40 P. 950, 48 Am.St.Rep. 156; Mendelsohn v. Van Herick, 1933, 133 Cal.App. 612, page 615, 24 P.2d 878, at page 879, where the court said: "It is true, as defendant contends, that 'an invitation to use property on which work is being done extends to the property in its then condition, and invitees using the property assume the risk of such condition' (45 C.J., p. 837); but obviously such rule does not do away with the legal duty imposed upon the owner to use ordinary care to keep the premises in a reasonably safe condition for those he has invited to come upon them." In speaking of liability for injuries, we find the following in Restatement, Torts, Vol. II, Sec. 384: "Persons Creating Artificial Conditions on Land on Behalf of Possessor For Bodily Harm Caused Thereby While The Work Remains In Their Charge. One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to the same liability, and enjoys the same immunity from liability, as though he were the possessor of the land, for bodily harm caused to others within and without the land, while the work is in his charge, by the dangerous character of the structure or other condition." The "other condition" which proved dangerous to Mrs. Donahoo consisted of the open hole dug by the defendants, left unguarded and, according to Miss Donahoo, never completely filled. Under the circumstances of the case this condition might well be called a trap created by the negligence of the defendants. It is true that Miss Donahoo testified that the hole which she had seen dug "apparently had been filled in and sunk some more because it was about 12 or 15 inches deep when I saw it—when I saw her in it—I saw my mother in it." She also said at another point in her testimony that "it had been filled in considerably." The first of these statements by Miss Donahoo is not conclusive; the second, while positive in its nature, implies that the hole had not been completely filled. Other facts hereinafter related would indicate that the actual filling in with dirt, if any, was very slight indeed, and there is nothing to indicate that any fill was made by the defendants or their agents.

[4] The court found, as the basis of one of its conclusions, that the defendants pri-

or to February 22nd disconnected their chain, cable and pulley from the timbers, heretofore referred to, and instead of removing the timbers left them in the hole. This finding is interesting in view of the fact that defendant Egnew, his foreman on the job, Charles Evans, and his workman, Clarence Simmons, all testified that according to their knowledge there never was any hole dug at the place where the accident occurred. They testified that two holes, and only two, were dug by Simmons on the Hansen property for the purpose of "anchors" and these, they said, were located at points immediately south of the Taylor house, practically on a line with the east and west sides of that building, and well out of the way of a person traveling over the route pursued by Mrs. Donahoo on the night of her accident. Being cross-examined, Simmons testified as follows:

"Q. I believe you testified, Mr. Simmons, that you took some deadmen out of the hole that you dug after your work had been completed, in so far as the moving of the Taylor house is concerned? A. Yes, sir * * *. They were taken out the day we completed pulling the house * * *.

"Q. After you took them out, what did you do * * * with reference to the hole? A. I filled the hole * * * I filled it full, and possibly a little more than full * * *.

"Q. It was tamped down? A. Part of the way."

While neither of the defendants nor any of their employees admitted knowing of the existence of the hole at the corner of the Donahoo house, they argue that *"when the defendants left the premises, the hole which had been used for the 'dead man' had been filled to the top with dirt * * *.* The evidence is undisputed that the defendants were not on the premises between the afternoon of the 19th and several days following the plaintiff's accident. During this period heavy rains fell. *It is apparent that the hole must undoubtedly have been filled up prior to the time the defendants left the premises on the 19th* for the reason that plaintiff's own witnesses testified that when the hole was dug it was approximately three to four feet in depth * * *. Miss Young, the plaintiff herself and the plaintiff's daughter, all testified that at the time of the accident the hole was only twelve to fifteen inches in depth." We have italicized portions of this argument for convenience in referring to them hereinafter.

After the plaintiff's testimony was submitted to the court, a motion for a nonsuit was made and denied. The defendants then proceeded to put on their testimony and early on Friday afternoon, October 2, 1942, their counsel rested. Immediately thereafter counsel for the respondent stated to the court: "This noon, just before I came back to court, I received a telephone call from Mrs. Donahoo, the daughter-in-law of the plaintiff in this case, who is visiting at the Donahoo home with her husband and daughter, and she advised me that her husband went out this morning and started digging at a place on the property located at 'JD–4' [the point on the map, Plaintiff's Exhibit 1, where Juanita Donahoo located the hole which defendants dug], and that he uncovered some timbers there. I requested her to have him stop the work, and I now ask the Court to reopen the plaintiff's case, and to adjourn to the scene of the accident and permit the plaintiff to present further evidence on the ground, as to what is there." Pending the decision on the motion to reopen and at the suggestion of the court, the opposing parties proceeded to the Donahoo premises to examine conditions there and under an order to report to the court on the following Monday morning. At that time the court granted leave to reopen the case and further testimony was introduced. Counsel for the appellants also offered a stipulation, which was accepted, as follows: "I offer to stipulate that on Friday, October 2, 1942, in the presence of Mr. Egnew, Mr. Evans, Mr. Simmons, myself, Mr. Read, Miss Donahoo, Mrs. Donahoo and Mr. Donahoo, the brother of Miss Donahoo and the son of Mrs. Donahoo, we were at the premises at 6048½ Hollywood Boulevard, the Donahoo house, and on arrival there we found Mr. Donahoo, and we found a hole in the ground near the northwest corner of the Donahoo house. That hole went down to a timber that was flat on the ground when a certain picture was taken * * * which is marked Plaintiff's Exhibit No. 13, showing the hole in the condition it was when we all arrived at the scene. * * * That thereupon we commenced to dig, and dug up four timbers, etc." These timbers it appears from the record had been placed in the hole as timbers for an "anchor" would be placed and after they were taken out, the hole measured 43 inches deep. It was stipulated that the top timber, as it lay in the ground, was 12 or 13 inches below the surface of the ground. The four timbers, laid broadside one upon the other with a few inches of dirt intervening between them, would measure 29 or 30 inches, leaving a space of only 13 or 14 inches to be filled. Since the depression into which Mrs. Donahoo fell was 12 to 15 inches deep, it is clear that any appreciable filling which was made in the trench was made by timbers found therein rather than by any dirt covering. It is quite possible that no dirt was thrown in the hole but that the rains washed a slight covering of dirt on top of the "deadmen." Mr. Simmons' testimony, as we have seen, was to the effect that he dug all the holes on the Hansen property that were used for "anchors" and also that the "deadmen" which he had used in the holes which he had dug were taken out. Under these circumstances, we find no support for the argument previously italicized that "when the defendants left the premises, the hole which had been used for the 'dead man' had been filled to the top with dirt" and "[i]t is apparent that the hole must undoubtedly have been filled up prior to the time the defendants left the premises on the 19th." On the testimony submitted the court was justified in finding that the defendants "instead of removing the timbers * * * left them in the * * * hole."

Furthermore, the matters just recited furnished ample grounds for the court's conclusion that it was also the duty of the defendants "to exercise reasonable care in guarding any openings or excavations it made on said property so that plaintiff and other invitees would not in the exercise of reasonable care fall into the same." In the case of Hall v. Barber Door Co., 1933, 218 Cal. 412, 419, 23 P.2d 279, 282, it is stated: "Upon both principle and authority, it is clear that an independent contractor, who by his own negligence creates dangerous conditions during the progress of the work, should be held responsible for an injury occasioned by those conditions to one rightfully on the premises, and should be held liable for damage directly attributable to the failure to perform this duty. [Citing cases.]" In that case, the plaintiff was the tenant of a building under construction and sought damages for personal injuries which he received when, in attempting to leave the premises, he raised a heavy door which had been installed by the defendant, an independent contractor, and which fell upon him. The work of installing the door had not been completed in that certain set-screws in the machinery had not been countersunk into the shaft but were simply screwed down against the shaft. Certain safety catches which would have held the door up even in the absence of counterweights had not yet been installed. A judgment of nonsuit, which was entered by the trial court, was reversed by the Supreme Court, and in the opinion the following language appears at page 419 of 218 Cal., at page 281 of 23 P.2d: "It cannot be doubted that an independent contractor is responsible to an occupant of a building rightfully on the premises at the request or consent of the owner for any wrongful acts that may be committed by himself or his employees while the stipulated work is in progress and resulting in injuries to such occupant. The ground upon which this liability is based is the implied duty which the law casts upon the independent contractor, as the person in charge and control of the work, to see that the rights of other persons, rightfully on the premises, are not injuriously affected by the performance of the work. [Citing cases.]" Quoting further from this case, we find a paragraph on page 420 of 218 Cal., at page 282 of 23 P.2d, which seems quite apropos in considering the facts in the instant case: "Defendant independent contractor contends that, as to it, plaintiff was a mere licensee. For reasons already stated, we do not think this is so, but, even if it were, the judgment of nonsuit would have to be reversed. As already pointed out, defendant installed the door and knew that the set-screws had not been countersunk. Under such circumstances, the jury could have found that defendant knew, or should have known, that persons rightfully on the premises were likely to use that door; that defendant knew or should have known that it would be dangerous to use the door under those circumstances. We think the jury could have inferred that, as left by defendant, there was an implied invitation to use the door. The jury could also have found that, as left by defendant, the door was a dangerous instrumentality within the meaning of that doctrine as recently enunciated by this court in Dahms v. General Elevator Co., supra [214 Cal. 733, 7 P.2d 1013], and that, as constructed and left by defendant, it was in legal effect a trap of the existence of which it was defendant's duty to warn even licensees."

In view of all the foregoing, it might well be argued that even if Mrs. Donahoo is considered a licensee, the appellants failed in the duty which they owed her.

[5] Adverting to the argument by the appellants that any fill made at the points where anchors were installed on the Hansen property had sunk by reason of heavy rains and therefore the defendants should not be held liable, we cannot accept this as a sound principle. In the case of Ames v. Gannon, 1909, 77 N.J.L. 385, 72 A. 27; the syllabus states the rule: "A person who excavates a trench in a public highway and places therein a sewer for property owners, under a private contract with them, is bound to restore the street to a safe condition, and this duty is not answered by simply replacing the excavated earth and leaving the street without further examination or attention, for he is charged with the knowledge that earth in a newly filled trench is likely to settle after a heavy rainfall, which imposes on him a duty to ascertain whether under such circumstances that condition exists, and, if it does, to make the necessary repairs."

The objection of the appellants to the conclusion of the court that defendants' carelessness and negligence "was the sole proximate cause" of the plaintiff's accident and injuries, we believe, is answered by the rule just quoted, for if the fill had been maintained on a level with the surrounding surface there would have been no hole for Mrs. Donahoo to fall into.

[6] The appellants rely strongly upon their affirmative defense of contributory negligence and argue that the adverse conclusion reached by the trial judge upon that question cannot be supported for the reason that the conditions show contributory negligence upon the plaintiff's part as a matter of law. We believe, however, that the trial judge was entitled to treat it as a question of fact to be decided by him. If one considers the actions of Mrs. Donahoo, aware as she was that her daughter and her friend, Miss Young, over a period of two weeks or more, had made frequent trips to and from her house to the fence corner where the boards had been ripped off, can it be said that she was contributorily negligent in taking a path which she knew existed and which, until then, had proven safe? Undoubtedly, this was one of the questions which the court had in mind when considering the subject of contributory negligence. Even if the lights, which Mrs. Donahoo turned on before making the trip, did not illuminate all the area traversed, the court would still be entitled to consider, as bearing upon the question of contributory negligence, the fact that she was able, nevertheless, without any apparent difficulty, to go to the fence corner where she met Miss Young before turning back toward her house. These conditions, in our opinion, sufficiently answer the contentions of appellants that the respondent was guilty of contributory negligence as a matter of law, and, at the same time, furnish a substantial basis for the court's decision in favor of the respondent upon the question of contributory negligence as one of fact, a decision which, so far as we are concerned, is conclusive. Hansen v. Cordoza, 1930, 106 Cal.App. 500, 502, 290 P. 62.

Judgment is affirmed.

PARKER WOOD, J., concurs.

SHINN, Justice (dissenting).

I dissent. It is, of course, unfortunate that plaintiff did not carry accident insurance, but I think the trial court went too far in an effort to extricate her from that dilemma. In her attempt to collect compensation for her injury she failed to establish a breach of duty by defendants under any principle of negligence, and if negligence had been shown, the judgment should have been in defendant's favor because plaintiff assumed the risk of using the premises under circumstances which clearly charged her with knowledge of their condition. She was guilty of contributory negligence as a matter of law.

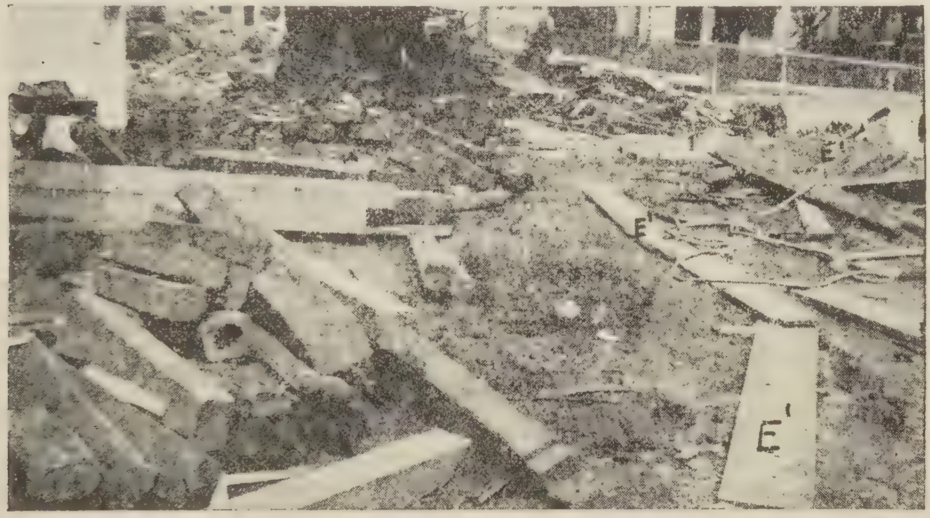
One of the theories of liability adopted by the trial court, and given approval by the main opinion herein, is that defendants were under a duty to provide plaintiff and her daughter, while they were occupying the house, with a reasonably safe passageway for ingress and egress. Apparently it is attempted to fasten that duty upon them upon the theory that Kress Company (hereinafter referred to as defendant) assumed it by its agreement with the owner to move the houses. There is nothing to that effect in the agreement. By the terms of the agreement defendant was to have exclusive and uninterrupted possession of the buildings and properties for the carrying on of its work, but this meant no more than that the owner undertook to see to it that defendant's work was not interrupted or interfered with. It is entirely beside the point to say that the lessor was under a duty to carry on or to complete the contemplated work with ordinary care. It is likewise immaterial whether the owner was under a special duty toward plaintiff and her daughter as their lessor. Defendant assumed none of the lessor's duties toward the lessees, but, upon the contrary, was to be protected against any claims they might make against it. Defendant did not become a lessor nor did it enter into any other legal relationship toward the tenants by failing to object to their occupying the house while the work was going on. Plaintiff and her daughter were not, as to defendant, invitees upon the premises or any part of it. They were not upon the premises for a purpose directly or indirectly connected with business dealings with defendant but as to defendant were using the premises solely for their own purposes and as a mere favor. Their presence on the land was tolerated but that did not amount to an invitation to use it. Polk v. Laurel Hill Cemetery Ass'n, 1918, 37 Cal.App. 624, 632, 174 P. 414. A mere licensee has no right to have the premises maintained in a reasonably safe condition for his use nor the right to assume that they will be so maintained. Aguilar v. Riverdale C. C. Ass'n, 1930, 104 Cal.App. 263, 266, 285 P. 889; Lindholm v. Northwestern Pac. R. R. Co., 1926, 79 Cal.App. 34, 37, 248 P. 1033. The judgment therefore cannot properly be sustained on the theory that defendant was under the duty to maintain a safe passageway and that it violated that duty.

It does not follow that defendant was under no duty toward plaintiff. It was under the general duty, declared by section 1714 of the Civil Code, not to injure plaintiff by its want of ordinary care or skill in the management of its property. Both plaintiff and defendant were rightfully on the premises, plaintiff using certain portions thereof for the purpose of ingress and egress and defendant using the entire premises in such manner and to such extent as might be necessary or convenient in the work of moving the houses. Since both were rightfully on private premises, their rights and responsibilities toward each other, measured in legal terms, were no different from those of two persons rightfully using a street or sidewalk, that is to say, those which arise out of the duty to use ordinary care. Donnelly v. Hufschmidt, 1889, 79 Cal. 74, 21 P. 546; Hayden v. Paramount Products, Inc., 1939, 33 Cal. App.2d 287, 91 P.2d 231.

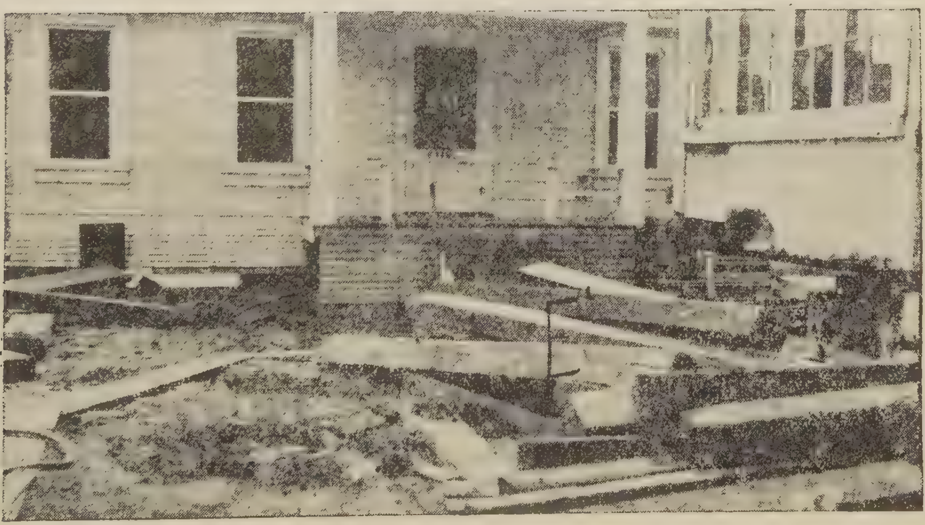
The truism that the question of negligence or the failure to exercise ordinary care must be determined under the circumstances of the particular case has peculiar application here. It involves an examination of the arrangement made between plaintiff and her daughter on the one hand and the lessor on the other, when the lessor consented that the former might remain in the house while the two houses were being moved. This is true only because defendant had knowledge of the arrangement and also gave its consent to the occupancy of the house. And it is necessary in order to give a true picture of the conditions under which the parties were to use the premises. The lessor of necessity gave his implied consent that the tenants might use the premises to the extent necessary to pass to and from the house. And it may be conceded that the lessees were, to that limited extent, invitees of the lessor because the relation of landlord and tenant had not been terminated by any new agreement, but continued as one of mutual advantage to the parties. But the lessor's consent, or we may say his invitation, was not unconditional. It was a consent that the lessees might use the premises as necessary in going to and from the house under conditions created in carrying on the work. There was no agreement as to how the work would be done nor how the premises would be kept. There was a mere privilege extended to the lessees to use the premises as they might find them, and that is exactly what they did, without complaint or remonstrance, or, in other words, they accepted the conditions with the privilege. One of the conditions necessarily implied was that the work of moving the houses would be carried on in the usual and customary manner. As shown from pictures appearing later in this opinion, the work was carried on after the fashion of house movers, which everybody knows is by means of much heavy equipment and a littering up of the premises in a manner peculiar to house moving operations. That is exactly what plaintiff and her daughter impliedly agreed to when they sought and obtained from the lessor permission to remain in the house while the work went on. Plaintiff's right so to use the premises was subordinate to defendant's right to carry on its work, that is to say, defendant was under no duty not to use any particular part of the premises that plaintiff and her daughter might wish to use, or to maintain them in a safe condition, but, upon the contrary, the latter, as I have said, were privileged to use them in the condition in which they might find them. It is suggested in the main opinion that the hole was in the nature of a trap, but it was no more of a trap than the timbers were which plaintiff had climbed over on her outward trip and which she was climbing over when she fell. It was no more of a trap than would have been a stake driven in the ground or any other obstruction left upon the premises. People of ordinary prudence are supposed to look where they are walking, to see what their footing will be. A hole in the ground that anyone with ordinary vision can see may become a trap at night, but if plaintiff stepped into a trap, it was one she made for herself by wandering around the premises in the dark. If it was negligent for defendant to leave a hole 12 or 15 inches deep and 5 feet long which had been excavated in daylight hours and had remained in open sight of the tenants, it would have been negligent to place and leave any obstruction upon any part of the premises which plaintiff might have chosen to use as a means of entrance or exit. It was not the duty of defendant to pick up all of its equipment each evening or to illuminate the premises or to maintain warning lights upon each object over which a pedestrian might stumble. And so far as the particular locality is concerned, it is to be noted that there was no proof that defendant knew that anyone was traveling between the house and the hole in the fence at the rear, or that small pieces of boards had been placed close to the excavation as "stepping stones" through the mud. Certainly defendant was under no obligation to do any more for plaintiff's safety than plaintiff under the circumstances had a right to expect, and plaintiff had no right to expect defendant to maintain an open, unobstructed way for passage to and from the house, especially one which was chosen and had been used without defendant's knowledge. One who carries on work that necessarily involves danger to those who come upon the premises where the work is going on is not obliged to change the manner of doing his work because strangers do come upon the premises either as licensees or invitees. If he carries on his work in the usual manner and the dangers of it are obvious, he is not guilty of negligence in failing to take unusual precautions to avoid injury to those who use the premises.

The main opinion takes no account of the peculiar conditions under which plaintiff and defendant, respectively, were using the property, but holds defendant to the same measure of care that is demanded of one who operates a store, market, hotel, or other place of business patronized by the public, where those invited to use the premises have the right to expect reasonably safe conditions. The law requires of every proprietor no more than that he shall keep his own place of business in that condition of safety that is found in like places of the same business as operated by persons of reasonable prudence and caution—the condition in which patrons of such places usually and reasonably expect to find such premises. The courts have no right to impose upon house movers the duty of keeping the premises they use in the condition of safety that is demanded of proprietors of public store buildings. It would be rewriting the law of negligence to say that everyone, no matter how hazardous his business, must carry it on in such a manner that those who come upon his premises either as invitees or licensees will be reasonably free from danger. For these reasons I think there is no basis for a finding of negligence on the part of defendant.

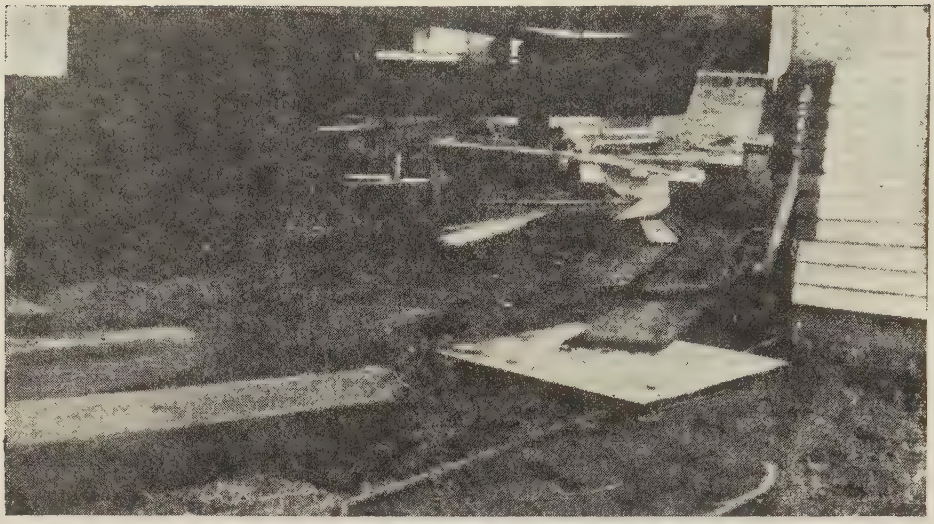
The next point, and one which I think is also conclusive, is that plaintiff assumed the risk of using the premises. On this point attention will be called to the general condition of the premises, which plaintiff knew and should have known. What she knew of the exact condition at the point of the accident and what she did will be pointed out later on the subject of contributory negligence. She had lived in the property with her daughter for at least three weeks during the moving operation, which included many activities preparatory to a change in the location of the buildings both before and after they were moved. Defendant had a right to believe that the tenants would make use of their faculties to observe the conditions under which they were living. The rules as to assumption of risk are the same as they would have been if defendant had been responsible for the safe condition of the premises, and defendant certainly could have had no greater duties than those of an owner. Restatement, Torts, p. 927, sec. 340, reads as follows: "A possessor of land is not subject to liability to his licensees, *whether business visitors or gratuitous licensees,* for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein." (Italics ours.) Comment e reads as follows: *"Assumption of risks by licensee.* A licensee's privilege to enter land in the possession of another is derived solely from the possessor's consent which he is free to give or withhold, the licensee not being entitled to enter without it. The licensee is, therefore, entitled to nothing more than knowledge of the actual conditions, which he will encounter if he avails himself of the possessor's consent. If he knows the actual conditions, he has an opportunity to exercise an intelligent choice as to whether the advantage to be gained from his entry is sufficient to justify him in incurring the risk which he knows is inseparable from it." This statement applies to invitees as well as to gratuitous licensees. Conditions under which plaintiff had been and was living at the time of her injury are best portrayed by some of the photographs which were in evidence. Three of such pictures follow.



A



B



C

"A", which was introduced as Plaintiff's Exhibit 4, shows what plaintiff would have seen if she had looked to the north from her house toward Hollywood Boulevard (the planks "E¹" were placed after the accident). "B" is what would have been directly in front of her as she emerged from her front door, as she did on the night of her unfortunate excursion. "C" portrays the course of her travels looking back past the place where she fell toward the house and showing the timbers which she climbed over and the concrete coping which she described. The heavy timber extending from beneath the house at the left in picture "C", which appears to be about a 12 x 12 timber, reached to within about 18 inches of the corner of the Donahoo house. It was about shoulder high, according to plaintiff's daughter, and in passing it was necessary to turn sidewise and squeeze between it and the house. The place on the other side of the beam at the spot marked "X" is where plaintiff fell. The boards shown in the picture were not those which plaintiff walked upon. The latter boards were none of them a foot wide, but were small short pieces. The "little white board" which plaintiff slipped upon was about three inches wide and a foot or two in length. One of the beams over which she climbed was an 8 x 8. The depression in question extended for 5 or 6 feet easterly and westerly on the north side of the Donahoo house within about a foot of the north wall, and its westerly end was about 4 or 5 feet west of the west wall of the house. Although plaintiff turned on lights in two of the rooms and a light on the front porch, the porch light would not have shone upon the point where plaintiff fell, and the other lights shining through windows rather high above the ground could not possibly have illuminated the point of the accident. In fact the evidence is that it was dark at that point—so dark that plaintiff did not see the depression either before or after her fall. It is said that plaintiff had remained in the house practically all of the time while the work was going on and that she did not know about the hole and had never traversed the so-called pathway to the fence. But the excavation had been made close to her front doorstep and had been used in shifting the other house, and I think it can avail plaintiff nothing to plead ignorance of the condition of the premises surrounding her house. It would be preposterous to say that anyone in the possession of his senses could have lived for weeks in plaintiff's surroundings and been utterly oblivious of them. Plaintiff knew the conditions from the house to Hollywood Boulevard, because she had traveled that way. The pictures show those conditions and the evidence was that what had been a sidewalk was torn up and littered with all manner of obstructions. No representations or promises had been made to plaintiff with respect to the maintenance of a pathway. Being a mere licensee as to defendant, she had no right to expect it to maintain a pathway and there was no evidence that she did. And in discussing the point of assumption of risk and what plaintiff had a right to expect, I repeat that there was no evidence that defendant knew that anyone had been passing between the house and the hole in the fence or that pieces of boards had been placed along this route through the mud. If defendant was under no duty to maintain the premises in a safe condition, it was under no duty to inspect them in order to find out what use was being made of them. Plaintiff had no right to expect of defendant performance of duties other than those imposed by law. And with respect to plaintiff's conduct, regardless of the question of defendant's duty, it is undeniable that she had no right to act upon the assumption that defendant would keep the premises in an orderly and safe condition, because she knew that that was not being done. She could have seen what was in front of her front doorstep unless she had closed her eyes to what was in plain sight. If she was not warned by what she saw, what more would have been needed to warn her? If she did not know that there was a risk involved in walking about these premises on a dark night, especially portions which she had never seen nor inquired about, what more would have been required to make her realize that she was assuming a risk? If defendant had built a fence around the depression, it is quite possible that plaintiff would have run into it, for "there are none so blind as those that will not see." And there is the inescapable fact that plaintiff did not step into the hole but slipped and fell as she was climbing over a timber and stepping onto a board laid in the mud, an adventure that would have involved obvious perils in the daytime and far greater ones at night. But aside from the fact that plaintiff knowingly and deliberately picked her way from board to board, on slippery ground, and fell while climbing over a timber on the return trip, I ask whether anyone seeing the condition of the premises, as shown in the pictures, could reasonably claim that she did not know and could not have learned, in the exercise of ordinary care, that it would be dangerous to walk about the premises in the dark? If defendant is liable in damages under the facts in evidence, it would have been liable if plaintiff had stumbled in the dark over any one of the numerous timbers, boards, ropes, cables, jacks, rollers, tools, piles of dirt or other obstructions which pretty well covered the lot and which she might have encountered while walking around the premises on a dark night.

Plaintiff not only assumed the risk of her jaunt at the time she entered upon it, but she was negligent as a matter of law in continuing with it under the obviously dangerous conditions. The defense of contributory negligence was established by the testimony of plaintiff alone. On her way to the hole in the fence she had stepped from board to board, climbed over two timbers and stepped down from a cement coping onto a paved passageway. It was in retracing her steps that she fell. She described her fall as follows:

"A. I stepped on the first beam with my right foot, after passing over the coping, and leaving the paving, I stepped on the beam—the first beam, with my right foot, and then over on the left beam with my left, and then down on this little white board with my right foot, which slipped into the hole or trench or whatever it was. I didn't see it before I slipped into it, or I never saw it afterwards; I never saw the hole.

"Q. What happened to you, that is, what position did you find yourself in when your foot slipped in the hole; describe your position to the Court. A. Well, the force of the fall sent me over the beam.

"Q. In what direction over the beam? A. South. It sent my body over the beam south, and the beam hit my knee, the sharp edge of the beam hit my knee, and I couldn't move."

These are the circumstances under which the trial court has decided that plaintiff's accident was caused by defendant's fault and not her own. Putting aside all other considerations, such as the knowledge that plaintiff had or should have had as to the general condition of the premises, how can plaintiff plead ignorance of the conditions which she had met on the way out? She knew that she would have to climb over the timbers on the way back and step down onto the boards, and she took that exact risk. Is defendant to pay damages because plaintiff chose to return by the way she had come rather than by a safer, if longer, way back to the house? I think the law is the other way. Powers v. Raymond, 1925, 197 Cal. 126, 239 P. 1069; Bruce v. Risley, 1936, 15 Cal.App.2d 659, 59 P.2d 847; Cornell v. Hearst Sunical, etc., Corp., 1942, 55 Cal.App.2d 708, 131 P.2d 404.

The judgment should be reversed.

63 Cal.App.2d 691

DOANE v. SMITH et al.

Civ. 14135.

District Court of Appeal, Second District, Division 3, California.

April 5, 1944.

Rehearing Denied May 4, 1944.

Hearing Denied June 1, 1944.

1. Appeal and error ⚷934(1)

On appeal from judgment for defendant notwithstanding jury's verdict for plaintiff, appellate court must weigh evidence and all reasonable inferences therefrom in light most favorable to plaintiff in determining whether judgment originally entered on verdict was sustained by evidence. Code Civ.Proc. § 639.

2. Automobiles ⚷245(17)

In action for injuries to driver of automobile running into rear of truck trailer standing partly on main traveled portion of highway at night, evidence was sufficient to take to jury question whether truck driver was negligent in failing to drive truck further off such portion of highway before stopping to observe oil gauge. Vehicle Code, § 582, St.1935, p. 190.

3. Automobiles ⚷245(62)

In action for injuries to driver of automobile colliding with rear of truck trailer stopped partly on main traveled portion of highway at night, evidence was sufficient to take to jury question whether truck driver's negligent failure to drive truck entirely off such portion of highway was proximate cause of accident. Vehicle Code, § 582, St.1935, p. 190.

4. Automobiles ⚷245(78)

Operation of automobile at night on desert highway at speed of 40 or 45 miles per hour was not negligent as matter of law.

5. Automobiles ⚷206

An automobile driver has right to anticipate that standing vehicle ahead of him will be parked off highway, if practicable to do so, and to act on such assumption until there are reasonable grounds to believe that there is a vehicle not so parked ahead. Vehicle Code, § 582, St.1935, p. 190.

6. Automobiles ⚷245(83)

A motorist, driving along right-hand edge of desert highway pavement at speed of 40 or 45 miles per hour, with his lights on low beam, at night, was not contributorily negligent as matter of law in failing to realize that truck ahead of him was standing still partly on pavement until he was about 100 feet from it, nor in failing to turn to left, instead of trying to stop automobile in time to avoid collision with rear of trailer attached to truck. Vehicle Code, § 525, St.1941, p. 2722; § 582, St.1935, p. 190.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Action by Ray Robert Doane against Gordon H. Smith and others for personal injuries sustained when plaintiff's automobile ran into the rear of a trailer attached to a truck standing partly on the main traveled portion of a highway. From an order for judgment in defendants' favor, notwithstanding a jury's verdict for plaintiff, and an order denying plaintiff's motion to amend the judgment, plaintiff appeals.

Appeals dismissed, and judgment reversed with direction to enter judgment on the verdict.

Steiner Larsen, Joseph Shane, Jean Wunderlich, all of Los Angeles, for appellant.

Eugene S. Ives and Schell & Delamer, all of Los Angeles, for respondents.

SHINN, Justice.

[1] After a verdict in favor of plaintiff against Northern Transportation Company and Andrew C. Mumler, Jr., for $32,250 for injuries sustained when plaintiff's automobile, driven by him, ran into the rear of a trailer attached to a truck belonging to the company and operated by Mumler, the court denied defendants' motions for a directed verdict and for judgment notwithstanding the verdict, but upon defendants' motion for new trial ordered judgment notwithstanding the verdict in favor of the defendants, under the provisions of section 639 of the Code of Civil Procedure. Plaintiff appeals. Our sole question is to determine whether the judgment originally entered upon the verdict was sustained by the evidence, and in this determination we must weigh the evidence and all reasonable inferences deducible therefrom in the light most favorable to plaintiff.

The collision occurred on the highway leading north across the desert from Mojave about 5½ miles from Mojave and around 10 o'clock at night. Defendant Mumler was driving a Diesel truck and trailer; he had installed a new oil pump at Mojave and when he observed that the oil gauge was not showing any pressure he shut off the motor and coasted to a stop. He then started the motor again to observe the gauge, after which he stepped onto the running board, when plaintiff's car struck the rear end of the trailer. The automobile caught fire, it was necessary to move the truck and trailer forward in order to shovel sand on the motor, and in order to do this the truck motor was started and the truck driven ahead some 10 feet. Later it was driven about 20 feet farther and again parked. The highway for a mile or two to the south of the collision is straight and level.

The appeal presents the questions whether there was evidence which justified the implied findings that defendants were negligent, that their negligence was a proximate cause of the accident, and that plaintiff was not guilty of contributory negligence.

[2] Section 582 of the Vehicle Code, St. 1935, p. 190, reads as follows: "Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway." The driver of the truck testified that when he stopped the truck he pulled off the highway until the left wheels and left side of the truck were on the paved and generally used portion of the highway and the remainder of the truck was on a shoulder of the highway to the east. A highway patrol officer who arrived shortly after the accident took certain measurements to which we shall refer. The paved highway at the point where the truck was last stopped was 12⅔ feet wide between the center line and the east edge. The sedan was pointed northwesterly and the left front corner was 5 feet west of the east edge of the pavement. The left rear wheel of the trailer, when it was standing some 10 feet north of the sedan, was 8 feet east of the center line of the highway.

Enough has been stated to show that the truck and trailer were standing partly upon the paved or improved or main traveled portion of the highway. This was a violation of law, if it was practicable to have parked the vehicles off that part or portion of the highway. There was testimony by the highway patrol officer, who arrived shortly after the accident, that the condition of the highway was such at the point of impact that the truck could have been driven farther to the east so that it would have been entirely off the highway and that generally the outside shoulder was perfectly good for vehicular travel for a width of 9 feet easterly of the paved portion. At points near to and both north and south of the point of the accident the shoulder was from 16 to 20 feet wide. Between Mojave and the scene of the accident, at points where the shoulder was soft, there were signs marked "Soft Shoulder" and the truck driver testified that he had observed such signs. He also testified that he did not drive farther off the paved highway because he feared the shoulder would be soft. However, according to his testimony, he did drive in the neighborhood of 6 feet off the pavement and it appears that he could have gone farther with safety. Defendants contend that if the driver believed that it was impracticable to drive farther off the pavement and if he was reasonably justified in so doing, he cannot be held guilty of violating the law in leaving the truck where he did. We do not agree that this is a proper construction of the Vehicle Code section, but if we assume that it is, the question would still remain whether reasonable grounds existed for the belief that it was impracticable to take the truck farther off the highway. There was evidence that it would have been entirely safe to do so and this would have justified a finding that it was also a practicable thing to do. Furthermore, with slight additional effort the truck could have been taken to a nearby point where the solid shoulder was much wider. The jury's implied finding of negligence on the part of defendants was not unsupported by the evidence.

[3] The next question is whether, disregarding the question of contributory negligence, the evidence warranted a finding that defendant's negligence was a proximate cause of the accident. The sedan left skid marks 63 feet long, made by both the right and left tires. The mark made by the left-hand tires at the southerly end of the skid mark was 9 feet east of the center line. The marks extended up to the

point of impact but over the entire distance drew to within about 8 feet of the center line. Plaintiff was unable to testify how far east of the center line the truck was at the time of the collision, but did testify that it was partially obstructing the paved highway. As already mentioned, there was testimony that in the vicinity of the point of the accident the easterly edge of the pavement was 12⅔ feet from the center line of the highway. It was stipulated that the sedan was 5 feet 5 inches wide. Starting with the fact that the left front wheel of the sedan at the time of the collision was 8 feet east of the center line, and making allowance for the fact that the entire width of the car was greater than the tread of the wheels, a simple computation shows that the sedan was traveling with its right side practically even with the right-hand edge of the pavement. Respondents in their brief say the trailer was not extending more than 2 feet onto the pavement, which we think is not an unwarranted deduction from the facts in evidence, although they do not furnish a basis for exact calculation. Respondents further say, "An average car driving in the center of the right-hand half of the main traveled portion of the highway would have just about cleared the truck and trailer without changing its course at all." We think the evidence justifies this statement, but on the issue of proximate cause one of the questions is whether the evidence was such as to warrant a finding that the collision would not have occurred if the truck and trailer had been entirely off the highway. Obviously if plaintiff had been driving along the shoulder where a legally parked vehicle would have obstructed his progress, we would have an entirely different case, not only from the standpoint of defendant's conduct but that of plaintiff as well. The evidence was clearly such as to warrant a finding that the collision would not have occurred if the truck and trailer had not extended over a part of the paved highway. True, the fact is not demonstrable and involves the consideration of distances measured by inches, but the fact was one that had to be determined one way or the other. In these situations a few inches may determine a question of proximate cause, and they may also mean the difference between catastrophe and escape or even life and death. Therefore the conclusion, based on a preponderance of probabilities, that the collision would not have occurred if the truck and trailer had been entirely off the pavement (not taking into consideration the question of contributory negligence) would be sufficient to support a finding in favor of plaintiff on the issue of proximate cause.

[4-6] The next question is whether the evidence showed plaintiff to have been guilty of contributory negligence as a matter of law. Plaintiff testified that his speed was about 40 to 45 miles per hour, and there was no testimony that it was greater. His lights were on low beam. He testified that he saw a light ahead of him when he was some 400 or 500 feet from the point of collision and that when he was 100 or 150 feet away he saw the vehicle and realized that it was stopped. In his deposition he had estimated the latter distance at from 150 to 200 feet and more than once he stated that his estimates were guesses. Plaintiff admitted having drunk two bottles of beer with his dinner before leaving Los Angeles and one bottle with some sandwiches at Mojave, which is approximately 100 miles from Los Angeles. There was evidence that he was not under the influence of liquor either in Mojave or after the accident, and no evidence from which a jury would have been required to find that he was intoxicated. Plaintiff, as we have seen, was driving along the right-hand edge of the pavement, as he should have been. Vehicle Code, sec. 525, St.1941, p. 2722. His speed of 40 or 45 miles per hour was not a negligent one as a matter of law. His testimony as to where he was when he realized that there was a large vehicle parked ahead of him was to be considered in connection with the undisputed evidence that the brakes of his car were locked when he was 63 feet away and that the efforts he made to stop the car became effective at that point. As between plaintiff's contradictory estimates of the distance from which he saw the truck standing still, the jury had a right to accept his minimum estimate of 100 feet or thereabouts and would have been required to determine whether he was negligent in not observing sooner than he did that the truck and trailer were stationary and were partially obstructing the paved roadway. It is not an easy matter to determine at night whether a vehicle seen ahead on the highway is standing still or moving, even though it be well lighted. It cannot be said as a matter of law that there is some definite distance from a parked vehicle at

which an approaching driver must realize that the vehicle is standing still, in order to be free from negligence. No more can it be said upon the facts of this case that plaintiff was negligent as a matter of law in failing to realize that the truck was standing still until he was within about 100 feet of it. It must be remembered that automobile drivers have the right to anticipate that standing vehicles ahead of them will be parked off the highway, if it is practicable to so park them, and the right to act upon that assumption until there are reasonable grounds for believing that there is some vehicle ahead that is not so parked. Plaintiff had driven over the road before, both in the daytime and nighttime and it could have been inferred that he knew there was a wide shoulder on the east side of the highway. It cannot be doubted that had plaintiff chosen to turn to the left instead of endeavoring to stop his car he could easily have avoided the collision, and respondents rely upon his failure to do so as conclusive evidence of his negligence. Certainly his failure to alter his course instead of trying to stop, and his apparent belief that he could stop his car in time to avoid a collision, might have been found to amount to negligent conduct. But these questions called for answers under the general principles of negligence and involved the determination whether plaintiff's conduct showed a want of ordinary care. We are satisfied that there was room for reasonable differences of opinion with respect to each of the phases of plaintiff's conduct which had relation to the question of his negligence.

In support of their argument that plaintiff was guilty of negligence as a matter of law defendants have cited the following cases: Edlund v. Los Angeles R. Co., 1936 14 Cal.App.2d 673, 58 P.2d 928; Lockie v. Pence, 1935, 5 Cal.App.2d 172, 42 P.2d 340; Christy v. Herbert M. Baruch Corp., 1933, 135 Cal.App. 355, 27 P.2d 660; Nicholson v. Porter, 1931, 118 Cal.App. 555, 5 P.2d 659; Moore v. Whitworth, 1927, 202 Cal. 711, 262 P. 715; McMillan v. Thompson, 1934, 140 Cal.App. 437, 35 P.2d 419; and James v. White Truck, etc., Co., 1934, 1 Cal.App.2d 37, 36 P.2d 401. A careful study of these cases has brought to light no basis for upholding the judgment herein upon the theory that plaintiff was guilty of contributory negligence as a matter of law. The case which furnishes the nearest approach on the facts is Lockie v. Pence, supra. The truck there was disabled and under section 136 of the California Vehicle Act (now section 584 of the Vehicle Code, St.1935, p. 191) was not wrongfully left on the highway and the driver was not guilty of negligence. It is true that the court said that plaintiff's husband unquestionably had been guilty of contributory negligence but it was also said that it was unnecessary to quote or analyze the evidence further than had been done, and it had been pointed out that the evidence showed without conflict that there was a tail light burning on the truck and that plaintiff's husband had testified that he did not see the stalled truck until he was within 10 or 15 or possibly 20 feet from it. Even these meager facts clearly distinguish the case from our own. A discussion of the other cited cases would extend this opinion to no good purpose.

We might discuss the evidence in the case in greater detail, but it would add nothing to the controlling features of the case as we have stated them. The case presented only factual questions upon the vital issues. It clearly appeared that the act of stopping the truck and trailer on the highway was, under the circumstances, a violation of law. The questions of proximate cause and contributory negligence were close questions which a court or jury could reasonably decide either way. Defendants present a forceful argument on the latter issue and it may be that if we were trying the facts we would agree with their contention. But the case upon this issue is not one of law. We are satisfied that the implied findings of the jury upon the material issues in the case were supported by the evidence. It was therefore not a proper case for a judgment notwithstanding the verdict.

The appeal from the order for judgment notwithstanding the verdict and from an order denying plaintiff's motion to amend the judgment, which latter order is not mentioned in the briefs, are dismissed. The judgment is reversed and the court directed to enter judgment on the verdict.

DESMOND, P. J., and PARKER WOOD, J., concur.

Hearing denied; GIBSON, C. J., and SCHAUER, J., dissenting.

BEWICK v. MECHAM.*

Civ. No. 3120.

District Court of Appeal, Fourth District, California.

April 14, 1944.

Rehearing Denied May 8, 1944.

Hearing Granted June 12, 1944.

1. Contracts ⚷292½
Executors and administrators ⚷135

Remedy under statute providing that where vendor in contract to convey land dies before conveyance, probate court may authorize executor or administrator to convey land, if available to holder of option to purchase which left the matter of price and terms to be determined by future agreement or by arbitration, was not exclusive in view of remedy provided by statute for enforcement of arbitration proceedings. Code Civ.Proc. § 1280 et seq.; Probate Code, §§ 850 to 853.

2. Landlord and tenant ⚷92(1)

Provisions of statute for regulation and enforcement of arbitration proceedings in effect when lease giving tenant option to purchase land was executed constituted a part of option agreement. Code Civ.Proc. § 1280 et seq.

3. Contracts ⚷292½

Where parties agree that the value of property shall be fixed in a certain manner, they are entitled to have it fixed in that manner, particularly where a full and complete remedy is provided by statute for carrying out and enforcing such agreement.

4. Equity ⚷43

An equitable remedy is not available where plaintiff has a plain, speedy and adequate remedy at law.

5. Equity ⚷23

Where parties to contract have definitely agreed upon certain things, equity will not make a new or different contract.

6. Specific performance ⚷28(1)

There must be a definite contract in order to have specific performance thereof.

7. Specific performance ⚷57

Holder of option to purchase land which provided for determination of price and terms by arbitration if not fixed by future agreement of parties had an adequate remedy under statute providing for enforcement of arbitration proceedings, though optioner died without agreeing as to purchase price or appointing an arbitrator, and optionee could not invoke equity jurisdiction to enforce specific performance of option. Code Civ.Proc. §§ 1280 et seq., 1282, 1284; Civ.Code, § 3390.

8. Contracts ⚷292½

Executrix of deceased optionor who contended that assignment of lease containing option to purchase did not effect an assignment of option did not waive right to have purchase price determined by arbitration as provided in option by not asking court to stay assignee's action for specific performance, particularly where executrix was in default in proceeding with arbitration. Code Civ.Proc. §§ 1280 et seq., 1284.

9. Landlord and tenant ⚷92(2)

Option to purchase land contained in lease which prohibited assignment of any interest therein or in option without written consent of landlord was included in assignment of all of the tenant's right, title and interest in lease to which landlord consented in writing describing assignment as transferring all of tenant's right, title and interest in the described lease.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Richard Bewick against Pearl Margaret Mecham, executrix of the last will and testament of J. J. Lopez, deceased, for specific performance of an option to purchase realty. From a judgment ordering specific performance, defendant appeals.

Judgment reversed.

Claflin, Dorsey & Campbell, of Bakersfield, for appellant.

Harvey, Johnston & Baker, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for specific performance. In 1929, J. J. Lopez leased certain real property in Bakersfield to one S. S. Lombard for a period of ten years, expiring on July 1, 1939. In September, 1930, with the written consent of the lessor all of the interest of Lombard was assigned to this plaintiff, who assumed and agreed to perform the terms of the lease. The plaintiff and his predecessor built a market and service station on the property which cost $13,500 and which the court found to be of the present value of $8,000. The plaintiff paid all rental and kept all covenants of the lease for the ten-year period.

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* Subsequent opinion 156 P.2d 757.

The lease provided that within thirty days after its expiration the lessee might remove the improvements erected by him. The lease also contained a provision granting the lessee an option to purchase the property at the expiration of the ten-year term at a price and on terms then to be agreed on or, if not agreed on, to be fixed by arbitration, each party to select one arbitrator, these two to select a third, and the three arbitrators to fix the purchase price and the terms of sale, with the provision that at least one-half of the purchase price should be payable in cash and the balance secured by a trust deed, at not less than the legal rate of interest. It was further provided that the lessee must give written notice to the lessor of his desire to exercise this option not later than thirty days before the expiration of the term of the lease, and accompany such notice with a deposit of not less than $1,000 to be applied on the purchase price.

On May 12, 1939, the plaintiff attempted to exercise the option to purchase the property by sending Lopez a check for $1,000 with a letter informing him of his desire to purchase the property and asking him to meet with the plaintiff for the purpose of determining the purchase price, or that the same might be fixed by arbitration, as provided in the lease, if it could not be agreed upon. Lopez refused to sell the property and attempted to return the $1,000 to this plaintiff. When the plaintiff refused to accept the return of the money Lopez deposited it to the plaintiff's account in a bank. The plaintiff then deposited the money in Lopez' account in a bank, where it has since remained.

A purported arbitration proceeding was then gone through which resulted in a purported award fixing the price of the property at $7,800, one-half to be paid in cash and the balance in three years in certain installments with interest at 7%, the deferred payments to be secured by a deed of trust. This plaintiff filed in the superior court a petition for an order confirming this award. J. J. Lopez had died in the meantime and his executrix filed an answer and objections to the confirmation of the award and moved to vacate the same. After a hearing, the trial judge granted the motion and entered a judgment vacating and setting aside the award and denying the petition to confirm it. That judgment was affirmed on appeal by this court on the ground that the evidence sufficiently supported the court's implied finding that J. J. Lopez in his lifetime had not appointed one of the purported arbitrators. In re Bewick, 49 Cal.App.2d 287, 121 P.2d 815. In the decision in that case it was suggested that the affirmance of the judgment on the ground that there had been no arbitration might not preclude this plaintiff from finding a remedy under the provisions of section 1280 et seq. of the Code of Civil Procedure.

After the going down of the remittitur on that appeal and on May 18, 1942, this plaintiff served a notice upon this defendant informing her that he had appointed a certain person to act as arbitrator in this matter, demanding that she appoint an arbitrator, and further notifying her that unless she appointed such an arbitrator within ten days he would take such action as he might be advised to enforce the terms of the lease and the option to purchase. No arbitrator was appointed by the defendant during that time, or at all.

For reasons that do not appear the plaintiff took no further steps to secure an arbitration but filed this action seeking a specific performance of the option to purchase the property. The complaint alleged, in substance, the facts above set forth and further alleged that the plaintiff was ready, willing and able to purchase the property for such amount as the court might determine to be a reasonable purchase price therefor, and to pay the same upon such terms as the court might fix, that if he were denied the right to purchase the property at a price and on terms to be determined by the court he would suffer the loss of all monies invested in the improvements, and that he has no plain, speedy or adequate remedy at law. The prayer was that the court fix and determine the purchase price of the property, that if the defendant desired the payment of the purchase price to be deferred that the court fix and determine the terms of payment, and that upon payment of the purchase price as fixed by the court the defendant be required to execute and deliver a deed to the property, and for other and further equitable relief. At the trial, over the defendant's objections that the complaint did not state a cause of action and that the court did not have jurisdiction to give the relief asked for, evidence was received, among other things, as to the value of the property in question and as to the present value of the improvements placed thereon by the plaintiff. The court found in favor of the plaintiff finding, among other things, that the defendant had refused to appoint an arbitrator to fix the purchase price of the property or the terms of payment therefor; that the plaintiff was and had been since May 12, 1939, ready, able and willing to pay the purchase price as it might be fixed by arbitrators appointed pursuant to the agreement, on the terms fixed by them; that he was now ready, willing and able to pay the purchase price and on the terms as fixed by the court; that the plaintiff has no plain, speedy or adequate remedy at law; that the reasonable value of the property in question is $9,000; and that the defendant has in her possession $1,000 which had been tendered to J. J. Lopez. A judgment was entered ordering specific performance of the option agreement in the lease and ordering the defendant to execute and deliver a grant deed conveying the property to the plaintiff on the payment of $8,000. From this judgment the defendant has appealed.

[1] It is first contended that the court was without jurisdiction to proceed in this equitable action because the matter was exclusively within the jurisdiction of the probate court by reason of the provisions of sections 850 to 853 of the Probate Code. Section 850, by its terms, is made applicable where a person who is bound by contract to convey property dies before making the conveyance and where he might, if living, have been compelled to make the transfer. This seems to imply a definite contract which is in a position to be specifically performed and where nothing remains to be done to make the conveyance enforceable. It hardly seems appropriate where under the contract in question the price has not been determined and something remains to be done before the conditions of the transfer can be fixed. In Estate of Garnier, 147 Cal. 457, 82 P. 68, 69, the court referred to this statutory provision as a wise one "where the right of petitioner in the premises is free from doubt." If we assume that the remedy thus provided by the Probate Code was available under the circumstances here existing that remedy is not made exclusive by these statutes and it cannot be here held to be exclusive since another remedy is so clearly and definitely provided by the statutes for the regulation and enforcement of arbitration proceedings. Sec. 1280 et seq. of the Code of Civ.Proc.

A number of points are next presented, all going to the general proposition that the court exceeded its jurisdiction in fixing the price and terms for the sale of this real property and that the equitable remedy of specific performance was not available to the respondent under these circumstances, and particularly since he had not exhausted his legal remedy under the arbitration statutes. Sec. 1280 et seq., Code of Civ.Proc.

[2, 3] These statutes, since the extensive amendments and additions thereto in 1927, furnish a full and complete remedy for the enforcement of an agreement to arbitrate and for the refusal of one of the parties to appoint an arbitrator. They were in force some two years before the agreement here in question was executed and it must be considered that the parties entered into their contract with these statutes in mind and that they constitute a part of the agreement. Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 55 P.2d 203. Where parties agree that the value of property shall be fixed in a certain manner they are entitled to have it fixed in that manner. Rives-Strong Bldg. v. Bank of America, 50 Cal.App.2d 810, 123 P.2d 942. This should be true where, as here, a full and complete remedy is provided by statute for carrying out and enforcing that agreement.

[4-7] In section 3390 of the Civil Code it is provided that an agreement to submit a controversy to an arbitration cannot be specifically enforced. In section 1282 of the Code of Civil Procedure, it is provided that in one stage of the procedure for enforcing an agreement to arbitrate either party has the right to demand a jury trial. In section 1284 of that Code it is provided that in any suit brought upon any issue arising out of an agreement providing for arbitration the court in which the suit is pending, upon being satisfied that the issue involved is referable to arbitration, shall stay the action until an arbitration has been had according to the terms of the agreement. Not only do these matters indicate a statutory intent that specific performance should not be resorted to in such a case as this but, under general principles,

an equitable remedy is not available where there is a legal remedy, where the plaintiff has a plain, speedy and adequate remedy at law, and equity will not make a new or different contract where the parties have definitely agreed upon certain things. Moreover, in order to have specific performance there must be a definite contract and the only definite part of the contract here in question is the provision for arbitration which, in itself, cannot be enforced in an action for specific performance but for which a statutory remedy is directly provided.

The respondent relies on certain cases from other jurisdictions as supporting his contention that this equitable remedy was available to him. Without analyzing all of these cases it is sufficient to state that even those cases are based upon the general ground that no other remedy was available and that equitable cognizance was necessary in order to secure justice. For instance, in Gunton v. Carroll, 101 U.S. 426, 25 L.Ed. 985, it was pointed out that a contract might be specifically enforced where the price was to be fixed by arbitration, where the owner had died before appointing arbitrators, and where the valuation could not be made in the manner agreed upon. The respondent here has not brought himself within the principle of that case since under our statutes the valuation can be fixed in the manner agreed upon even though one of the parties died before arbitrators were appointed.

The respondent particularly relies on two decisions in this state. In Streicher v. Heimburge, 205 Cal. 675, 272 P. 290, which was an action in unlawful detainer, the court held that a tenant, having given timely notice of a desire to extend the period of a lease, was entitled to retain possession even though the lease provided that in such case the future rental was to be fixed by arbitration. Under such circumstances and for the purposes of that action it was held that the essence of the contract was the renewal of the lease and that the fixing of the future rental was merely incidental thereto. Not only was that not a case of specific performance but the court determined the right of possession only, and specifically did not pass upon the question as to whether a court of equity might fix the future rental. Not only is that case not applicable here, where we are concerned with specific performance, and where the right to purchase the property is so closely connected with the fixing of the purchase price, which has never been done, but that case was decided upon facts which arose before our arbitration statutes were amended in 1927 and at a time when no complete remedy for the refusal to arbitrate was provided. The inferences which respondent would draw from that case are not applicable here. Similar considerations obtain with respect to the other case in this state relied upon by the respondent. Glenn v. Bacon, 86 Cal.App. 58, 260 P. 559. That also was a case in unlawful detainer and while it was held that under the agreement there in question there was a right to extend the term of a lease the court made no attempt to fix the amount of the rental for the extended time.

[8] The respondent further argues that the appellant waived any right to arbitration by not asking the court to stay this action as provided for in section 1284, Code of Civil Procedure. It may first be observed that the appellant was hardly in a position to ask for such a stay since that section provides that it is not to be granted to an applicant therefor who is in default in proceeding with the arbitration. The appellant was not waiving arbitration of the price and terms but, as it appears from the record, was denying the respondent's right to purchase the property at all on the ground that the option provisions of the lease were separable from the lease itself, and that the option to purchase had never been assigned to the respondent with the consent of the lessor. In any event, the burden of proof was upon the respondent to establish his case and it was incumbent upon him to show that he was entitled to specific performance.

[9] The only other point which need be considered is appellant's contention that the respondent has no right to maintain this or any other action because the option to purchase the property had never been assigned to him with the written consent of the lessor. This contention is without merit as we, at least impliedly, held in our former decision where the same point was presented. In re Bewick, 49 Cal.App.2d 287, 121 P.2d 815. The lease provided that the lessee could not assign the lease or any interest therein except on the written consent of the lessor and that the lessee could not assign any option to purchase contained in the lease, or any interest in such option, without the writ-

ten consent of the lessor. The assignment of this lease to the respondent, dated September 12, 1930, makes particular reference to this lease and assigns to the respondent all of the lessee's right, title and interest in and to that instrument. The lessor signed a written consent to that assignment, describing it as transferring to the respondent all of Lombard's "right, title and interest in and to that certain lease herein mentioned," and particularly describing that lease. On October 1, 1934, an agreement was entered into between the respondent and the lessor in which it was agreed that the rental should be reduced for a certain time and in which it was provided that "it is mutually agreed—that Richard H. Bewick is the owner of said lease and entitled to all of the rights and privileges thereunder." The option to purchase the property was by the lease given to the lessee, the respondent became that lessee by the written consent of the lessor, and it must be held that the assignment of the lease, and the consent thereto, included the assignment of the option to purchase the property.

It appears that the respondent has mistaken his remedy and that he cannot maintain this action in specific performance under the circumstances here appearing.

For the reasons given, the judgment is reversed.

MARKS and GRIFFIN, JJ., concur.

KRELING v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 14420.

District Court of Appeal, Second District, Division 1, California.

March 28, 1944.

Rehearing Denied April 13, 1944.

Hearing Granted May 26, 1944.

Prohibition ⚷26

Where Superior Court judge, in answer to petition for writ of prohibition to restrain him from trying action in which petitioner was a party, admitted that he expressed opinion as to petitioner's lack of credibility, as alleged in petition, petitioner was entitled to peremptory writ.

Original proceeding by Mike Kreling for a writ of prohibition to restrain the Superior Court in and for the County of Los Angeles and Myron Westover and Stanley Mosk, Judges thereof, from hearing and trying three actions pending in such court.

Peremptory writ granted.

Leo V. Youngworth, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, and Alfred Gitelson, all of Los Angeles, for respondents.

WHITE, Justice.

This is a petition for a writ of prohibition to restrain the Superior Court of Los Angeles County and Honorable Stanley Mosk, a Judge thereof, from hearing and trying three certain actions now pending in respondent Court, and in which actions petitioner herein appears as a party litigant.

For a detailed statement of the factual situation presented and the issues raised by this petition, see Kreling v. Superior Court, etc., 146 P.2d 935, wherein we ruled adversely to respondents upon their demurrer challenging the sufficiency of the petition herein as not stating facts sufficient to constitute a cause of action for the issuance of a writ of prohibition; and wherein we also ruled upon respondents' motion to strike therefrom certain portions of the petition for a writ.

Upon the return day fixed by us in the Order to Show Cause why a peremptory writ of prohibition should not issue it was agreed that should respondent's demurrer be overruled, and after decision upon their motion to strike they should have additional time within which to file an answer to the petition for a writ.

The answer, as now filed, does not dispute the facts taken as they are from the transcript of proceedings had at the trial, and as recited in our opinion above mentioned wherein we ruled upon the demurrer and motion to strike. Judge Mosk does not deny the statements allegedly made by him of and concerning petitioner when rendering his decision upon the affirmative defense interposed in action numbered 483841. In fact, by his answer to the petition herein, he candidly admits having made the statements set forth in the petition for a writ.

It therefore follows that Judge Mosk having admittedly expressed an opinion as to the lack of credibility on the part of petitioner herein, the latter, for the reasons stated in Kreling v. Superior Court, etc., supra, is clearly entitled to the writ he seeks.

In directing the issuance of the writ, it is obvious that it should be confined in its application to the particular judge of the respondent Court whose disqualifications are herein passed upon.

Let the peremptory writ, as thus limited, issue.

YORK, P. J., and DORAN, J., concur.

63 Cal.App.2d 679

PEOPLE v. LONG.

Cr. No. 3741.

District Court of Appeal, Second District, Division 3, California.

April 4, 1944.

1. Criminal law 🔑1170½(5, 5½)
Witnesses 🔑274(1), 282¾

In prosecution for statutory rape and for violation of statute relating to crimes against children, where pictures showing nude body of the girl were introduced in evidence, defendant denied having taken the pictures, and after examination and cross-examination of character witness had been completed court suggested that pictures be shown witness who was then further cross-examined, and who did not alter his testimony regarding general reputation of defendant, there was reversible error. Pen.Code, § 288.

2. Witnesses 🔑274(1)

The fact that character witness shared in what he testified was the general belief regarding defendant's good general reputation for morality in the community did not shift the basis for his testimony or open door for cross-examination as to individual estimation of the witness.

3. Criminal law 🔑1186(4)

The phrase "miscarriage of justice," as used in Constitution prohibiting reversal unless appellate court determines that error has caused a miscarriage of justice, does not merely mean that a guilty man has escaped or an innocent man has been convicted, but is also applicable where an acquittal or conviction has resulted from a form of trial in which the essential rights of accused or the people were disregarded, and the sufficiency of evidence to sustain the conviction is not the test whether a miscarriage of justice has occurred. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

4. Criminal law 🔑1186(4)

Where grave error has been committed and reviewing court cannot with a feeling of assurance say that without the error a conviction would not have been had, it is duty of court to reverse the judgment. Const. art. 6, § 4½.

5. Criminal law 🔑1186(4)

In prosecution for sex crimes, action of trial court which was such as to cast discredit upon character evidence introduced by defendant which was substantially all the evidence defendant had to offer in his defense in addition to his own denials required a reversal as causing a "miscarriage of justice", where the reviewing court was not satisfied that without the error a conviction would have been had. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Gilbert Lee Long was convicted of statutory rape and of violating the statute relating to crimes against children, and he appeals.

Reversed.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendant was convicted by verdict of a jury of two offenses of statutory rape and one of violation of section 288 of the Penal Code. He appeals from the judgments and from an order denying his motion for new trial. The prosecuting witness was his step-daughter of the age of 13 years. She testified that the first offense of rape charged was committed January 29, 1943, the offense of violation of section 288 shortly thereafter, and the second offense of rape on February 10, 1943, all of them in the home of the parties and in the absence therefrom of her mother. The mother was employed and left the home between 6:30 and 7 o'clock in the morning, returning about 4:30 in the afternoon. Defendant went to work about the time his wife returned. The girl left for school early in the morning and returned home about 3:30. No other person lived in the house. The offenses were alleged to have been committed after the child's return from school and before her mother returned from work.

Defendant presents an analysis of the evidence in the case and an argument for reversal of the judgments and order upon the ground of insufficiency of the evidence. It is essentially an appeal to this court to overthrow the conviction upon a theory that would require us to hold that the testimony of the prosecutrix did not amount to substantial evidence that defendant committed the acts charged. Prosecutrix is shown by her testimony to be a child of normal intelligence. Her testimony as to the acts of defendant of which she accused him was positive and explicit. There was, in our opinion, nothing unbelievable in the story which she related. Her mother had been married to defendant about a year and a half but defendant had lived in a room over her garage prior to the marriage. Prosecutrix testified to an act of rape committed by defendant when she was 10 years of age and that defendant had made attempts as often as once a month to commit the same offense from that time until the time of the offenses charged. She made no complaint to her mother until after the date of the latest offense charged, following which defendant was promptly arrested. She had lived with her mother ever since she was 10 years of age but before that had spent some time in Arizona with her father, he and her mother having been divorced. There were certain contradictions in the testimony of the prosecutrix to which we shall refer, and except for these and the denials of defendant of any and all acts of wrong-doing to which prosecutrix testified, it can be fairly said that her testimony was not contradicted in any material particular. There was evidence which, if believed, would have shown that one of the dates stated in the information was incorrect, but this evidence was not such as would have shown that the prosecutrix had willfully given false testimony. Upon the other hand, there was little, if any, corroboration, unless her complaint made to her mother be considered as some corroboration of her charges. And we might except also evidence concerning certain pictures that had been taken of prosecutrix and which were placed in evidence by the People. These were eight in number. She testified that they had been taken by the defendant in the home and with her camera. Defendant admitted having taken the film out of the camera; there was testimony by a police officer that he took the roll of film out of defendant's sweater pocket at the place of his employment, had the film developed and pictures printed. Prosecutrix testified in great detail as to the circumstances under which the pictures were taken; that defendant had forced her to disrobe and when she protested and fought against it had forcibly taken her clothes off, and had struck and threatened her until she had assumed the poses depicted in the pictures. She testified that one of the acts of rape charged immediately followed the taking of the pictures. The pictures themselves, showing the nude body of the girl, were in poses that could have suggested themselves only to one without moral sense. One who had looked at the pictures would not put it beyond the one who took them to commit acts such as those of which defendant was accused. Defendant's version of the picture episode is that upon returning from work one day he observed a boy running out of the back door of the house, who departed so suddenly that defendant was unable to recognize him; that he found prosecutrix in the house clad only in a slip and that upon inquiry she told him that the boy had been taking some pictures of her on the veranda and that they were landscape pictures; that defendant inquired whether the film was in the camera, learned that it was, took it out and later gave it to his wife and that he did not see it afterwards. The wife denied ever having seen or having had possession of the film. Defendant testified that his sweater and one which belonged to his wife had been purchased at the same time, that they were identical and were used interchangeably. There was no contradiction of this testimony. It also appeared that defendant's wife accompanied the officer to the plant where defendant worked on the occasion when the film was taken from defendant's sweater pocket.

In his defense defendant called a number of witnesses who testified to his good general reputation for morality in the community in which he resided. One of these was Everett C. Mills, a Minister of the Gospel, who had known defendant for 8 or 10 years and had visited at his home. He testified on cross-examination that he and defendant had at least 20 mutual acquaintances, that defendant had a good reputation in the community for morality and

"A. The folks in the community that I know speak well of him, everyone that I know and that I have met.

"Q. There are few of us that have general reputations, the community is too large, but those people that you know and know of this defendant speak well of him? A. Yes, sir." After the cross-examination had been completed there was some redirect examination, at the close of which the following took place:

"Mr. Gleason: [defendant's counsel] That is all, your Honor.

"The Court: Is that all Mr. Loucks?

"Mr. Loucks: That is all, your Honor.

"The Court: Let Mr. Everett see this Exhibit No. 8, those eight photographs. Where are they? Will you look at those, Mr. Everett. I should have said Mr. Mills. I beg your pardon. That is all.

"Mr. Loucks: May I ask one question based on that?

"The Court: Yes.

"Q. By Mr. Loucks: Mr. Mills, if you knew that the defendant took those photographs of Irene, would your opinion be the same as to his general reputation for morality?

"Mr. Gleason: To which I will object.

"Q. By Mr. Loucks: You heard the question, did you not? A. Not very plainly.

"Mr. Loucks: Will you re-read the question?

"The Court: Reframe it.

"Q. By Mr. Loucks: Mr. Mills, having seen these eight photographs, and if you knew that the defendant took those photographs of Irene would your testimony as to the defendant's reputation be the same?

"Mr. Gleason: To which I will object on the ground that it is immaterial, outside of the issues, not proper impeachment and not proper cross examination, and on the further ground that it has nothing to do with the evidence or reputation of this defendant. That is merely, if it is true, it would merely be an act of one given time under certain circumstances which would not go to determine the man's character or his reputation for morality in that community.

"The Court: Well, the witness has based his statements partially on what he himself knows about the defendant. The objection is overruled. You may answer it, Mr. Mills.

"A. Repeat the question.

"The Court: Read it now. (Question read.) A. Well, that is a hard question to answer.

"Q. By Mr. Loucks: What is difficult about it, Mr. Mills? A. That would be a hard question to answer.

"The Court: Let's try. Mr. Mills, what is your answer? A. Knowing the man as I do, it would not change my thought toward him one particle.

"Mr. Loucks: That is all.

"Mr. Gleason: I also want to—For the purpose of the record—object to the Court's direction of this witness' attention to these pictures on the ground that there was no question presented by the Court to this witness about these pictures so that I could interpose an objection of any sort, the Court merely having directed the witness' attention to the pictures, and not followed it up with any question of any sort, and I declare that is error at this time and prejudicial to the defendant, having been done in the presence of the jury.

"The Court: The objection is overruled. Is that all now from Mr. Mills?"

[1] This action upon the part of the court was, in our opinion, highly prejudicial to the rights of the defendant. The District Attorney had not endeavored to make use of the pictures upon cross-examination in an effort to cause the witness to change his testimony as to the reputation of defendant. This procedure was sug-

gested by the judge, and the District Attorney, as was to be expected, followed the suggestion. He had not been remiss in the performance of his duties in any particular; he was conducting a vigorous prosecution and had cross-examined the witness in a competent and thorough manner. The questioning of the witness in the manner suggested by the court was not proper cross-examination.

[2] It is true that the witness had testified, in answer to questions by the District Attorney, that he took into consideration his own belief as to defendant's good character, but this statement, elicited on cross-examination, was purely incidental and did not go to the substance of the testimony. It is clear from the entire examination, especially the cross-examination, that the witness distinguished between his own estimate of defendant's character, based upon personal acquaintance and knowledge, and the matter of defendant's general reputation in the community for morality. He was shown to be qualified to testify as to defendant's general reputation and he expressly stated that he testified from what he had been told and had heard said of defendant by mutual acquaintances and friends. His own belief in the defendant's good character was not given as the basis of his testimony but was an additional fact brought out by the District Attorney. The fact that the witness shared in what he testified was the general belief did not shift the basis for his testimony or open the door for the character of cross-examination suggested by the judge. It is too plain to require discussion that the taking of the pictures by defendant under the circumstances testified to would have had no bearing upon his general reputation. The jury could not have given proper consideration to the character testimony unless they understood that the reputation of the defendant as to the trait in question was the estimation in which he was held in the community, and not merely what the several character witnesses thought of him. The questioning of the witness as directed by the court plainly suggested that the individual estimation of the witness was an important, if not a controlling, factor and it clearly tended to mislead and confuse the jury. But the harm did not come alone from the irrelevancy of the matter inquired about; it came also, and with far greater force, from the action of the judge in assuming the role of prosecutor. Whether consciously or not, the judge aligned himself with the prosecution, and the jurors could not have failed to realize that he had done so. If the District Attorney had propounded his questions without prompting by the court it would have been the duty of the judge to sustain objections to them as improper cross-examination. In that case the ruling would have indicated to the jury that the testimony of the character witnesses was to be weighed according to its intrinsic worth and was not to be confused with specific accusations which had been made against defendant, the truth of which he had not admitted. There was manifested, in the direction of the judge that the pictures be shown to the witness, that in the opinion of the judge, at least, an examination of the pictures would or should cause the witness to change his belief as to the general reputation of defendant and to alter his testimony accordingly. The witness did not change his previous answers, and of course if he had done so, the result would have been harmful to the defendant. The fact that the witness did not change his answers was also harmful, for the jurors must have believed that in the opinion of the judge an examination of the pictures would or should cause him to alter his testimony, else the judge would not have directed that they be shown to him. And when the witness, after protesting that the question was a difficult one, was obliged to again state his belief based in part upon the supposition that defendant had taken the pictures, and still was of the belief that he enjoyed a good reputation, the jurors might well have concluded, in view of the judge's attitude in the matter, that the witness was unworthy of belief. Certainly the injection of this irrelevant and highly prejudicial matter at the instance of the judge made it extremely difficult, if not impossible, for the jurors to give proper consideration to the testimony of the witness and to the character testimony as a whole. An improper cross-examination of a witness who testifies to a defendant's good character in a criminal case may be productive of much harm, as by the unwarranted suggestion that defendant has been guilty of wrongful or criminal acts other than those with which he is charged, and where prejudice has resulted from such cross-examination, judgements of conviction have been reversed. People v. McDaniel, 1943, 59 Cal.App.2d 672, 140 P.2d 88. Here we have much more than

improper cross-examination of a character witness. Mr. Mills was obliged to assume the culpability of defendant in extraneous and irrelevant matters and then to either stand by his original answer or alter it and, in addition to that, there was discernible in the conduct of the judge his belief that the witness should change his testimony. The inevitable effect of all this was to deprive defendant of the right to have the character testimony weighed by the jury fairly, impartially and judically.

It is well understood that cases of this type must be tried with the utmost fairness and impartiality in order that the defendant may receive a fair trial. Accusations such as were made by defendant's step-daughter of themselves arouse feelings of animosity and prejudice against the accused, and the testimony of the accuser in such cases frequently is, and in this case it certainly was, of such a nature as to depict the defendant as a depraved individual. In People v. Adams, 1939, 14 Cal.2d 154, at pages 167, 168, 93 P.2d 146, at page 152, it was said: "In such a situation, the only defense available, ordinarily, to the accused is his own denial of any asserted misconduct, together with evidence of a former good reputation; otherwise, he is utterly defenseless and at the mercy of a jury which probably is very much prejudiced. * * * It is because of the recognized existence of the case with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind that courts are at pains to insist upon fair trials in all respects being accorded to the accused. Errors committed either by the prosecution or by the court in the course of the trial, which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse effect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved." And in People v. Putnam, 1942, 20 Cal.2d 885, at page 891, 129 P.2d 367, at page 370, it was said, "It has long been recognized that there is no class of prosecutions 'attended with so much danger, or which afford so ample an opportunity for the free play of malice or private vengeance.' [Citing] People v. Benson, supra [1856, 6 Cal. 221, 65 Am. Dec. 506]; see People v. Lucas, supra [1940, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485]; People v. Adams, supra; People v. Baldwin [1897], 117 Cal. 244, 49 P. 186; [and] People v. Vaughan, supra [1933, 131 Cal.App. 265, 21 P.2d 438]." Our courts have many times quoted People v. Benson, supra, to the same effect.

In determining whether error committed in a case of this sort has been sufficiently prejudicial to require a reversal, a reviewing court is in the difficult situation of having no opportunity to observe the prosecutrix and the defendant as witnesses in the case. It sometimes appears even from the printed record that a strong case of guilt was not made out, and in such a case it may be the clear duty of the court to reverse the judgment for errors which would not justify a reversal in a case where guilt was clearly shown. But even if the evidence is not such as to affirmatively show that the case of the People was a weak one, it does not necessarily follow that it was a strong case. The verdict of guilt may have been rendered by jurors who were so strongly convinced of defendant's guilt as to have been entirely uninfluenced by errors or misconduct at the trial, or the scales may have been so evenly balanced as between the testimony of the complaining witness and that of the defendant that the errors or misconduct tipped the balance against the defendant.

We have carefully considered the entire evidence in order to determine whether there has been a miscarriage of justice. The prosecutrix had testified upon direct examination that an offense of rape was committed on February 10, 1943, in the living room of the home and she gave an explicit account of what took place. Upon cross-examination she testified as follows:

"Q. By Mr. Gleason: All right. Where were you that afternoon when this act occurred, that is, I am talking now about Wednesday, February the 10th? A. I don't really remember now whether it was upstairs or down in the house.

"Q. Do you remember how the act took place? A. No, I don't.

"Q. You don't remember any of the details about it? A. No, I don't.

"Q. You don't remember how you were dressed or how he was daressed, do you? A. He was dressed as usual in his work clothes.

"Q. Do you remember that? A. Yes, I remember that because I never saw him in the afternoon except when he was in his work clothes, except maybe on Tuesday.

"Q. That is the only reason that you now say that he was dressed that way because that was his usual custom, is that it? A. Yes.

"Q. But you have no independent recollection that that was the way he was dressed on that occasion? A. No.

"Q. You could not remember now how you were dressed on that occasion? A. No, I don't.

"Q. Now, you don't remember anything about that particular act of intercourse other than you know it was an act of intercourse, is that it? A. That is right.

"Q. You don't remember whether you had the act standing up, sitting up or lying down or how? A. It was lying down; I know that.

"Q. How do you remember that? A. Because all of them were lying down.

"Q. You remember that because the acts you had in the past were always in a lying position? A. Yes.

"Q. So that is how you remember on this particular occasion that you were lying down? A. Yes.

"Q. But you have no independent recollection that you were lying down when you had this act of intercourse with him? A. No.

"Q. Do you remember—Do you have any independent recollection as to whether or not it was on the bed or on the floor? A. No.

"Q. Do you have any independent recollection whether it was under the covers or on top of the bed covers? A. I don't know if it was on the bed.

"Q. In other words, you don't remember anything about that particular act of intercourse? A. Not now, I don't.

"Q. And that was the day before Mr. Long was arrested? A. Yes.

"Q. And do you know whether you had more than one act of intercourse with him that day or just the one? A. Just the one.

"Q. And that was all that occurred, that is to say, was just one act of intercourse with the defendant, until your mother came home? A. That is right.

"Q. How long before your mother came home did this act of intercourse take place? A. I don't know.

"Q. How long after you got home from school did the act of intercourse take place? A. I don't know that either.

"Q. What time did you get home from school that day? A. 3:30.

"Q. How long did the act of intercourse take? A. I don't know.

"Q. Do you have any independent recollection now as to whether or not he removed your clothing on this occasion when he had this act of intercourse with you on February the 10th? A. No.

"Q. You then really don't remember or you have no recollection of what he did? A. I have no recollection of what he did.

"Q. In other words, you don't know whether he did take your clothes off or did not? A. That is right."

She had testified at the preliminary examination to acts of the defendant in addition to those testified to at the trial, and when questioned about them by the court at the trial could not remember whether they had occurred. Such contradictions in the testimony of the witness did not necessarily prove her to be unworthy of belief, but they might well have raised serious doubts in the minds of the jury as to her credibility. The fact that the prosecutrix made no complaint to her mother as to defendant's frequent assaults upon her for a period of some three years, half of that time before her mother married defendant, was a circumstance that might or might not have led the jury to question the truth of her accusations. There was ample evidence to sustain a guilty verdict reached after an unbiased and dispassionate consideration of the evidence, but this of course is not the test in determining whether there has been a miscarriage of justice.

[3, 4] In People v. Wilson, 1913, 23 Cal. App. 513, at page 524, 138 P. 971, at page 975, it was said: "The phrase 'miscarriage of justice' does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive

them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.'" Section 4½, Article VI of the Constitution, requires that convictions be affirmed notwithstanding errors at the trial, if it appears from the record on appeal that the errors were not of sufficient gravity as to probably have influenced the verdict. This situation may exist where the errors are not considered to be grave ones or, although the errors be serious, the evidence of guilt is yet so strong as to cause a reviewing court to believe that the result would have been the same if the errors had not been committed. But where grave error has been committed and the reviewing court cannot with a feeling of assurance say that without the error a conviction would have been had, it becomes the duty of the court to reverse the judgment. People v. Degnen, 1925, 70 Cal.App. 567, 606, 234 P. 129; People v. Davis, 1930, 210 Cal. 540, 556, 293 P. 32; People v. MacPhee, 1914, 26 Cal.App. 218, 226, 146 P. 522; People v. Patubo, 1937, 9 Cal.2d 537, 543, 71 P.2d 270, 113 A.L.R. 1303; People v. Duvernay, 1941, 43 Cal. App.2d 823, 829, 111 P.2d 659; People v. Mahoney, 1927, 201 Cal. 618, 627, 258 P. 607; People v. Williams, 1942, 55 Cal.App. 2d 696, 131 P.2d 851.

[5] It cannot be doubted that the court committed grave error in directing the use of the pictures in the cross-examination of the witness Mills. As we have said, the greatest harm came from the manifestation of the court's attitude toward the defense. Any conduct of the judge in a case of this nature which is susceptible of a reasonable interpretation by the jury that the judge is of the opinion that the defendant should be convicted cannot fail to have a potent influence on the jury. Where the question of guilt or innocence depends upon the jury's appraisal of the credibility of the accuser and the accused, which is frequently one of great difficulty, any conduct or remarks of the judge evidencing a departure from an attitude of strict impartiality and evidencing belief or disbelief of the testimony of the prosecutrix or of that of the defendant or his witnesses cannot fail to have a persuasive effect upon the minds of the jury. We believe the court's attitude in the instant case was such as to cast discredit upon the character evidence introduced by the defendant. This evidence was substantially all the defendant had to offer in his defense, in addition to his own denials. It was legitimate testimony and it was given by witnesses who were not shown to have had any motive to testify untruthfully. If given proper consideration by the jury, it might have been sufficient, with other beliefs reasonably based upon the evidence, to raise a reasonable doubt in the minds of the jury that defendant was guilty of the acts charged.

We are of the opinion that the prejudice resulting from the error we have discussed was more grave and harmful than would have been the failure to give a cautionary instruction, which has been held to be reversible error in cases of this sort where there is slight, if any, corroboration of the testimony of the prosecuting witness, and the court is not satisfied that the verdict would have been the same if the instruction had been given. People v. Putnam, 1942, 20 Cal.2d 885, 889, 129 P.2d 367; People v. Vaughan, 1933, 131 Cal.App. 265, 273, 21 P.2d 438; People v. Williams, 1942, 55 Cal.App.2d 696, 700, 131 P.2d 851. The court's direction of the cross-examination, with its obvious implications, not only tended to discredit the testimony of the character witnesses for defendant but was such as to practically foreclose his chances of an acquittal. We are not satisfied that without the error a conviction would have been had.

The judgment and order denying motion for new trial are reversed.

DESMOND, P. J., and BISHOP, Justice pro tem.

63 Cal.App.2d 742

WATTS v. D. & B. OIL CO.

Civ. 14033.

District Court of Appeal, Second District, Division 3, California.

April 10, 1944.

Constitutional law ⚷309(2)

Corporations ⚷500

Statutes which authorized service of process on secretary of state where domestic corporation had not designated agent for service of process and which imposed no duty on county clerk after receipt of process from secretary of state were unconstitutional as denying corporation "due process of law" and service attempted thereunder was ineffective. Code Civ.Proc. § 411, subd. 1, § 473; Civ.Code, § 373.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Emerson Watts against D. & B. Oil Company on a series of notes and a claim for money. A judgment by default was secured against the defendant. From an order denying a motion to vacate the default judgment and to quash purported service of summons, the defendant appeals.

Order reversed and cause remanded with directions.

Arthur C. Fisher, of Los Angeles, for appellant.

Don R. Lehman and A. A. Goldstone, both of Los Angeles, for respondent.

DESMOND, Presiding Justice.

The plaintiff in this case, as assignee of a series of notes and a claim for money, secured a judgment by default against the defendant, a California corporation, on March 24, 1942. Counsel for defendant, appearing specially four months later, on July 23, 1942, gave notice of his intention to move to vacate the default entered in the action, as well as the default judgment, and to quash the purported service of summons. On August 27, 1942, the trial court denied said motion "without prejudice to the filing of a motion under Section 473 of the Code of Civil Procedure."

Counsel for appellant made no motion under section 473 but appeals from the order and undertakes to state his case as follows: "The sole question involved in this appeal is whether service on the Secretary of State, instead of service on the officers of a domestic corporation, is provided for by Section 411, Subdivision 1, of the Code of Civil Procedure, and, if so, is said section valid and constitutional. An examination of the transcript will disclose the fact that the appellant herein maintained its office in the City of Pasadena at all times involved in the litigation, and was listed in the telephone directory of the Los Angeles Extended Area at all times mentioned in the complaint; that plaintiff and plaintiff's attorney knew the address of appellant and the whereabouts of its officers, but proceeded on the theory that Section 411, Subdivision 1, of the Code of Civil Procedure required service on the Secretary of State instead of on the officers of the corporation."

Replying, the respondent states that: "At the time the action herein was commenced and summons and complaint served, the only method available for service under Section 373 of the Civil Code upon a California corporation which had failed to file in the office of the Secretary of State a designation of agent upon whom process could be served was service upon the Secretary of State. The defendant had failed to file such a designation, and summons and complaint were served upon the defendant by serving the Secretary of State pursuant to the statute."

Section 411 of the Code of Civil Procedure appears in Title V of Part II of that code, under the caption, "Manner of Commencing Civil Actions," and subdivision 1 thereof, in the year 1942 when the instant case was filed, provided that summons must be served upon domestic corporations by delivering a copy to one of various named officers or a person designated for process or authorized to receive same "if the corporation is an insurance company or is subject to the jurisdiction of the Railroad Commission; if such corporation is a bank or trust company, to any of the foregoing officers or agents thereof, or to a cashier or an assistant cashier thereof; otherwise, pursuant to Section 373 of the Civil Code." The defendant corporation in the instant case is not an insurance company or subject to the jurisdiction of the Railroad

Commission; it is not a bank or trust company; therefore, counsel for plaintiff undertook to effect service of summons by resort to section 373 of the Civil Code under the direction contained in section 411 of the Code of Civil Procedure.

Section 373 of the Civil Code is found in that part of the code dealing generally in matters concerning corporations of various kinds, including foreign and domestic corporations. In the year 1942 it provided in its first two paragraphs that: "Every domestic corporation other than a bank, trust company, insurance company or a corporation subject to the jurisdiction of the Railroad Commission may file with the Secretary of State a certificate by the secretary or an assistant secretary thereof, designating a natural person residing within the State as its agent for the purpose of service of process and stating the complete business and residence address of such agent and the name and complete business and residence address of its president or other head, vice president or vice presidents, secretary, assistant secretary or assistant secretaries and general manager and the location and address of its principal office. The person named in the certificate as such agent may but need not be one of such officers. Service of any process against any such domestic corporation which has not filed such a certificate may be made by delivering a copy thereof to the Secretary of State or to any person employed in his office in the capacity of assistant or deputy. * * *" Section 373 also provided: *"Order for service on Secretary of State.* If personal service of process against such domestic corporation can not be made with the exercise of due diligence as hereinabove provided and the fact appears by affidavit to the satisfaction of the court or a judge thereof, such court or judge may make an order that the service be made upon such corporation by delivering to the Secretary of State, or to any person employed in his office in the capacity of assistant or deputy, one copy of such order and one copy of such process for each defendant to be served. Service in such manner shall be and constitute personal service upon such corporation. *Forwarding of copies.* Upon the delivery, to the Secretary of State or to an assistant or deputy, of any such copy or copies pursuant to this section, the Secretary of State shall forward the same to the corporation by registered mail, with request for return receipt, addressed to the corporation at its principal office in this State, as shown by such certificate or certificates on file in his office or, if such certificate has not been filed, as shown by any other document on file in his office disclosing the location and address of such principal office, otherwise addressed to such corporation in care of the county clerk of the county in which its principal office or place of business is located. The defendant shall appear and answer within 30 days after delivery of such copies to the Secretary of State. * * *" There is nothing in section 373 from which a determination can be made of what constitutes "due diligence as hereinabove provided", and there is nothing in the record to show that any court or judge ever made an order in the instant case that service upon the defendant corporation might be made by delivering to the Secretary of State, or any person employed in his office, a copy of such order. This language and this condition results in confusion—we might say, "confusion worse confounded" by the simple language that "service in such manner shall be and constitute personal service upon such corporation."

Prior to the hearing on the motion to vacate and quash, an affidavit was filed by the vice-president and manager of the defendant company, from which it appears that the defendant company for many months prior to the commencement of the instant action had maintained a business office at 35 North Arroyo Parkway, Pasadena, and during all that time the name of the defendant, with the address and telephone number of the company, had appeared in the telephone directory; that said office had been open during business hours for the transaction of business, except on Sundays and public holidays; that at all times since the commencement of the action and for many months previously thereto, he had been in charge of the business office and, further, that the plaintiff and the plaintiff's attorney and the plaintiff's assignors "have at all times known of the location of the office of the D. & B. Oil Company, and of the names of the officers of the corporation upon whom service of process could be

Counsel for the plaintiff later filed an affidavit prior to the hearing upon the motion in which there was no denial of the allegations of the foregoing affidavit and from which it appeared that on February 6, 1942, when the complaint in this case was filed, an attachment was levied, of which he believes the defendant was informed. It also appears from this affidavit that in an effort to resolve the confusion arising from the code sections, which we have mentioned, he concluded from reading an article in the Los Angeles Daily Journal and another in the State Bar Journal "that the only way that service of process could validly be made upon the above-named defendant was in the manner in which service was actually made and that such procedure was followed."

From an affidavit of the Acting Secretary of State, it appeared that the complaint and summons had been delivered to him on February 11, 1942, pursuant to section 373 of the Civil Code of the State of California, for the purpose of serving the defendant, D. & B. Oil Company, therewith. From this affidavit it appeared also that the defendant company was incorporated under the laws of the State of California and at the time of service had not been dissolved and had not filed in his office the certificate provided for but not required by section 373. The affidavit of the Secretary of State further showed that on February 11, 1942, he had transmitted the copies of complaint and summons to said defendant by mailing to the County Clerk of the County of Los Angeles, in which the principal office of the corporation was located, a sealed envelop containing said copies and a letter stating the fact of delivery thereof.

So far as the record discloses the process still rests in the hands of the County Clerk of Los Angeles County since, under section 373 of the Civil Code, no duty devolves upon him to dispose of the process received from the Secretary of State. The County Clerk was in the same position in Bruhnke v. Golden West Wineries, Inc., 1942, 56 Cal. App.2d Supp. 943, 132 P.2d 102 where it was held, as indicated in the syllabus, that: "The 1941 amendments to Civ.Code, § 373, and Code Civ.Proc., § 411, subd. 1, making service of process upon the Secretary of State mandatory in most cases as the only means of achieving legal service upon a domestic corporation, unless the latter has filed a certificate with such secretary designating a natural person within the state as its agent for the purpose of serving process, and imposing no duty upon the county clerk to do anything with the process after it is mailed to him by the Secretary of State, violate the due process clauses of both the federal and state Constitutions, in that the code provisions are indefinite, uncertain and not subject to reasonable construction, and that they confer a greater right upon a foreign corporation than upon a domestic corporation." The appeal in the Bruhnke case presents problems almost exactly like those presented in the instant case and the opinion contains an interesting and learned dissertation upon the subject of due process of law as related to substituted service. This opinion was filed since the appeal in the instant case was taken and answers satisfactorily all questions presented by said appeal. The appellant relies upon it and since it is easily available in our reports, we need not quote from it at length, but merely note that the cause was remanded to the trial court with instructions to vacate and set aside the default of the defendant and the judgment.

Respondent believes that the Bruhnke case "is in direct conflict with Olender v. Crystalline Mining Company, 149 Cal. 482, 86 P. 1082, and decisions by the U. S. Supreme Court and the U. S. Circuit Court of Appeals cited * * *." We have considered all these cases, including State of Washington ex rel. Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361, 53 S.Ct. 624, 77 L.Ed. 1256, noted in 89 A.L.R. 662, and Badger Dome Oil Co. v. Hallam, 8 Cir., 99 F.2d 293, and noted the differences between them and the instant case. We are satisfied that the reasoning in the Bruhnke case should prevail. Incidentally, we note that both the questioned sections, 411, Code Civ.Proc., and 373, Civ. Code, have been amended since the opinion in the Bruhnke case was published and at least some of the confusion caused by those sections in 1941 has been eliminated.

The order is reversed and the cause remanded to the trial court for appropriate action in accordance with the views herein expressed, each party to bear his own costs.

SHINN and PARKER WOOD, JJ., concur.

CORONA MINING CO. v. OLDEN et al.

OLDEN et al. v. CORONA MINING CO.

Civ. 12530.

District Court of Appeal, First District, Division 1, California.

April 17, 1944.

Rehearing Denied May 17, 1944.
Hearing Denied June 15, 1944.

1. Mines and minerals ⚷101

Under defendants' contract to work mineral lease on shares, requiring payment of royalties to plaintiff's assignor from profits, but failing to specify which party should pay royalties if no profits were realized, defendants could not recover for plaintiff's failure to pay royalties, resulting in cancellation of lease, where no profits were realized.

2. Mines and minerals ⚷101

Defendants' contract to work mineral lease assigned to plaintiff by third party, pay expenses from proceeds of operation, and pay royalties to assignor from profits, was an agreement to work on shares, though in the form of a sublease, and defendants would not be liable for failure to pay royalties, resulting in cancellation of lease, if they attempted in good faith to develop property but realized no profit.

3. Mines and minerals ⚷101

In action for breach of contract to work mineral lease on shares, based on defendants' failure to pay royalties to plaintiff's assignor, resulting in cancellation of lease, conflicting evidence as to whether defendants exercised good faith in endeavoring to develop property and realize sufficient profits to pay royalties was for jury.

4. Trial ⚷178

On defendant's motion for directed verdict, all evidence in conflict with plaintiff's evidence must be disregarded.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action for breach of contract by the Corona Mining Company against William F. Olden and others, doing business under the firm name and style of the Twin Peaks Mining Company, wherein a counterclaim was filed. From the judgment, all parties appeal.

Affirmed in part, and reversed in part, with directions.

Treadwell & Laughlin, of San Francisco, for appellant Corona Mining Co.

Millington, Grover, Comaich & Baumgarten, of San Francisco (Herbert Pothier, of San Francisco, of counsel), for respondent Twin Peaks Mining Co.

WARD, Justice.

Plaintiff brought this action to recover from defendants William F. Olden, V. L. Sheridan, Guy Morley and Arthur Sieroty, doing business under the name of Twin Peaks Mining Company, damages for the breach of an agreement existing between them, by the terms of which the defendants undertook to extract and mill ore from certain mineral-bearing lands known as the Corona mine. The defendants denied the breach, and counterclaimed, alleging that the plaintiff itself had failed to comply with the terms of the agreement in that it had neglected to pay certain royalties to J. T. Flynn in connection with his lease of the Corona mine, which lease had been assigned to plaintiff in consideration of the payment of such royalties. Defendants further averred that, by reason of the non-payment of such royalties, Flynn cancelled the sublease, in consequence of which they had been damaged in the sum of $2,469.64, the amount of advances made by them under said agreement which were to be reimbursed to them from net profits to be derived from the operation of the mine and which were not forthcoming by reason of such cancellation.

It appears from the record that the Corona mine is a quicksilver mining property of about 88 acres situated in the Cat Hill Mining District in the county of Napa, and owned by Vallejo Quicksilver Mining Company. This company leased the property to T. J. Flynn, reserving certain royalties and also granting an option to purchase for $65,000. Flynn assigned to W. H. Tuggle, Dallas H. Gray and Edward R. Rodgers, reserving a gross royalty of ten per cent, with a monthly minimum of $200 and an annual minimum of $5,000. Tuggle, Gray and Rodgers assigned to the plaintiff.

Plaintiff operated the mine for about two months after the date of the assignment, March 29, 1941, incurring an indebtedness for a furnace and other improvements placed on the property. It subsequently became unable to meet its payroll and on November 12, 1941, shut down, being at that time entirely without funds. On November 18, 1941 it subleased the Corona property with certain exceptions to defendants, who owned property nearby known as Twin Peaks, on which was a mill for treating quicksilver ore. As the construction of this sublease and agreement is one of the principal questions to be decided on this appeal we quote it practically in its entirety:

"This Agreement, made this 18th day of November, 1941 by and between Corona Mining Company, a California Corporation, having its principal place of business at and in the City and County of San Francisco, California, sublessor, and hereinafter referred to as First Party, and William F. Olden, V. L. Sheridan, Guy Morley and Arthur Sieroty, co-partners all of the State of California, doing business under fictitious name and style of Twin Peaks Mining Company, having its principal place of business at and in the City and County of San Francisco, California, sublessee, hereinafter referred to as Second Parties.

"I.

"In consideration of the payments and covenants and agreements hereinafter mentioned the First Party does by these presents sublease to the Second Parties, for the term hereinafter specified, the following described mining claims and real property situated in Cat Hill Mining District, Napa County, California, more particularly described as follows; to-wit: ......

"II.

"Subject, to the terms, covenants and agreements of that certain lease, pertaining to the within described property, heretofore executed by and between The Vallejo Quicksilver Mining Company, a corporation, lessor and T. J. Flynn, of San Mateo, California, lessee, on the 6th day of November 1940;

"III.

"And subject to the terms and conditions of that certain assignment of Option to Purchase the within described property, executed on the 29th day of March, 1941, by and between T. J. Flynn, therein designated as assignor and W. H. Tuggle, Dallas H. Gray and Edward R. Rodgers, therein designated as assignee.

"IV.

"And subject to the terms and conditions of that certain assignment of Option to Purchase the within described mining property, executed on the 19th day of April, 1941 by and between W. H. Tuggle, Dallas H. Gray and Edward R. Rodgers, therein designated as assignors and the Corona Mining Company, a California Corporation, therein designated as assignee.

"V.

"To have and to hold unto the Second Parties for the term, with all the rights and powers conferred by and coextensive with that certain lease and assignments referred to in Paragraphs II, III, IV of this agreement.

"VI.

"The Parties hereto further covenant and agree:

"A.

"That Second Parties shall endeavor to produce an average of thirty (30) tons of ore per day on said premises and shall employ the customary number of men and supply the customary equipment, materials and supplies to produce said quantity of ore.

"B.

"That Second Parties shall mill seven hundred fifty (750) tons of ore from said premises per month, subject however, to breakdown of equipment, inability to obtain supplies necessary for operation, strike, destruction of equipment, act of God or inability to operate for any cause whatever for which the Second Parties may not be responsible.

* * * * *

"D.

"That Second Parties shall exclusively manage and control all operations and developments of Second Parties on said premises and receive an allowance therefor in the sum of Two Hundred ($200.00) Dollars Per month, to be charged as operating expenses.

"E.

"That Second Parties shall operate and develop said mine; produce the ore therefrom and mill the same on its own premises and in its own furnace and the mining operations shall be carried on in an efficient and workman like manner.

"F.

"That all necessary mining, operating, development and milling expenses incurred by Second Parties only shall be charged against the gross proceeds of sale of minerals of any kind, including quicksilver produced from said premises, and upon charging the same, the net proceeds shall be divided equally between the parties hereto.

"G.

"That expenses incurred for repairs to furnace on Second Parties land and all equipment used for or incidental to production shall be charged against gross proceeds in proportion to the use made of furnace and equipment on ore produced from within described premises and the use of furnace and equipment in production from the Second Parties own mining premises.

"H.

"Second Parties shall be allowed the customary depreciation on all equipment used in said operations, except furnace, in the same proportion as in last paragraph mentioned.

"I.

"Royalties provided in the lease and assignments referred to and described in Paragraphs II, III, IV, shall be charged as operating expenses, and any operations carried on by First Party, royalties shall be paid direct by First Party on its own gross production.

"J.

"That First Party shall faithfully and promptly pay said royalties to the parties entitled thereto immediately upon receipts thereof from Second Parties and immediately thereafter produce to Second Parties evidence of payment.

"K.

"That First Party upon payment of all sums in said lease provided and any sums due T. J. Flynn, as provided in said option to purchase, shall take title to within premises in its name at such time and Second Parties' name, in equal charges, provided this agreement is in full force and effect.

"L.

"That Second Parties shall have and keep accurate and detailed accounts and records of all transactions pertaining to this venture and shall have them available to First Party at all reasonable times.

"M.

"Second Parties shall render a full and complete account of all transactions pertaining to the within on or before the 10th day of each consecutive month commencing January 1st, 1942, covering the preceding calendar month or until the last prior accounting and any losses incurred in any accounting period may be charged against operating expenses in the succeeding accounting period or periods until Second Parties have been reimbursed for such loss.

"N.

"First Party shall have right at all reasonable times to visit and inspect said premises and the premises of Second Parties where furnace is located to determine the progress of operations.

"O.

"Second Parties shall sell mineral production at prices in line with current market.

"P.

"That Second Parties shall not permit any lien of any kind to be created or levied against the within premises by reason of any act or default on its part only.

"R.

"That First Party only shall be liable for each and all outstanding and unpaid obligations incurred by it or with its consent prior to execution hereof, except as herein expressly recognized by Second Parties.

"S.

"That, if to protect its investment, Second Parties should pay any obligation not herein expressly assumed, the amount so paid shall be changed [charged] against any net proceeds due or to become due First Party.

"T.

"That either of the parties hereto shall have and are hereby granted the right to cancel the within lease and agreement upon thirty (30) days notice by registered mail of such intention except that the right of cancellation shall be terminated if not exercised on or before the 1st day of November, 1944.

"U.

"That Second Parties shall advance First Party Fifteen Hundred ($1500.00) Dollars on execution of this agreement to be repaid by First Party at rate of ten per cent (10%) of its net from operation under this agreement beginning February 10, 1942.

"V.

"The First Party hereby warrants that it is not in default of any of the provisions or terms of the lease and assignments referred to in Paragraphs II, III, IV herein. * * *"

At the time of entering into this agreement the plaintiff had paid the royalties reserved except $200 due November 1, 1941, and this it paid on November 19, 1941 from money advanced to it by the defendants under the provision of subdivision U of the agreement; the defendants knew that the plaintiff was without funds to pay further royalties, and the money so advanced was used principally to discharge the payroll obligations of the plaintiff.

While the plaintiff retained certain portions of the Corona property all quicksilver thereafter produced, on which royalties became payable, was produced from that portion of the property leased to defendants, and no quicksilver was produced on the portion retained by the plaintiff.

The record further shows that the defendants did not produce an average of 30 tons of ore per day, and did not mill 750 tons per month, but milled only 130 tons in three months; nor did they pay or deliver to plaintiff the royalties required by the Flynn lease. The defendants were notified by plaintiff that it had no money to pay the royalties and that unless they were paid by the defendants the lease would be cancelled. Payment of the royalties not being made Flynn cancelled the lease. It was further shown, in support of an averment in the complaint to that effect, that defendants knew that plaintiff had no means, and entered into the agreement so that the royalties would be paid and the lease preserved, and that the loss of the lease was a damage within the contemplation of the parties.

The cause was tried before a jury, and at the conclusion of the evidence the court directed a verdict for the defendants on plaintiff's cause of action, and a verdict for the plaintiff on defendants' counterclaim. In ruling the trial court stated the grounds of its decision as follows: "The case is ended. The Court, of course, is called upon to determine the issues of law involved in the case, and among the questions of law involved is the question of the interpretation of this so-called contract between the Corona and the Twin Peaks. In one of the clauses of the agreement is a certain provision concerning the question of the payment of this royalty. And the Court finds that Twin Peaks—I am not finding this as a matter of infringing on your province, but as a matter of law—that there is nothing in the contract that creates a covenant on behalf of the Twin Peaks to pay this royalty; but all the contract provides is that when the royalty is paid, it shall be paid—shall be charged to operating expenses, which means that out of the division of net profits, if there is any, then the so-called royalty is to be reflected in the nature of costs. So, in the opinion of the Court, there cannot be found any interpretation from the entire contract amounting to a covenant on the part of the Twin Peaks to pay that amount, or to do anything other than as I have stated.

"Now, as to the cross-complaint, that was paid during the time that both parties were in operation under the agreement, and the other $900 went into the property which is now in the hands of the Twin Peaks in order to prevent liens, and they now having the property, there will be no recovery on that."

Plaintiff and defendants have both appealed.

Upon the theory that it was plaintiff's duty to pay the royalties, defendants sought recovery by cross-complaint, contending that its failure to pay them constituted a breach of the contract. An examination of the contract discloses no assumption by the Twin Peaks Mining Company to pay such royalties. In the absence of sufficient funds from the operation of the properties, the contract does not specify which of the parties is to pay. The only duty imposed upon plaintiff would be to minimize damages resulting from nonpayment by paying the royalties to the extent of its ability to do so.

[1] Defendants failed to show that the cancellation of the lease prevented them from realizing profits out of which royalties due prior to the cancellation could have been paid. However, the evidence does in fact show that the Twin Peaks' operation of the mine was unprofitable. The contract contemplated payment out of net profits. In view of the evidence that there were none, the order directing a nonsuit against defendants on the cross-complaint was proper.

Taking up the appeal of the plaintiff, the plaintiff contends that, quite apart from any provision of the contract requiring the defendant to pay the royalties reserved by the Flynn lease, they were as a matter of law liable for them on minerals extracted by them while in possession of the property. It also contends that, while the agreement contains no direct covenant on the part of the defendants to pay the royalties, its proper construction so requires. It further contends that on the evidence it should have been left to the jury to determine whether the defendants had failed to comply with the terms of the agreement in the matter of production from the mine; and also whether such failure was excused under subdivision B thereof.

The defendants introduced evidence tending to show that ore taken from the Corona mine was different in character from that produced from the Twin Peaks mine; that on account of the high sulphur content of the Corona ore they had trouble in making their furnace work; that it took two weeks to adjust the furnace so as to properly handle the Corona ore; that they had to make changes in the burner and condenser system of their furnace and that, prior to entering into the agreement, they had had no experience in treating ore of the particular characteristics of that taken from the Corona mine.

Defendants also introduced evidence tending to show that from the end of November 1941 all through the winter there was almost continuous rain, making the road between the Corona and Twin Peaks mines almost impassable; one witness testified that the defendants were not able to take out 750 tons of ore because of the bad weather conditions; that the weather conditions were so bad that a truck could not get up the hill to the mine; that the road was "pretty well gummed up" most of the time. Another witness, Moody, who was accustomed to make regular deliveries of oil to both mines, testified that he went into Corona and Twin Peaks mines on November 19th, December 2d, 5th and 30th; that when he went there on December 5th the road was in bad shape and he "got stuck", that he had to do road building under his car in order to get out; that he refused to go to the mines from December 5th to 30th because the road was in bad shape; that his truck weighed 13,500 pounds loaded and 7,600 pounds net. On the subjects of the weather and the condition of the road, evidence introduced by the plaintiff tended to show that the ore had to be hauled only a mile from Corona to Twin Peaks furnace; that a witness, Tuggle, had no difficulty reaching the property in the latter part of January; that one Shrode had no difficulty in reaching the property between November 18th and January 9th; that Moody reached the property without difficulty on November 6th, 7th, 17th, 19th, December 2nd, 30th, January 13th, 14th, 16th, 20th and 26th; that the only day he had trouble was on December 5th; that he demanded that defendants fix the road, and their failure to do so was the reason he made no oil deliveries between December 5th and 30th. There was also evidence tending to show that defendants actually hauled ore on days when the rain-fall was greatest, and that the rain-fall during the period in question, both in monthly and annual amounts, was less than in other years.

[2] Upon the theory that the instrument was an assignment, plaintiff advances the argument that the Twin Peaks Mining Company was by operation of law liable for rents and royalties and contends that it makes no difference whether the agreement constituted actually an assignment or a sublease—it appears that either party had the right of cancellation; that under its terms defendants became liable for rents which accrued during their possession and royalties upon minerals extracted. Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163. In the Hartman case the court was dealing with an instrument referred to as an assignment. In the present case the agreement is in the form of a sublease and is so designated, but it is in fact an agreement to work the property on a share and share basis, that is, as tenants in common. An oil lease is different from the usual usufructuary lease in commerce and trade. Stone v. City of Los Angeles, 114 Cal.App. 192, 299 P. 838; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871. The Hartman case is an oil case wherein damages and a forfeiture of the lease were prayed by reason of alleged failure to protect against "drainage." The equity plea in that action was not upheld due to failure to name the holders of the parent lease as parties to the action. Wilful drainage when so pronounced by triers of the facts may justify a liberal construction of the terms of an agreement. Nevertheless in the Hartman case, 10 Cal. 2d at page 243, 73 P.2d at page 1168, the court said: "By virtue of our decision in Barkhaus v. Producers' Fruit Co., 192 Cal. 200, 219 P. 435, followed in Kendis v. Cohn, 90 Cal.App. 41, 48, 265 P. 844; Backus v. Duffy, 103 Cal.App. 775, 284 P. 954, and

Webb v. Jones, 88 Cal.App. 20, 27, 263 P. 538, we are committed to the so-called Massachusetts rule that where the transferor reserves the right of re-entry for breach of conditions he has a 'contingent reversionary interest' which prevents his transfer from operating as an assignment of the whole of the unexpired term. Instead, a sublease arises. Dunlap v. Bullard, 131 Mass. 161, 162; Davis v. Vidal, 105 Tex. 444, 151 S.W. 290, 42 L.R.A.,N.S., 1084; Roberson v. Pioneer Gas Co., 173 La. 313, 314, 137 So. 46, 82 A.L.R. 1264, page 1268; Smith v. Sun Oil Co., 165 La. 907, 116 So. 379; Johnson v. Moody, 168 La. 799, 123 So. 330; Saling v. Flesch, 85 Mont. 106, 277 P. 612. The last four citations involved oil leases." An exact estimate of damage by reason of drainage is usually impossible of ascertainment. There was no provision in the instrument for the payment to plaintiff of rental except in the sense of royalties. The very nature of the mining industry ordinarily makes it necessary that royalties be paid from production and by the parties in possession. The agreement herein does not include the entire property leased by its owners to T. J. Flynn, nor are its terms identical with those of such lease. When read in its entirety it is plain that the agreement provided that the property should be worked for the benefit of both parties; that plaintiff should be paid one-half of any net proceeds realized, and that if the option granted should be exercised, title to the property was to be taken in the name of the parties hereto, one-half to plaintiff and the other half to the Twin Peaks Mining Company associates. Though in the form of a sublease it is an agreement to work on shares. 40 Corpus Juris, 991, § 584. The royalties were to be paid upon a percentage basis, and it was provided that defendants should use their best efforts to bring production to specified amounts. All necessary expenses of operation were to be met before the disbursement of funds as royalties. Mere possession of the mine did not obligate defendants to pay royalties to Flynn.

We agree with the trial court's interpretation of the contract between "Corona and Twin Peaks" that as a matter of law there was no covenant in the contract requiring the latter company to pay royalties unless they were charged to operating expenses—which in effect necessitated a net profit—and that there was no evidence of a net profit.

Another question arose, however, namely, did the defendants in good faith endeavor to develop the property in accordance with the provisions of clauses "A" and "B" of the contract. It may be that due to "breakdown of equipment, inability to obtain supplies necessary for operation", etc., defendants were unable to pay Corona an amount sufficient to enable the latter to pay the designated royalties, etc.

[3] Defendants introduced evidence tending to substantiate their claim that, due to weather conditions, the mine was for a long time inaccessible, and that this resulted in a total or partial discontinuance of operation. Plaintiff introduced evidence of witnesses who without difficulty actually visited the mine on certain days during the time in question. It is possible that a passenger automobile could travel the road when a truck could not. There is a conflict in the evidence, a matter that should be determined as a question of fact.

[4] On a motion for a directed verdict "all evidence in conflict with the plaintiff's evidence must be disregarded." In re Estate of Flood, 217 Cal. 763, 769, 21 P.2d 579, 581; In re Estate of Arnold, 16 Cal. 2d 573, 107 P.2d 25; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; Martin v. Tully, 44 Cal.App.2d 226, 112 P.2d 282; Perkins v. Maiden, 57 Cal.App.2d 46, 134 P.2d 30; Barton v. Capitol Market, 57 Cal. App.2d 516, 134 P.2d 847.

The portion of the judgment in favor of defendants is reversed with directions, if plaintiff so elects, to proceed in accordance with the views expressed herein; the portion of the judgment against defendants on the cross-complaint based upon the verdict is affirmed, each party to pay its own costs.

PETERS, P. J., and KNIGHT, J., concur.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

64 Cal.App.2d 6

ORLOFF v. MOSHER et al.

Civ. 3128.

District Court of Appeal, Fourth District, California.

April 19, 1944.

1. Action ⚷65

In action in partition and to quiet title brought against plaintiff's former wife and others, the execution of a deed by the wife to plaintiff after action was brought did not destroy plaintiff's cause of action as against other defendants claiming an interest in the real estate.

2. Deeds ⚷199

Testimony as to the circumstances surrounding the signing of a deed in blank was competent to show that the deed was incomplete and invalid.

3. Deeds ⚷32

A deed which failed to designate any grantee and was not acknowledged at time of execution was void in the absence of circumstances showing the application of doctrine of estoppel.

4. Deeds ⚷207

Grantor's testimony that deed signed by him was not acknowledged and that no grantee was designated therein when deposited with agent, supported by grantee's sworn statement that he acted only as a "dummy" in the transactions and had no interest therein, sustained finding that deed was void.

5. Estoppel ⚷118

Evidence failed to establish any circumstances which would estop owner from asserting title to land, of which he was presumptively in possession, as against persons claiming under one whose title was based on a fraudulent deed.

6. Limitation of actions ⚷60(10)

Grantor, who executed deed in blank which was left with real estate broker who fraudulently completed and delivered deed to another, was not compelled to proceed against broker through an action for fraud upon discovery of broker's disappearance, and grantor's action to quiet title, which was not brought within three years after discovery of broker's fraud, was not barred as against persons claiming under the fraudulent deed.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Peter I. Orloff against Cleon Mosher and others in partition and to quiet title. From a decree quieting title in plaintiff, defendants Dorothy L. Brockman and Mary Katherine Wolfrum, as administratrix of the estate of Frank Pruher, deceased, appeal.

Affirmed.

Paul Staniford, of Fresno, and Walter H. Young, of Los Angeles, for appellants.

Chester R. Andrews, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action in partition and to quiet title. The complaint alleged that a certain 160 acres of land in Fresno County was owned as joint tenants by the plaintiff and Cleon Mosher, who was formerly the wife of the plaintiff. About two months after the action was filed Cleon Mosher conveyed her interest in the property to the plaintiff and a supplemental complaint was filed alleging that fact. An answer and cross-complaint were filed by defendant Dorothy L. Brockman, who claimed to be the owner of 40 acres of this land under a deed to her from Frank Pruher. Frank Pruher died and the administratrix of his estate was substituted as a defendant and filed an answer in which it was alleged that said estate is the owner of another 80 acres of the land.

At the conclusion of the plaintiff's case the defendant Brockman moved for a nonsuit. A ruling on this motion was reserved. The matter was not again called to the attention of the court and no ruling was made. Evidence was put in by the answering defendant and rebuttal evidence by the plaintiff followed.

The court found in all respects in favor of the plaintiff and against the answering defendants. Among other things, it was found that the plaintiff and Cleon Mosher were the owners as joint tenants of the property in question; that Cleon Mosher had by deed conveyed her interest in the property to the plaintiff; that as a result of this conveyance a partition of said real property is not desirable or proper; that the plaintiff owns a fee simple title in and to said property; that no defendant or any other person has any title to or interest in said property; that on October

8, 1931, the plaintiff and the defendant Cleon Mosher, who then owned the property, went to the office of G. C. Harbolt, a duly licensed real estate broker in Los Angeles for the purpose of selling this real property; that Harbolt had informed them that he had a prospective purchaser; that a purchase price of $325 payable in cash was agreed upon between Harbolt and the Orloffs; that the plaintiff suggested that the delivery of the deed and payment of the purchase price should be made through a bank as escrow holder; that Harbolt objected on the ground that this would take too long and the buyer would not wait; that Harbolt suggested that he be the escrow holder, pointing out that he was a real estate broker and that it was customary for such brokers to act as escrow holders; that the Orloffs then consented that Harbolt should be the escrow holder on the condition that the deed should be left blank as to a grantee until the purchase price was paid in cash, that Harbolt would hold the deed in escrow until the purchase price was personally paid to the Orloffs, and that the insertion of the name of the grantee in the deed should take place in the presence and under the direction of the plaintiff after the full payment of the purchase price; that upon these conditions the Orloffs signed and left with Harbolt a deed to the property without any grantee being named therein and without acknowledging either of their signatures; that neither the plaintiff nor the defendant Mosher ever gave to any person any authority to complete, alter, deliver, record or otherwise deal with this deed in any manner other than as above set forth; that in violation of the escrow instructions, and without any authority from the plaintiff or the defendant Mosher, this deed was by some person completed by the forged insertion therein of the name of Frank Pruher as grantee and a false certificate of acknowledgment by a notary public was affixed to said deed; that as so completed by said forgery and by said false certificate of acknowledgment, and without being delivered by the plaintiff or the defendant Mosher, and without any authority given by them said deed was recorded; that by reason of these facts said purported deed to said Frank Pruher was and is null and void; that no interest or title was thereby conveyed to the said Frank Pruher; that the plaintiff and the defendant Mosher had never acknowledged their signatures before a notary public or other officer authorized to take acknowledgments and had never authorized any person to insert the name of a grantee in said deed; that on December 21, 1931, said Pruher executed a deed purporting to convey 40 acres of said property to the said Brockman, which deed was recorded on December 26, 1931; and that on March 8, 1932, said Pruher signed a deed purporting to convey another 40 acres of this property, which is not material on this appeal, to one D. E. Phillips. As conclusions of law, it was found that the plaintiff is the owner in fee simple of the property in question and that neither the answering defendants or any other person has any right, title or interest therein.

A judgment was entered quieting title to the property in the plaintiff and enjoining the defendants from claiming any interest therein. From this judgment the defendant Brockman and the defendant Wolfrum, as administratrix of the estate of Frank Pruher, have separately appealed.

[1] It is first contended that the appellant Brockman's motion for a nonsuit should have been granted. It is argued that the original complaint stated a cause of action for partition as between the plaintiff and his former wife, Cleon Mosher, and that the filing of the supplemental complaint alleging a conveyance of Mrs. Mosher's interest to the respondent utterly destroyed this cause of action, leaving no issue properly before the court. This argument overlooks a number of issues which were raised. In addition to raising an issue as to partition between the respondent and his former wife, the complaint alleged that Frank Pruher and Dorothy L. Brockman claimed an interest in the property, that the extent of such interest, if any, was unknown to the plaintiff, and the prayer was that the interests of the several owners be ascertained and that a partition be had according to the respective rights of the various owners as ascertained by the court. While the complaint is not a model, it raised an issue as to partition as between the plaintiff and the defendants Pruher and Brockman, and as an incident to the several issues of partition it raised the further question of quieting title to the property. The defendant Brockman not only raised the issue of quieting title to 40 acres of the property in her answer but she filed a cross-complaint in which she sought to quiet her own title to that part of the property. The de-

fendant Wolfrum, as administratrix, did not file a cross-complaint but in her answer she fully raised that issue and directly alleged that the plaintiff has no right, title or interest in or to any of the real property described in the complaint. In view of the remaining issues raised by the pleadings the trial court could not properly have granted the motion for a nonsuit.

[2-4] The appellant Brockman next argues that the evidence is insufficient to support the finding that there was no grantee named in the deed from Orloff to Pruher when it was signed and left with Harbolt. It is argued that this finding rests on the testimony of the respondent, that this testimony was not corroborated and that it is, therefore, not sufficient to overcome the presumption of regularity arising from the deed with the official certificate of the notary public attached thereto. The appellant Wolfrum argues in this connection that the court erred in permitting the respondent to testify with respect to his conversations with Harbolt. We know of no rule of evidence which would prevent the respondent, in such a case as this, from testifying as to the circumstances under which he signed a deed which necessarily is the foundation for any title which may be claimed by the appellants. His testimony, which was accepted by the court, fully supports the findings made and an uncompleted deed, executed under such circumstances, is null and void unless other circumstances are present which permit the doctrine of estoppel to be invoked against the persons signing the deed. Trout v. Taylor, 220 Cal. 652, 32 P.2d 968.

Moreover, the respondent's testimony was somewhat corroborated by the reading into evidence of a written statement made by Frank Pruher, under oath, before the district attorney of Los Angeles County in 1932. While it was stipulated that in this statement Frank Pruher had not specifically mentioned any of the property involved in this action, he stated therein that he was in Harbolt's office for some time; that Harbolt furnished him a room in which to live and gave him "whatever he felt like giving me"; that he knew nothing about the transactions in which he participated; that he was acting "as a 'dummy'"; that he took title to a number of properties and then "deeded out" these properties; that he put no money in these properties and that he had no interest in them financially; and that he never knew what property he held title to. There is ample competent evidence to support the finding in question.

[5] The appellant Wolfrum, as administratrix, further contends that the respondent was negligent and guilty of laches and should be held to be estopped from asserting his title to the land. It is argued that an innocent purchaser should be protected under such circumstances. This argument is not very convincing coming from the personal representative of Frank Pruher, who put nothing into the purchase of the land, claimed no interest therein, and allowed himself to be used in this manner. Moreover, it appears, without contradiction, that the respondent did not discover that anyone claimed any interest in the land until approximately a year after Pruher allowed his name to be inserted as grantee in the deed and after he, acting for Harbolt, had executed deeds to the appellant Brockman and to another party for portions of the land. The respondent testified that in 1932, while looking over a map, he saw the names of Dorothy L. Brockman and D. E. Phillips in connection with portions of this land and that he thereafter, without success, endeavored to locate these parties and ascertain what interest they had. No estoppel was pleaded and no real effort was made at the trial to establish facts sufficient to justify a holding of estoppel as against the respondent. If it be assumed that any evidence in the record would have supported such a finding the most that can be said is that a question of fact was presented and the implied finding of the court cannot be disturbed.

[6] The appellant Wolfrum argues that the respondent's claim of title is barred by the statute of limitations, contending that the respondent should have brought an action for fraud within three years after he returned to Harbolt's office, a few days after October 8, 1931, and found that Harbolt had disappeared and that he was unable to get back the deed which he had executed in blank. The respondent has been presumptively in possession of the property (Ward Redwood v. Fortain, 16 Cal.2d 34, 104 P.2d 813), he was not compelled to proceed against Harbolt through an action for fraud, and our attention is called to no statute of limitations which is applicable here.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

63 Cal.App.2d 747

CROUCH v. CROUCH.

Civ. No. 3107.

District Court of Appeal, Fourth District, California.

April 11, 1944.

Hearing Denied June 8, 1944.

1. Appeal and error ⚷994(3), 1011(1), 1012(1)

Question of credibility of witness and weight to be given his testimony are primarily questions addressed to the trier of facts, and trial court's determination on conflicting evidence is conclusive on appeal.

2. Divorce ⚷130

Evidence that wife refused to return property which she had secured prior to their marriage from a man of advanced age as she had promised husband on his explaining that their good reputation might be adversely affected, and that wife cursed and screamed at husband, was sufficient to authorize granting husband a divorce on ground of extreme cruelty. Civ.Code, §§ 92–94.

3. Appeal and error ⚷1170(7)

Prejudicial error did not result from exclusion of evidence, where it was clear that evidence excluded would not have changed trial court's ultimate determination. Const. art. 6, § 4½.

4. Divorce ⚷249(1)

In action for divorce on ground of extreme cruelty, trial court has right to award such portion of community property to offending spouse as it deems reasonable under the circumstances. Civ.Code, § 146.

5. Divorce ⚷252, 286

In action for divorce on ground of extreme cruelty, proportion of community property to be awarded each party depends upon particular circumstances, and it will be presumed that trial court properly exercised its discretion in assigning community property. Civ.Code, § 146.

6. Appeal and error ⚷945

Where trial court has exercised a legal discretion, District Court of Appeal, though clothed with power of revision under statute, will be slow to interfere with that discretion.

7. Divorce ⚷252

Where husband was awarded divorce on ground of extreme cruelty, trial court did not abuse its discretion in awarding wife $2,500 in lieu of wife's share in community property, as against wife's contention that some proportionate share of contingent fees earned by husband in two legal proceedings commenced prior to their marriage was part of community property and that trial court abused its discretion in not giving her a larger amount. Civ.Code, § 146.

◆

Appeals from Superior Court, San Diego County; Franklin G. West, Judge.

Action for divorce by Charles C. Crouch against Ann Crouch, wherein the defendant filed a cross-complaint. From judgment awarding plaintiff a divorce, the defendant appeals, and the plaintiff appeals from that portion of the judgment which awards defendant $2,600 in lieu of any right or interest in the community property.

Affirmed.

Monroe & McInnis and Phil D. Swing, both of San Diego, and George W. Crouch, of Los Angeles, for plaintiff.

Dempster McKee, of San Diego, for defendant.

Ann Crouch, in pro. per.

GRIFFIN, Justice.

Plaintiff Charles C. Crouch was married to defendant Ann Crouch in Yuma, Arizona, on August 26, 1939. They separated on April 18, 1941. On May 3, 1941, plaintiff commenced this action for divorce on the ground of extreme cruelty. Defendant filed an answer and cross-complaint seeking a divorce on the same ground. After a lengthy trial, the court awarded the plaintiff a divorce and, in lieu of any right or interest in the community property, awarded her the sum of $2,500, in addition to the sum of $100 owing from plaintiff to defendant. Defendant appealed from the entire judgment. Plaintiff appealed from the portion of the judgment awarding the defendant $2,600.

It is first contended by defendant that the evidence is insufficient to establish that she had been guilty of extreme cruelty justifying a decree of divorce. Plaintiff contends otherwise.

Plaintiff's complaint alleges several distinct acts of claimed extreme cruelty inflicted upon him by defendant. In the main it is found by the trial court that since said marriage the defendant has treated the plaintiff with extreme cruelty which caused the plaintiff grievous mental and physical suffering and which conduct on defendant's part "destroyed the legitimate objects of matrimony and made a continuation of the marriage relation between" them impossible. That said acts of cruelty are more particularly described as follows, to wit: (a) Sometime prior to the marriage of plaintiff and defendant the defendant was living in the City of Santa Barbara in the home of one William Goetsch, a man of advanced years. Prior to the marriage of the plaintiff and the defendant Goetsch deeded to defendant several improved parcels of real estate in said city and transferred to her certain money and funds. The court found, in reference to the matter, that prior to their marriage, defendant stated to plaintiff that she considered the said William Goetsch an utterly incompetent person; that prior to their marriage plaintiff explained to defendant that his good name and reputation, as well as hers, would be adversely affected by the notoriety incident to any effort on the part of the said William Goetsch or his relatives or friends if they tried to recover the said property and money; that plaintiff exacted a promise from the defendant that immediately after their marriage she would reconvey the said property to the said Goetsch and return to him the said money; that on frequent occasions after their said marriage, plaintiff urged the defendant to keep her promise; that he could not afford to have his wife's name brought into any litigation concerning the matter, and in which it would probably be alleged that at the time the said properties and monies were conveyed to her the said William Goetsch was under her undue influence; that each time plaintiff so urged the defendant, she would either change the subject or make a promise to take care of the matter sometime in the future, but that she failed to make such reconveyances; that on September 13, 1939, plaintiff learned that friends and relatives of Goetsch were threatening to make trouble concerning the matter, and on that date he wrote a letter to him offering to reconvey the property and requested the defendant to sign and mail it; that she refused to do so and plaintiff informed her that if she did not sign and mail it he would leave her and never live with her as her husband thereafter; that thereupon the defendant flew into a violent rage, cursed and swore, and accused the plaintiff of improper motives; that she stated that if she didn't keep the money and property someone else would take it away from him; that thereafter Goetsch came to San Diego and told various friends and employees of the plaintiff that defendant had taken all of his property away from him and left him a pauper, to the great humiliation and shame of the plaintiff; that at that time defendant again promised that she would reconvey the property to him; that thereafter defendant received numerous communications from the brother of said Goetsch requesting a return of the property, which defendant concealed from plaintiff and that the next thing he knew of the matter was when he was called on the telephone by a deputy sheriff informing him that a complaint and summons had been issued from Santa Barbara against her concerning that property; that plaintiff then forced her to go to Santa Barbara and stop the litigation; that she secured a dismissal of the suit by reconveying the properties with the exception of $1,000 of money which she had in the bank in the name of her daughter.

It was further found that in January, 1940, plaintiff returned to his home and heard defendant screeching at the top of her voice, cursing and using foul names at and in the presence of her two children; that on February 10, 1940, in a violent rage, defendant cursed plaintiff. It was generally found that on other occasions defendant flew into a violent rage, cursed plaintiff, and on one occasion, in a voice that could be heard for a block which attracted the attention of passers-by on the streets; that at a time when plaintiff did not have any great amount of funds "the conduct of the defendant in running bills and overdrawing her bank account caused the plaintiff worry and interfered with his health and his work. The court's findings above mentioned are supported by the evidence and received some corroboration.

Defendant maintained throughout the trial that there was nothing improper in the manner in which she acquired the property from Mr. Goetsch; that she agreed to care for him for the rest of his life with its revenue and proceeds and was so doing when plaintiff agreed to marry her; that he was the one who caused her to deed the property back and he would not allow her to share her attentions and fulfill her obligation to care for Mr. Goetsch from the revenues of his property; that as a result of the marriage to plaintiff she lost all of her said property. As to the charge of cursing and screaming, she admitted these facts generally, but contended that plaintiff so aggravated her in his conduct that she became hysterical and intimated that she was fully justified in calling him the names she did call him.

[1, 2] The trial court has decided these conflicts in the testimony in favor of plaintiff. The question of the credibility of the witness and the weight to be given his testimony were primarily questions addressed to the trier of fact and the trial court's determination on such conflicting evidence is conclusive on this appeal. If true, the acts proved were sufficient to constitute extreme cruelty within the meaning of the statute. Secs. 92–94, Civ.Code; Hawkins v. Hawkins, 104 Cal.App. 608, 610, 286 P. 747; Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660.

[3] It is next contended that the trial court erred in certain rulings rejecting certain testimony. This evidence bore upon the question as to how well plaintiff knew defendant prior to their marriage. The evidence sought to be elicited was immaterial to the issues. We have examined the entire record and find that both parties were allowed more latitude in the general reception of evidence than would have been necessary. No evidence was excluded or received over objection that had any particular bearing on the questions presented. It is clear that the evidence excluded or received over objection would not have changed the trial court's ultimate determination. No prejudicial error resulted. Art. VI, sec. 4½, Constitution.

The last question presented is the main cause of the appeal. Plaintiff has been a practicing attorney in San Diego for many years. A the time of trial he was 65 years of age and had been previously married to Ivy M. Crouch, who died on June 17, 1938. Four children, now grown, were the issue of the previous marriage. Defendant, aged 50 years, had a son 24 years of age by her first marriage and a daughter 16 years of age by either her second or third marriage. During the days when public improvements were flourishing in San Diego County, plaintiff enjoyed a lucrative practice of the law, but lost such earnings as he then made, during the depression. During the period of his marriage to his first wife he, on September 19, 1936, entered into an agreement with one Austin, whereby he was to represent said Austin in an action against the Hallmark Oil Company to recover certain claimed oil interests. That agreement provided, among other things, that he was to receive a 40 per cent interest in whatever plaintiff might obtain in the event of a recovery. An action was instituted and judgment was obtained for plaintiff in the trial court dated August 14, 1940, as of July 1, 1940. An appeal was subsequently perfected. See Austin v. Hallmark Oil Co., Cal.App., May 15, 1942, 125 P.2d 935. Plaintiff and defendant were married on August 26, 1939. The judgment was modified and affirmed in the Supreme Court on March 11, 1943. Austin v. Hallmark Oil Co., 21 Cal.2d 718, 134 P.2d 777. As a result of that litigation, plaintiff's contingent fee, approximately $100,000, less expenses, became due and payable, but had not been paid at the time the judgment in this action was entered.

In another action, Sefton v. Sefton, plaintiff entered into a written agreement dated October 22, 1936, with Mrs. Sefton, which provided, among other things, that she would pay plaintiff herein one-half of any amount recovered. After the trial of that action a judgment was entered on September 7, 1937. On March 17, 1938, an action was brought, Sefton v. San Diego Trust & Savings Bank et al., Cal.App., 106 P.2d 974. About November 29, 1938, a judgment resulted in favor of plaintiff, and on appeal was by this court, on December 4, 1940, modified and affirmed. A hearing was granted by the Supreme Court. The case was later dismissed. Plaintiff testified that as a result thereof he then collected his contingent fee of approximately $9,600, less expenses.

During the probating of the estate of Ivy M. Crouch, deceased, plaintiff entered into a written agreement with his four children, agreeing that "the parties hereto are desirous of dividing all of the property owned by the said Charles C. Crouch and/or the said Ivy M. Crouch, at the time of her decease, whether separate or community, on the following basis, to wit:" one-half thereof to plaintiff and one-half to the children, share and share alike. It further provided that "whereas, the parties hereto are desirous of settling their respective rights and interests in certain legal cases the party of the first part has on a contingent fee basis * * * the parties hereto agree * * *"; that plaintiff "has a contingent fee in the cases of Sefton v. Sefton, and Austin v. Hallmark Oil Company et al."; that "in the event recovery is had on either or both of said cases then the total fees received by the party of the first part (less the deductions hereinafter mentioned) shall be divided by the parties thereto in the following manner * * * upon the theory that the 'children' are entitled to one-half the amount earned prior to June 17, 1938, the date of the death of said deceased, and plaintiff shall be entitled to the remaining one-half, plus the entire amount earned subsequent to the said 17th day of June, 1938", and should be divided on a "time devoted to" basis.

Defendant argues mainly that the trial court failed to consider her community interest in those contingent fees in awarding her the sum of $2,500; that "had the court been dealing with community property of $100,000, in making a division of the same, he would have given to the defendant the same proportion of the community as he did in his findings and judgment in this case".

Plaintiff and defendant purchased a home and furniture during their marriage state. Plaintiff paid $250 thereon. Defendant paid $100 from her separate funds. The trial court awarded this property to plaintiff as well as other incidental properties, and ordered him to repay the defendant the $100 advanced by her. At the time the trial court made the findings and signed its judgment in the present case the Hallmark Oil Company case had not been finally determined and plaintiff's rights to collect any amount under the agreement had not been decided. Accordingly, any community rights defendant may have had therein were likewise undeterminable. In the Sefton case, as well as the Hallmark Oil Company case, most of the trial work had been completed before plaintiff was married to defendant. See also, Austin v. Turrentine, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178. However, in the Sefton case the money was collected during the existence of the present marriage. Considerable of the balance of the proceeds from that fee was expended in support of the community. This was also true of other smaller accounts collected during their marriage.

[4-7] As we construe defendant's contention, she desires this court to now hold that some proportionate share of the Hallmark Oil Company fee and the Sefton case fee were part of defendant and plaintiff's community property; that we should so segregate it and hold that the trial court abused its discretion in not giving to the defendant a larger amount in her judgment. In this respect the court specifically found as follows:

"Upon the issue of the existence of community property, the Court finds that it is true that plaintiff and defendant acquired during their marriage community property consisting of real and personal property and including certain legal fees earned by plaintiff and to be thereafter earned prior to the final decree of divorce herein, which said community property aggregated more than Five Thousand Dollars ($5000.00). That it is not true that defendant has any interest, community or otherwise, in the oil well located near Bakersfield, California, nor in the Studebaker automobile referred to in defendant's cross complaint nor in either of the contingent attorney's fees earned or to be earned by plaintiff as the result of contingent fee contracts entered into by plaintiff prior to said marriage; and fees collected on said contingent fee contracts or which may hereafter be collected are the separate property of plaintiff. The court further finds that the exact amount and extent of the community property of the parties and the value thereof has not been accurately established herein; but the Court further finds that such exact valuation is immaterial, for the reason that in view of all the facts and circumstances, the Court finds that the amount of Twenty Five Hundred Dollars ($2500.00), and no more, is a fair and reasonable amount to be paid to the defendant by the plaintiff in lieu of all her community interest and her right, title and interest in and to all community property owned by the parties or to be acquired by them in the future. The Court further finds that the defendant is entitled to no greater sum in lieu of her share in any community property. The court further finds that upon payment of said sum of Twenty Five Hundred Dollars ($2500.00) by the plaintiff to the defendant, all of the community property, both real and personal, owned by the parties hereto and in which the defendant has any community interest, heretofore acquired or hereafter to be acquired and in which there exists or may exist any community interest, shall be and is hereby adjudged to be the sole and separate property of the plaintiff. The court further finds that in view of the stipulation of the parties made in open court, said sum of Twenty Five Hundred Dollars ($2500.00) shall be due and payable ninety (90) days from and after the entry of interlocutory decree in this action, unless there be an appeal taken herein. The court further finds that there is due and owing to the defendant from the plaintiff the sum of One Hundred Dollars ($100.00) by reason of monies advanced by defendant to plaintiff, which said sum shall be due and payable immediately upon the entry of the interlocutory decree herein."

This finding clearly shows that the exact community interest of plaintiff and defendant in their property at the time the judgment was entered "has not been accurately established" and that therefore, in lieu of defendant's share therein, the court awarded her $2,500, regardless of the amount or value of the community property. In an action for divorce upon the grounds of extreme cruelty, the trial court has the legal right to award such portion of the community property to the offending spouse as it deems reasonable under the circumstances. It may even deny such party any award whatever if, from all the facts and circumstances of the case and conditions of the parties, it may deem such action just. In an action for divorce on the ground of extreme cruelty, subdivision 1 of section 146 of the Civil Code confers upon the trial court a wide latitude for the exercise of its judgment and discretion in assigning the community property to the respective parties and in every case it will be presumed that such discretion has been wisely and properly exercised, and though impliedly requiring that more than one-half of the community property shall be awarded to the innocent party, it does not otherwise limit the discretion of the trial court in making the award. The proportion should depend upon the particular circumstances of each case, and where the trial court has exercised a legal discretion this court, though clothed with the power of revision under the statute, will be slow to interfere with that discretion. Sec. 146, Civ.Code; Knapp v. Knapp, 23 Cal.App. 10, 136 P. 719; Thomsen v. Thomsen, 31 Cal.App. 185, 159 P. 1054; Eslinger v. Eslinger, 47 Cal. 62; Gorman v. Gorman, 134 Cal. 378, 66 P. 313; Quagelli v. Quagelli, 99 Cal.App. 172, 277 P. 1089; Nave v. Nave, 35 Cal.App. 27, 169 P. 253; Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714.

Under the facts of the present case as found, the judgment of the trial court cannot be disturbed.

Judgment affirmed. Each party to pay his and her costs on appeal.

BARNARD, P. J., and MARKS, J., concur.

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63 Cal.App.2d 733

SEAGREN v. SMITH.

Civ. No. 14341.

District Court of Appeal, Second District, Division 1, California.

April 10, 1944.

Hearing Denied June 8, 1944.

1. Patents 🔑203

Where contract assigning patent and right to manufacture and sell thereunder on a royalty basis provided for cancellation and reassignment on notice, which was given, but manufacture and sale continued, the manufacturer was liable to patentee on theory of implied contract against unjust enrichment.

2. Courts 🔑489(3)

Where contract assigning patent and right to manufacture and sell thereunder on a royalty basis provided for cancellation and reassignment on notice, which was given, but manufacture and sale continued, state court had jurisdiction of that portion of patentee's cause of action which arose after cancellation of agreement on theory of implied contract against unjust enrichment, and also had jurisdiction to grant injunction in respect of continued manufacture and sale after cancellation of original contract and reassignment of patent.

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Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Nils Seagren against R. Stanley Smith for an accounting under a patent license and injunction. From that portion of judgment determining that trial court was without jurisdiction to grant any relief after date of notice cancelling license, the plaintiff appeals.

Reversed, with directions.

Walter G. Danielson, of Los Angeles, for appellant.

Walter E. Smith and Everett H. Mills, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This appeal which is presented on the judgment roll alone is from that portion of a judgment rendered in an action by a patentee for an accounting and injunction against his licensee by which the trial court determined that it was without jurisdiction to grant any relief from and after the date of a notice given to him by the defendant cancelling the license.

From a recitation in appellant's opening brief outlining the factual background of the instant litigation—which is not disputed by respondent,—it appears that appellant is the inventor of a multiple gear rotary pump used in pumping liquids; that the gears are enclosed in a housing in which the pressures on opposite sides of each pumping gear are equalized. Respondent, an engineer of many years experience, has been engaged in various manufacturing enterprises including the manufacture and development of spray guns and rotary meters and since November, 1938, has conducted his business under the name of "Smith Precision Products Company". Appellant's invention is described in and covered by a patent issued to him and dated February 21, 1939. Sometime in November of 1939 appellant entered the employ of respondent, who began the manufacture and sale of pumps covered by appellant's patent. Thereafter, on April 11, 1940, while appellant was employed by respondent, the parties entered into a written agreement by the terms of which respondent agreed to pay appellant certain royalties under the conditions therein set forth and appellant agreed to assign to respondent the "sole right, title and interest in and to the said patent No. 2,147,928, including the right to make, use and sell pumps or mechanisms made in accordance with the invention as claimed or in accordance with any improvements made by Seagren thereon"; royalty payments to be estimated on the net selling price of pumps only and to be made at stated intervals during the life of the agreement. It was provided that the life of the agreement should extend to the expiration date of the patent and it was also provided that respondent "shall have the right at any time to cancel this agreement provided that he shall be liable for the payment of all royalties to such date of cancellation and shall on such cancellation reassign to Seagren all such rights as have been assigned by Seagren to Smith hereunder."

The parties operated under the agreement until November, 1941, when appellant either left respondent's employ or was discharged therefrom, and on December 29, 1941, respondent gave appellant the following Notice of Cancellation of Agreement, to-wit:

"Referring to that certain agreement entered into between us on or about the 11th day of April, 1940, and relating to United States Patent No. 2,147,928, dated February 21, 1939, you are notified that pursuant to the terms of that agreement I hereby cancel the agreement and I hereby transfer and reassign to you all right which you have heretofore assigned to me."

The court found, in addition to the facts hereinbefore recited, "that the royalties on the pumps which were manufactured and sold prior to December 31, 1941, and not previously accounted for by respondent, and on which royalties have not been paid, but on which royalties should have been paid, is the sum of $1,482.11, which sum is due, owing and unpaid.

"XV. That the defendant continued from and after December 31, 1941, to manufacture and sell the same pumps as he was theretofore manufacturing under the Seagren agreement, and at the trial of this cause on April 12, 1943, said defendant was still continuing to manufacture and sell said pumps. The defendant refused to furnish the plaintiff any statements of the number of pumps manufactured and sold after December 31, 1941, refused to pay to plaintiff any royalties on the pumps thus manufactured and sold and refused to, and still refuses to desist and refrain from manufacturing and selling said pumps. The defendant at no time has stopped the manufacture and sale of the same pumps that he was manufacturing prior to December 31, 1941.

"XVI. That the rates of royalties provided in the agreement of April 11, 1940, and heretofore set forth, are reasonable, and computing royalties at said rates on the pumps manufactured and sold from January 1, 1942 to April 9, 1943, the amount thereof is the sum of $1185.13. No part thereof has been paid."

From the facts so found, the court decreed the following conclusions of law:

"1. The plaintiff is entitled to judgment against the defendant in the sum of $1,482.11, together with interest thereon at 7% per annum from January 20, 1942, to date of judgment herein, which represents the royalties on pumps manufactured and sold by the defendant up to December 31, 1941, and as to which he has paid no royalties.

"2. The Court is without jurisdiction to render any injunction or any judgment for royalties or other compensation as to pumps manufactured and sold after December 31, 1941, because the exclusive jurisdiction for the determination of the rights and duties of the parties hereto from and after said date, because of the notice of cancellation given by the defendant and reassignment by him of the patent to the plaintiff, is the District Court of the United States. Were it not for this lack of jurisdiction the plaintiff would be entitled to a judgment of this Court against the defendant in the additional sum of $1185.13 which represents royalties on the pumps manufactured and sold from December 31, 1941 to April 12, 1943, computed at the rates set forth in the agreement of April 11, 1940.

"3. As this court is lacking jurisdiction to give any relief for the acts and conduct of the defendant from and after December 31, 1941, the denial to plaintiff of an injunction and of a judgment for reasonable royalties or compensation for pumps manufactured and sold from and after December 31, 1941, is without prejudice to the plaintiff's right to seek redress and relief in the District Court of the United States, for the acts and conduct of said defendant from and after December 31, 1941."

Judgment was accordingly entered, and this appeal is prosecuted from that portion thereof which denies relief to appellant by way of injunction and royalties for pumps manufactured and sold subsequent to December 31, 1941.

Appellant contends that the court fell into error in not distinguishing between a case under the patent laws, and an action arising out of a contractual relationship. "This is not a case where the plaintiff, either before or after the notice of cancellation, sets 'up a right under the patent laws as ground for a recovery', which is the test to be applied. Deakins v. Superior Court, 90 Cal.App. 630, 266 P. 563. He bases his rights to an accounting and an injunction upon a contractual relationship between him and the defendant. He desires an accounting of all pumps manufactured and sold. As to those manufactured and sold before the notice of cancellation he is entitled to the royalties specified in the contract. As to those after the cancellation he is entitled to reasonable royalties or compensation on the theory of implied contract."

On the question of jurisdiction, it was held by our Supreme Court in Pendleton v. Ferguson, 15 Cal.2d 319, 326, 101 P.2d 81, 85, 688:

"It appears to be the settled rule that while the federal courts have exclusive jurisdiction of all cases arising under the patent laws, such jurisdiction does not extend to all questions in which a patent may be the subject-matter of the controversy, for courts of a state may try questions of title, and may construe and enforce contracts relating to patents.

"As we understand the issues in this case, they simply involve a contract relating to the title to certain patents. A determination of whether or not the relief prayed for should be granted must be arrived at by the application of rules and principles of equity cognizable in the courts of this state and in no degree whatever upon any act of congress concerning patent rights.

"In the case of Luckett v. Delpark, Inc., 270 U.S. 496, 46 S.Ct. 397, 399, 70 L.Ed. 703, the late Chief Justice Taft, in an exhaustive opinion reviewed the cases on this subject and quoted with approval the rule announced by Chief Justice Taney in the case of Wilson v. Sandford, 10 How. 99, 13 L.Ed. 344, which appears to be directly in point in the case at bar. In the case of Luckett v. Delpark, Inc., supra, Chief Justice Taft said:

"'In Wilson v. Sandford, supra, a bill in equity was filed in a federal circuit court setting forth complainant's ownership of a patent, an assignment to defendants of a license in consideration of five promissory notes, with a condition of reversion to complainant on failure to pay any note. The bill averred that the first two notes were not paid, insisted that the license was forfeited by the failure and the licensor was fully reinvested at law and in equity with all his original rights, that the defendants were using the patented machine and were infringing the patent, prayed an account of profits since forfeiture, a temporary and permanent injunction, and a reinvestiture of title in the complainant. On demurrer, the bill was dismissed for lack of jurisdiction as not arising under the patent laws. Chief Justice Taney, speaking for the Court, said:

"‘"The rights of the parties depend altogether upon common-law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited, and the prayer is, ‘that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court,’ and for an injunction. But the injunction he asks for is in consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside; and if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of Congress concerning patent rights."’"

Again, in Davis v. Kittle Mfg. Co., 134 Cal.App. 254, 262, 25 P.2d 253, 256, the court quoting from 20 R.C.L. par. 63, pp. 1181, 1182, said: "‘* * * where an action or suit is brought on a contract of which a patent is the subject-matter, either to enforce the contract or annul it, the case arises on the contract and not under the patent laws, and a state court has jurisdiction. Accordingly, an action may be maintained in a state court to enforce the payments of royalties or license fees—and while it is elementary that a state court has no jurisdiction with respect to a case arising under the patent laws, it is equally well settled that a case involving patent rights does not necessarily "arise under the patent laws", and that a state court has jurisdiction to determine questions relating to patent rights whenever such questions arise incidentally or collaterally to a main cause of action over which a state court has jurisdiction.’ * * * The cause of action is based upon contract, and the matter of patent rights is incidental to the main issue. It therefore follows that our state courts have jurisdiction over the subject matter of this controversy."

Respondent urges—and it was apparently upon this theory that the trial court declined to take jurisdiction of that part of appellant's cause of action which arose after the cancellation of the contract—that the contractual relation between the parties was terminated by the cancellation and therefore appellant's only redress is by an action for infringement in the federal courts.

However, in the case of In re Michigan Motor Specialties Co., D.C., 288 F. 377, which involved a license contract made terminable by its terms in the event the licensee "discontinues its business through insolvency, * * * bankruptcy, * * * or any other cause", it was held that the license terminated in accordance with its own provisions at the time of the adjudication in bankruptcy and the appointment of a receiver, and that the trustee in bankruptcy, who continued the manufacture of the patented articles after the termination of the licensing agreement was liable upon an implied contract to pay a reasonable royalty to the licensor.

In the case of In re Norcor Mfg. Co., 7 Cir., 109 F.2d 407, the Norcor Company by the terms of a written contract agreed to pay one Schmitt a certain stipulated royalty for the exclusive right to manufacture and sell chairs on which said Schmitt had pending an application for a patent. The conditions of the contract were complied with and the contract remained in effect until June 1, 1933, when it terminated by its own terms. Meanwhile on June 28, 1932, the Norcor Company was adjudged a bankrupt and the directors thereof were appointed receivers to carry on the business, at which time all creditors, including Schmitt, were enjoined from taking further action on their claims against the company, although Schmitt by decision of the Supreme Court of Wisconsin was adjudged to have a valid claim antedating the receivership in an amount of $50,514.67. This latter adjudication included the amount due Schmitt under the terms of his contract from June 1, 1929, to June 1, 1933. Thereafter, however, the receivers continued the manufacture of the product described in the contract, which comprised the major portion of the company's business. During this period (subsequent to the expiration of the contract) as before, the receivers enjoyed the sole and exclusive right in respect to manufacture and sale of the chairs, and also during this period Schmitt was enjoined from prosecuting any claim for such use. Schmitt sought to recover the sum of $19,816.91 as royalties for the use of his invention subsequent to the expiration of the contract. The receivers took the position that after the expiration of the contract Schmitt was not entitled to royalties for the use by them of his invention, urging that his claim with respect to the period in question was based upon infringement and that the Special Master appointed to hear the case had no jurisdiction to consider such a claim. Said Master decided against this contention, stating: "I am of the opinion that this is fair and equitable, and that the receivers were operating under an implied contract to pay the same * * * I find that after the expiration of the fourth year of the Schmitt contract, that claimant is entitled to 5% of the invoice of the chairs made and sold by the receivers."

In upholding the Special Master's decision, the Circuit Court of Appeals for the Seventh Circuit in the instant proceeding held (page 409 of 109 F.2d): "* * * we are satisfied the Master reached the proper conclusion. We do not think the opposing contention is sustained by any authorities to which our attention has been called, and certainly it is not sustained by logic or equitable consideration. When the receivers were appointed in the State Court * * * they had knowledge of the contract—in fact, worked and complied with its terms until its expiration. Prior thereto, Schmitt had been enjoined from taking any action looking toward the protection of his rights. The receivers continued, after the expiration of the contract, to manufacture the product the same as they had before. We see no reason why he should not be entitled to reasonable compensation for the use of his property, his invention. No question of infringement was involved—the estate is liable under the circumstances by reason of an implied contract."

Respondent cites the case of Fageol & Tate v. Baird-Bailhache Co., 138 Cal.App. 1, 4, 5 P.2d 75, 76, as authority for his contention heretofore stated. In that case the licensing agreement gave the licensors the right to terminate the agreement in the event of a breach thereof by the licensee and its failure to comply with the terms thereof within thirty days after receipt of a written notice from the licensors of such breach. The court there held: "The provision for the termination of the contract upon default of the licensee was for the benefit of the licensors. Upon default of the licensee, the licensors could either terminate the contract by giving the thirty-day notice therein provided for or they could elect to continue the contract in force and insist on the payment of the royalties as they accrued. They could not do both. Having elected to terminate the contract as of September 25, 1925, the contract came to an end on that date, and neither party thereafter could obtain any new or further rights under it. The license of appellant to manufacture and sell the patented articles ceased on that date, and their obligation to pay future royalties ceased as well."

Such holding is not controlling in the instant case, where the licensee saw fit to cancel the contract and continued to manufacture and sell the pumps to the detriment of licensor.

[1] From what has heretofore been said in this opinion, it is clear that respondent is liable to appellant upon the theory of implied contract based upon the well-recognized and settled principle that a person shall not be permitted to enrich himself unjustly at the expense of another. 17 C.J.S., Contracts, § 6, pp. 322, 323.

[2] Clearly, the trial court had jurisdiction of that portion of appellant's cause of action which arose after the cancellation of the agreement, upon the theory of implied contract. Moreover, it also had jurisdiction to grant an injunction, and upon the authority of Holley v. Hunt, 13 Cal. App.2d 335, 56 P.2d 1240, and Pendleton v. Ferguson, 15 Cal.2d 319, 101 P.2d 81, 688, injunction is a proper remedy under the facts presented by the instant litigation.

For the reasons stated, that portion of the judgment appealed from is reversed, and the lower court is directed to enter judgment for plaintiff in accordance with its finding of fact numbered XVI, for the additional amount as set forth in said finding.

DORAN and WHITE, JJ., concur.

Hearing denied; EDMONDS, J., dissenting.

ROCHE v. ROCHE.*

Civ. 12642.

District Court of Appeal, First District.
Division 2, California.

April 11, 1944.

Hearing Granted June 8, 1944.

1. Divorce ⚷312

Where appeal was taken on judgment roll alone, appellate court was required to assume in support of decree that evidence was sufficient to show that best interests of minor child required the disposition regarding custody made in decree. Civ. Code, § 138.

2. Divorce ⚷301

The presumption regarding parent's right to custody of minor child is rebuttable. Code Civ.Proc. §§ 1962, 1963.

3. Divorce ⚷312

Where divorce decree gave joint custody of minor to parents but provided that the physical care and control, until further order of court, should be placed in paternal grandparents, and appeal was taken on judgment roll alone, appellate court would not modify the decree. Civ.Code, § 138.

SPENCE, J., dissenting.

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Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action for divorce by Margaret Roche against Joseph E. Roche. From portion of decree relating to the custody of a minor female child, plaintiff appeals.

Affirmed.

Phillip Barnett and Robert L. Dreyfus, both of San Francisco, for appellant.

Eugene H. O'Donnell, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued for a divorce on the ground of cruelty and was granted an interlocutory decree. She appeals from the decree as entered directing her attack solely to the portion relating to the custody of the minor female child.

The complaint alleged that this child was of the age of eight years, that plaintiff was a fit and proper person to have its custody and control, and that thirty-five dollars a month was a reasonable sum to be awarded plaintiff for its support and maintenance. The answer pleaded that "said minor child Patricia Roche has been living with the mother of defendant for several years, and that she has not been living with plaintiff, and to remove said minor child from her present abode with defendant's mother would not be beneficial to said child." The trial court found in general terms that the allegations of the complaint, including the paragraph relating to the fitness of plaintiff, were true. But the allegations upon which the prayer for alimony and an award for the support of the minor child were found untrue. As to the custody and care of the minor the trial court made a special finding reading:

"The best interests of the said minor child will be subserved by the following:

"That the joint control of said minor child be awarded to both parents, but it is hereby ordered that the physical care and control thereof, until the further order of this Court be awarded to the paternal grandparents, residing on a ranch near Turlock, California; and it is further ordered that plaintiff be granted the privilege of visiting said child whenever she desires."

[1] The appeal has been taken on the judgment roll alone and hence there is no evidence before us showing upon what facts these findings are based. Such being the case we must assume in support of the judgment that the evidence was sufficient to show that the "best interests" of the minor required the disposition made in the decree. The appellant alone has appeared and filed a brief. When the cause was called for hearing we were informed that the respondent had joined the military services and was unable to appear or procure counsel to represent himself.

[2] In her attack upon this portion of the decree the appellant relies upon Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229; Eddlemon v. Eddlemon, 27 Cal.App.2d 343, 80 P.2d 1009; In re White, 54 Cal.App.2d 637, 129 P.2d 706, and Guardianship of McCoy, 46 Cal.App. 2d 494, 116 P.2d 103. The cases are all to the same purport and rest upon the accepted statement as a legal principle that "before the court can deprive the mother of her right to the minor's custody and give her into the charge of strangers, there must be a finding that the

* Subsequent opinion 152 P.2d 999.

mother is an unfit person to have the custody of her child." Stever v. Stever, supra [6 Cal.2d 166, 56 P.2d 1231]. No case has been cited to the effect that when the trial court has found as a matter of fact, and upon evidence presumably sufficient to support the finding, that "the best interest of the child in respect to its temporal and its mental and moral welfare" (Civil Code, section 138) requires that it be placed temporarily in the care of a third party, or of an institution, the award of the legal "custody" to the parents is not all that the rule of these cases requires. It should be noted that the code section authorizes the trial court to "make such order for the custody, *care, education,* maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same." (Emphasis ours.) The rule of the cited cases is that, because of this presumption (one which is not found in the statutes), the parent has the legal right of "custody" unless found to be unfit. But, whatever presumption may be invoked here, it is clear that it is a rebuttable one because section 1963 of the Code of Civil Procedure declares that all presumptions other than those enumerated in section 1962 are disputable "and may be controverted by other evidence."

[3] Here the question of the best interests of the minor was put in issue by the complaint and the answer and the finding of the trial court cannot be treated as a conclusion of law. It is a finding of fact on a material issue and, since none of the evidence has been brought up, we must assume that the facts proved fully supported the finding. The effect of the decree is that the parents are given joint legal custody of the minor, but that, for reasons which are not disclosed by the record, she should be placed in the care of another, until the further order of the court. It may be that the evidence showed that, though the appellant is morally fit to have the joint legal custody of the minor, she is not physically able to provide for it the care and education which the circumstances require, and that the father, who is also given legal custody, is unable to give the proper care to the minor, because of his absence in military service. But if the conditions and circumstances are changed, the appellant is permitted to apply to the trial court for a modification of the order since section 138 of the Civil Code expressly grants that right. The appellant requests this court to modify the decree by awarding her full custody and control of the minor, and to direct the trial court to award her a reasonable sum for its support and maintenance. In view of the common practice of the divorced wife seeking such awards in order to participate in the pay of those engaged in the military service, this court is disposed to let appellant pursue her remedy in the trial court, where all the facts and circumstances may be inquired into.

The judgment is affirmed.

STURTEVANT, J., concurs.

SPENCE, Justice (dissenting).

I dissent as I can find no justification for the portion of the decree relating to the custody and control of the minor child.

Plaintiff, a resident of San Francisco, sought a divorce and the custody of her eight year old minor daughter. She alleged that she was "a fit and proper person to have the custody and control of said minor child". The answer expressly admitted that plaintiff was a fit and proper person to have such custody and control and the trial court so found. Defendant did not allege that he was a fit and proper person to have such custody but he alleged the facts set forth in the majority opinion. Upon this state of the pleadings the trial court also made the so-called "best interests" finding, and awarded "joint control" to both parents but awarded "physical care and control * * * to the paternal grandparents, residing on a ranch near Turlock, California". The decree did not use the word "custody" but it is obvious that the decree had the practical effect of depriving plaintiff of the care, custody or control of said minor.

The authorities cited by plaintiff declare the salutary rule that "before the court can deprive the mother of her right to the minor's custody and give her into the charge of strangers, there must be a finding that the mother is an unfit person to have the custody of her child." Stever v. Stever, 6 Cal.2d 166, 170, 56 P.2d 1229; see also Newby v. Newby, 55 Cal.App. 114, 202 P. 891; Eddlemon v. Eddlemon, 27 Cal.App.2d 343, 80 P.2d 1009; In re White, 54 Cal.App.2d 637, 129 P.2d 706; Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103; In re Mathews' Estate, 174 Cal. 679, 164 P. 8. These authorities announce a rule of substantive law as well as a presumption. The presumption referred to in the authorities played its part in such cases as Stever v. Stever, supra, and Newby v. Newby, supra, where the record on appeal contained neither evidence nor finding regarding fitness. In the present case, however, the trial court made an affirmative finding of fitness and all reference to a presumption with respect to fitness appears to be beside the point in the present discussion.

When the trial court determined and found in the present case that plaintiff was a fit and proper person to have the custody of her minor daughter, the rule of substantive law enunciated in the cited cases required that the custody of the minor be awarded to plaintiff rather than to the child's paternal grandparents. Under these circumstances, the so-called "best interests" finding became a wholly immaterial finding. As was said in Eddlemon v. Eddlemon, 27 Cal.App.2d 343, at page 344, 80 P.2d 1009, at page 1010: "The question here presented has been before our courts in the cases of Newby v. Newby, 55 Cal.App. 114, 202 P. 891, and Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, in both of which it was held that before a court can take the custody of a minor child under the age of fourteen years away from its parents and place it in a stranger (in the Stever Case, in its grandparents) it must find that the parent seeking custody of the child is unfit to have such custody." And in Re White, 54 Cal.App.2d 637, at page 640, 129 P.2d 706, at page 708, it was said: "The right of a parent to the care and custody of a child cannot be taken away merely because the court may believe some third person can give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to the care and custody of a minor child, and this right can only be forfeited by a parent upon proof that the parent is unfit to have such care and custody." See also In re Mathews' Estate, 174 Cal. 679, 164 P. 8.

The only theory upon which the decree herein may be affirmed is that the law permits parents, who are found by the trial court to be fit and proper persons, to be deprived of custody and control of their children whenever the trial court believes and finds that some third person can give the children greater advantages. I find no support for this theory in reason or authority. On the contrary, any such theory appears to be out of harmony with the authorities cited and to be violative of every accepted concept of the natural and legal rights of such parents.

In my opinion, the portion of the decree relating to the custody and control of the minor child should be reversed.

64 Cal.App.2d 12

STYRING et al. v. CITY OF SANTA ANA et al.

Civ. 3264.

District Court of Appeal, Fourth District, California.

April 19, 1944.

1. Municipal corporations 🔑64

The Municipal Corporation Act serves as the charter of those municipalities incorporated pursuant to its provisions, and Legislature has much more power to regulate affairs of such unchartered cities than it has over cities organized under a charter. St.1883, p. 93; Const. art. 11, § 6.

2. Statutes 🔑94(1)

A municipal corporation is neither a "county" nor a "township" within constitutional provision prohibiting adoption of special laws regulating county and township business. Const. art. 4, § 25, subd. 9.

See Words and Phrases, Permanent Edition, for all other definitions of "County" and "Township".

3. Statutes 🔑102(3)

The statute requiring cities, fire districts, etc., having regularly organized, paid fire departments to grant regular or permanent members thereof leaves of absence from active duty of not less than 15 days in each year and four working shifts in every month of service, does not affect salaries to be paid firemen so as to violate constitutional provision prohibiting passage of a local or special law affecting fees or salary of any officer. Gen.Laws 1937, Act 2598; Const. art. 4, § 25, subd. 29.

4. Statutes 🔑68, 77(1)

A law which affects one class of citizens who are distinguished from others outside the class by an intrinsic, natural, and reasonable ground for distinction is "general" and not "special".

See Words and Phrases, Permanent Edition, for all other definitions of **"General Law"** and **"Special Law"**.

5. Statutes ⚷94(1)

The statute requiring cities, fire districts, etc., having regularly organized, paid fire departments to grant regular or permanent members thereof leaves of absence from active duty of not less than 15 days in each year and four working shifts in each month of service, is not unconstitutional as being "special legislation" but is "general legislation" in view of reasonable ground for classification.

6. Mandamus ⚷73(1)
Master and servant ⚷13(4)

The statute requiring cities, fire districts, etc., having regularly organized, paid fire departments, to grant regular or permanent members thereof leave of absence from active duty of four working shifts in each month is mandatory, and writ of mandate properly issued requiring an unchartered city of the fifth class to grant specified leave of absence to regular and permanent members of city's regularly organized paid fire department. Gen.Laws 1937, Act 2598; St.1883, p. 93.

7. Mandamus ⚷12

A duty resting on a public official which the law requires him to perform may be enforced by writ of mandate.

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Dave L. Styring and others, individually and for the benefit of all regular and permanent members of the regularly organized, paid Fire Department of the City of Santa Ana, Cal., therein not including the fire chief, two assistant fire chiefs, and fire marshal, against the City of Santa Ana, a municipal corporation of the fifth class, and others for a writ of mandate requiring the defendants to grant plaintiffs and other regular members of the Fire Department leaves of absence from active duty of four working shifts in every month. From a judgment directing issuance of the writ of mandate prayed for, defendants appeal.

Judgment affirmed.

Otto A. Jacobs, City Atty., of Santa Ana, for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

MARKS, Justice.

This is an appeal from a judgment directing the issuance of a writ of mandate requiring defendants to grant plaintiffs and other regular members of the regularly organized paid fire department of the City of Santa Ana leaves "of absence from active duty of four working shifts in every month of such service" as required by an act of the legislature. Stats. 1895, p. 76, as amended, Deering's Gen.Laws, 1937, Act No. 2598.

[1] The city of Santa Ana is a municipal corporation of the fifth class organized under the municipal corporation act. Stats. 1883, p. 93, as variously amended. This act serves as the charter of those municipalities incorporated under it. Frisbee v. O'Connor, 119 Cal.App. 601, 7 P.2d 316; People v. Bagley, 85 Cal. 343, 24 P. 716; Ex parte Jackson, 143 Cal. 564, 77 P. 457; City of Mountain View v. Southern Pacific R. Co., 1 Cal.App.2d 317, 36 P.2d 650; Sec. 6, Art. XI, Const. Section one of this act provides that cities "shall have the powers conferred, or that may be hereafter conferred, by law, upon municipal corporations of the class to which the same may belong." Thus the legislature has much more power to regulate the affairs of unchartered cities than it has over those organized under a charter which have authority "* * * to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, * * *." Sec. 6, Art. XI, Const. It follows that cases dealing with the rights of officers and employees of chartered cities are unimportant here and need not be noticed.

The act in question here (Stats. 1895, p. 76, as amended) provides in part as follows:

"In every city, fire district, county fire district and fire protection district of this State where there is a regularly organized paid fire department, the board of supervisors, common council, commissioners or other body having the management and control of the same shall once each year grant to each regular or permanent member thereof, a leave of absence from active duty of not less than fifteen days in each year and in addition thereto a leave of absence from active duty of four working shifts in every month of such service. Leave of absence so granted, as aforesaid, must be arranged by said board, council, commission, commissioners or other governing body so as not to interfere with or in any way impair the efficiency of said department."

In Santa Ana there is a regularly organized paid fire department whose members have been given fifteen days leave of absence from active duty each year but have been refused leaves of absence from four working shifts each month.

Defendants maintain that the act in question is unconstitutional and void for several reasons.

[2] It is first argued that the act of 1895 is void as violating section 25 of Article IV of the Constitution which prohibits the passage of special laws regulating county and township business. Subd. 9. It is sufficient answer to this argument to note that a municipal corporation is neither a county nor a township (Kenyon v. Johnson, 97 Cal.App. 552, 276 P. 110; Platnauer v. Board of Supervisors, 65 Cal. App. 666, 225 P. 12) so the provisions of that section are not applicable here.

[3] It is next argued that the act violates section 25, subd. 29 of Article IV of the Constitution which prohibits the passage of a local or special law affecting the fees or salary of any officer. We can not see how the act in question affects the salaries to be paid firemen. None of its provisions even approach that question. The matter of the compensation of firemen is left entirely to the legislative body of the city of Santa Ana.

It is next argued that the act is unconstitutional as it is special legislation affecting only members of regularly organized paid fire departments.

[4,5] This argument possesses little merit. It is thoroughly settled in California that a law is general and not special where it affects one class of citizens and there is an intrinsic, natural and reasonable ground for a distinction between those falling within that class and others outside of it. See: Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; In re Richardson, 170 Cal. 68, 148 P. 213; Town of St. Helena v. Butterworth, 198 Cal. 230, 244 P. 357; Bueneman v. Santa Barbara, 8 Cal. 2d 405, 65 P.2d 884, 109 A.L.R. 895; E. A. Hoffman Candy Co. v. City of Newport Beach, 120 Cal.App. 525, 8 P.2d 235; In re Hoskins, 16 Cal.App.2d 251, 60 P.2d 535; In re Fassett, 21 Cal.App.2d 557, 69 P.2d 865; Soares v. City of Santa Maria, 38 Cal. App.2d 215, 100 P.2d 1108; Van Gammeren v. City of Fresno, 51 Cal.App.2d 235, 124 P.2d 621. Here the reason for the classification is found in the nature of the services performed by paid members of organized fire departments. It differs from the work of those engaged in other employments and is an intrinsic, natural and reasonable ground for classification. As the Act of 1895 affects all persons falling within one class it is general and not special legislation.

Defendants argue that the act of 1895 must be construed as directory and not mandatory. This argument is based on the case of Shealor v. City of Lodi, 23 Cal.2d 647, 145 P.2d 574, where it was held that an act of the legislature (Stats. 1889, p. 56) providing for the creation of a police relief, health and life insurance and pension fund was not mandatory in that it permitted municipal corporations to take advantage of its provisions but did not require them to do so. It is also indicated in that decision that where an unchartered city desires to adopt a pension system it must do so under the legislative authority given in the act. Shealor v. City of Lodi, supra; Frisbee v. O'Connor, supra.

The act of 1895 does not require a municipal corporation to maintain a regularly organized paid fire department. It merely requires a city which has such a department organized to give the firemen the leaves of absence from active duty there indicated which sufficiently distinguishes the instant case from the Shealor case.

[6,7] The leaves of four working shifts a month from active duty is made obligatory by the act of 1895. Thus it becomes the duty of those having control of regularly organized paid fire departments in unchartered cities to arrange such leaves of absence "so as not to interfere with or in any way impair the efficiency of said department(s)." A duty resting on a public official which the law requires him to perform may be enforced by a writ of mandate.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

63 Cal.App.2d 757

SOUTHERN PAC. CO. v. HYMAN-MICHAELS CO.

No. 12483.

District Court of Appeal, First District, Division 1, California.

April 14, 1944.

Rehearing Denied May 13, 1944.

Hearing Denied June 12, 1944.

1. Carriers 🔑100(1)

The car demurrage tariff does not in and of itself impose liability on a purchaser from a railroad while the subject of sale remains the property of the railroad and has not been delivered actually or constructively to the purchaser.

2. Sales 🔑199

Generally, the question of when title to goods sold passes from the seller to the buyer is one of intention between the parties.

3. Evidence 🔑455

It is proper under certain circumstances to allow parol evidence for purpose of bringing before the court all of facts and circumstances characterizing transactions culminating in an agreement and the writings evidencing its terms, not for the purpose of altering or modifying the terms thereof, but only to show what the intention of parties was with respect to terms used therein. Civ.Code, §§ 1738 (1), 1739.

4. Carriers 🔑100(1)

Where delay in unloading freight cars containing scrap iron purchased from railroad for overseas shipment was occasioned by refusal of connecting carrier to accept cars for loading on ship because of picketing of ship, the determination of issue in respect of demurrage tariff sought to be imposed by railroad depended upon question of when and where title to scrap iron passed from railroad to buyer.

5. Carriers 🔑196

In action by railroad to recover demurrage charges on freight cars containing scrap iron purchased from railroad for overseas shipment, question of when and where title to scrap iron passed from railroad to buyer, which was determinative of liability for charges, was properly submitted to jury in view of purchase order showing delivery was to be F.O.B. railroad tracks at destination with shipping instructions to be furnished later and testimony showing that nonrevenue waybills such as were used in consigning scrap iron were used only in cases of transportation of railroad company's own property. Civ.Code, §§ 1738(1), 1739.

6. Carriers 🔑196

In action to recover demurrage charges on freight cars containing scrap iron sold by railroad for overseas shipment, implied finding of jury that title to scrap iron did not pass until actual delivery to connecting carrier for spotting on docks alongside the ship, was supported by purchase order showing delivery was to be F.O.B. railroad tracks at point of loading on ship and nonrevenue waybills used in consigning scrap iron together with testimony that such nonrevenue waybills were used only in cases of transportation of railroad company's own property. Civ. Code, §§ 1738(1), 1739.

7. Sales 🔑201(4)

While the expression "F.O.B." signifies generally an intention to pass title, such meaning is not conclusive on that question.

See Words and Phrases, Permanent Edition, for all other definitions of "F. O. B."

8. Sales 🔑201(4)

The term "F.O.B." as used in contract for purchase of scrap iron from railroad for overseas shipment, when considered in light of other facts showing that scrap iron was shipped under nonrevenue waybill, might reasonably be construed as meaning merely that purchase price of scrap iron was fixed on basis that railroad would transport it free of charge and not as indicating the point of passage of title.

9. Carriers 🔑196

Evidence, in action to recover demurrage on freight cars containing scrap iron sold by railroad for overseas shipment which were detained on plaintiff carrier's tracks until connecting carrier could handle them, justified denial of plaintiff's motion for directed verdict and motion for judgment notwithstanding verdict, on ground that title did not pass to buyer until actual delivery of cars to connecting carrier for movement to docks for loading on ship.

10. Appeal and error 🔑1064(2)

Instruction, after ruling by court as matter of law on liability for demurrage charges submitting practically the same question to jury as issue of fact, was not erroneous where controlling element involved in issue was passage of title and determination of that question rested largely on intention of parties.

11. Appeal and error ⚷1048(2)

In action to recover demurrage charges on freight cars containing scrap iron sold by railroad for overseas shipment, permitting expert witness to testify respecting railroad tariff and to give opinion that tariff did not apply to situation presented was not prejudicial where opinion of witness was based entirely on undisputed facts.

12. Appeal and error ⚷1116

In action to recover demurrage on freight cars containing scrap iron sold by railroad for overseas shipment, wherein recovery was denied on ground that title did not pass until actual delivery of cars to connecting carrier for delivery to docks for loading on ship, reviewing court would not permit recovery for demurrage charges for time cars were detained after transfer to connecting carrier for which liability was conceded on trial, where plaintiff made no attempt to show what portion of its claim was for such demurrage, or state the amount it claimed thus to be due.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by the Southern Pacific Company against Hyman-Michaels Company to recover demurrage charges claimed to be due. Judgment for defendant, and plaintiff appeals.

Affirmed.

A. A. Jones and William Meinhold, both of San Francisco, for appellant.

Cooley, Crowley & Supple, of San Francisco, for respondent.

KNIGHT, Justice.

The plaintiff, Southern Pacific Company, sued to recover demurrage charges claimed to be due on 365 freight cars containing scrap iron purchased by defendant from plaintiff for overseas shipment. The cause was tried by a jury, and it returned a verdict in favor of the defendant. Plaintiff appeals from the judgment entered upon the verdict and from the order denying its motion for judgment notwithstanding the verdict.

The main grounds urged for reversal are that there was no contested issue of fact to be submitted to the determination of the jury; that the evidence established as a matter of law that the demurrage tariffs imposed by plaintiff applied to the factual situation presented, and that therefore the trial court erroneously submitted the cause to the determination of the jury; and that in any event the evidence introduced does not support the verdict. The points made by plaintiff in this behalf are not sustainable.

The circumstances out of which the controversy arises are these: For many years the defendant company was engaged in the business of purchasing large quantities of scrap iron from the western railroads for sale and shipment overseas through the port of San Francisco; and throughout the three-year period immediately preceding March, 1940, it purchased several hundred carloads from plaintiff, which defendant sold and exported to Japan. The price paid for the scrap iron by defendant included transportation "f.o.b." Southern Pacific tracks, San Francisco. All but two of the cars here involved were loaded at plaintiff's store yards in Oakland, Sacramento, and El Paso, and the waybills, made out by plaintiff as seller and shipper, named Southern Pacific Company as consignee, care agent for defendant, in care of a certain steamer at a designated dock. However, the Southern Pacific tracks end at Second Street and the Embarcadero; it owns no trackage along the San Francisco waterfront. All of it is owned and controlled by the Belt Line, a state railroad over which the state operates its own engines and switching crews. Consequently, in order to place the scrap iron alongside the ships to be loaded, it was necessary that the loaded cars be transferred to and taken over by the Belt Line at the end of the Southern Pacific tracks and spotted on the docks alongside the ships. The Belt Line had an established rule, which was well known both to plaintiff and defendant, that it would not take over any cars containing overseas shipments unless the ships that were to receive the cargo were not only docked but ready and free to take the cargo. The purpose of the rule was to prevent congestion on the limited trackage along the waterfront; and the delay which is the basis of the demurrage charges herein was brought about by the refusal of the Belt Line to take over the cars immediately upon their arrival. The reason for the refusal was that the material could not be loaded on the ships. Of the total sum of $4686.30 which plaintiff sought to recover as demurrage, $2996.40 was claimed to be due on cars containing scrap iron to be exported on the "S.S. Spyros" which had been picketed at the dock by the Chinese in protest against the scrap iron being sent to Japan; other ships were picketed in the same manner and for the same reason, but for shorter periods. The other delays arose from inability to foretell exactly when the ships on which the material was to be exported would arrive in San Francisco, or when after arrival they would be ready and free to load. Therefore, until the Belt Line was ready and willing to accept the transfer of the cars to its tracks, they remained unloaded on the Southern Pacific tracks at its Bayshore freight yards, just outside of the municipal limits of San Francisco, and thereupon they were moved by the Southern Pacific, without charge to defendant, from its Bayshore freight yards to the point of transfer and turned over to the Belt Line.

[1-3] The demurrage tariffs assessed and sought to be collected are set forth in a schedule filed by plaintiff with and sanctioned by the California Railroad Commission and the Interstate Commerce Commission, and in cases where such tariffs apply the "free time" permitted thereunder for unloading after notice of arrival is 48 hours. The parties are agreed, however, that published railroad tariffs, whether for movement of goods or for demurrage, by their very nature, may be assessed and collected only when a shipper-carrier relationship exists; that is, when the railroad is acting as a carrier of the goods of another, and that they have no application to the transportation by the railroad of its own property. Hence there is no legal ground upon which it may be held that the car demurrage tariff in and of itself imposes liability on a purchaser from a railroad while the subject of the sale remains the property of the railroad and has not been delivered actually or constructively to the purchaser. The general rule is that the question of when title to goods sold passes from the seller to the buyer is one of intention between the parties (Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 P. 248, 9 Am. St.Rep. 199; Gopcevic v. California Packing Corp., 64 Cal.App. 132, 220 P. 1078), and in the present case that issue was a disputed one. Plaintiff's theory was that the passage of title and constructive delivery occurred as soon as the cars were placed on the "hold" track at the Bayshore freight yards and notice of arrival thereof given to defendant; whereas defendant claimed that it was the intention of the parties that the title would remain in plaintiff until defendant was able to take over the material for loading purposes on the ships to which the material had been consigned by the waybills, which meant, at the earliest possible time, when the cars were turned over to the Belt Line by the Southern Pacific Company at the point of transfer. Section 1739 of the Civil Code provides that: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. * * * Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." And Section 1738 of the same code provides: "(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case." Furthermore it is held that it is proper under certain circumstances to allow parol evidence for the purpose of bringing before the court all of the facts and circumstances characterizing the transactions culminating in an agreement and the writings evidencing its terms, not for the purpose of altering or modifying the terms thereof, but only to show what the intention of the parties was with respect to the terms used therein. Gianelli v. Globe Grain & Milling Co., 48 Cal.App. 103, 191 P. 720. In the present case the evidence shows the following with respect to the making of the contracts and the movement of the cars: In some instances an employee of plaintiff telephoned defendant that scrap iron was available for purchase by defendant, in others an employee of defendant would telephone plaintiff asking

whether it had scrap iron on hand. The terms of sale were discussed on the telephone. Defendant would then send plaintiff a purchase order on one of defendant's regular forms used generally by it in making purchases. Plaintiff's Exhibit 5 was introduced as typical of these orders. Beneath the figures which appear in the price column is typed "fob your tracks San Francisco or Los Angeles." There also appears in typewriting: "Shipping instructions will be furnished you later." On this exhibit there is also, in handwriting, "Fob Cars SP Tks San Fran"; and the provision "Shipping instructions will be furnished you later" is interlined as follows: ~~"Shipping~~ instructions ~~will be~~ To Follow ~~furnished you later."~~ Plaintiff's witness Keane, Supervisor of Sales in plaintiff's purchasing department, testified that these penciled notations were made by him, after the order was received, for use of a stenographer in writing up plaintiff's record of the transaction. Two of the carloads were sold pursuant to a request for bid on material for sale sent out by plaintiff. These forms called for an offer on a sale "F.O.B." followed in typewriting by the provision "CARS—S.P. Tracks SAN FRANCISCO." When this form was used defendant did not send in one of its regular purchase orders. Thereafter the defendant gave shipping instructions upon each order by letter, or thus confirmed instructions given over the telephone. It was agreed on the trial that plaintiff's Exhibit 6 is typical. It provided: "This material is to be consigned to Hyman Michaels Company, c/o SS NORWAY MARU, Pier 45, San Francisco, expected to commence loading January 22." Upon the receipt of the shipping instructions the scrap iron was loaded into cars at plaintiff's store yards and carried to San Francisco over plaintiff's tracks under a non-revenue "Waybill for Company Freight" made out by the railroad company. Exhibit D is a typical waybill. It includes the following: "Consignee S. P. Lines c/o agt for Hyman Michaels c/o S.S. Eidevold Pier 45." With a few exceptions the cars containing the scrap iron arrived in San Francisco by the date the vessel was expected to commence loading as given in the shipping instructions. All of plaintiff's freight trains entering San Francisco go first to plaintiff's Bayshore freight yards, where they are broken up. If steamship orders for overseas shipments had been received, the cars containing the shipments would be moved from the Bayshore yard to the place where plaintiff's tracks meet those of the Belt Line, and thence taken by the Belt Line to the dock. If steamship orders had not been received, the cars containing overseas shipments would be placed on the "hold tracks" in the Bayshore yard to await a steamship order. As noted above, the Belt Line would not accept cars for the docks until the steamship company had given its order or notice indicating that it would load. When the steamship order was received by plaintiff a "drag list" was made up of cars to be sent to the Belt Line, and the cars were then moved by plaintiff to the transfer point. Under plaintiff's schedule of tariffs as filed it was required to make a charge of 50 cents per ton for the movement of all "revenue freight" (not owned by plaintiff) from Bayshore to the Belt Line; but plaintiff made no charge for moving the cars in question here from its Bayshore yards to the point where its tracks connect with the Belt Line, nor were any waybills issued therefor covering this haul. The regular tariff for movement over the Belt Line tracks to the docks was paid by defendant.

The evidence also shows another written provision to which all sales were subject and which must be considered in the determination of the question of the passing of title and delivery. In this respect plaintiff's witness Keane, supervisor of sales in the purchasing department, testified unequivocally that although plaintiff's form request for bid on material for sale was used only for two carloads, it was understood that all sales were subject to its terms unless contrary conditions were agreed upon; and paragraph 9 of the terms and conditions of that form is as follows: "Seller shall not be obligated to deliver, or Buyer obligated to receive, the property purchased hereunder, when and while, and to the extent that Buyer is prevented from receiving, or Seller from delivering, by act of God, fire, *strike,* partial or total interruption, or loss or shortage of transportation facilities, commandeering of raw materials, products, plants or facilities or by any other similar or different acts of civil or military authorities *or by any cause beyond the control of Seller or Buyer,* whether similar to the causes herein specified or not." (Italics added.)

Furthermore, defendant introduced the testimony of an expert witness whose qualifications were not questioned, from whose testimony it is apparent that the "non-revenue" waybills such as plaintiff here used in consigning the scrap iron to itself care of the ship on which it was to be exported, were used only in cases of transportation of the railroad company's own property.

[4-6] From the foregoing it is quite obvious that the determination of the issue of whether the demurrage tariffs sought to be imposed applied to the situation here presented depended upon the question of when and where title to the scrap iron passed from plaintiff to defendant; and it is apparent that under the circumstances this was a question which was properly submitted to the determination of the jury; it is further apparent that the facts and circumstances above narrated and the fair inferences to be deduced therefrom are legally sufficient to support the implied finding of the jury on that issue.

[7] Plaintiff attaches much significance to the use of the term "f. o. b." Southern Pacific Tracks, San Francisco, contending in effect that it is in itself proof that title passed when the cars reached the Southern Pacific tracks in San Francisco. It has been held, however, that while the expression "f. o. b." signifies generally an intention to pass title, such meaning is not conclusive on that question. Gopcevic v. California Packing Corp., supra; Gianelli v. Globe Grain & Milling Co., supra. In the latter case the court after reviewing several earlier decisions went on to say [48 Cal.App. 103, 191 P. 723]: "It is held in all of the above cases that whatever may be the general trade meaning of the phrase 'payable f. o. b.' or other trade phrases peculiar to commercial contracts or the characters 'f. o. b.,' the fact remains that such trade or commercial signification or meaning is always controlled by the express contract of the parties, and that parol evidence may be received to show what effect such phrases or characters have on such contracts as in fixing the nature, scope, or effect thereof, or as in disclosing the intention of the parties as to such scope and effect."

[8] It is true that in the present case no oral testimony was produced concerning the meaning of the term "f.o.b."; but when its use is considered in the light of the other facts and circumstances hereinabove set forth, it reasonably may be construed as meaning merely that the purchase price of the scrap iron was fixed on the basis that plaintiff would transport it free of charge from the places where it was loaded into plaintiff's cars to plaintiff's tracks in San Francisco and not beyond; and that the expression was not used as indicating the point of the passage of title. American Factors, Ltd., v. Goss, 72 Cal.App. 742, 238 P. 121.

[9, 10] Plaintiff argues that the question of whether the demurrage tariffs sought to be collected applied to the factual situation here presented was one of law and as such should have been passed upon by the trial court. The record shows, however, that the trial court did pass upon that question, first in denying plaintiff's motion for a directed verdict, and again in denying plaintiff's motion for judgment notwithstanding the verdict; and the state of the evidence shows that the trial court was justified in so ruling. It is true that through the medium of an instruction practically the same question was submitted to the jury as an issue of fact. However, there was no error in so doing, for as already pointed out the controlling element involved in that issue was the passage of title, and since the determination of that question rested largely on the intention of the parties, it was doubtless a jury question.

[11] After testifying at some length in explaining the operation of railroad tariffs and the meaning of certain technical terms employed therein, defendant's expert witness was permitted, over plaintiff's objection, to give his opinion that the tariffs did not apply to a situation of the kind here presented. Assuming that the objection should have been sustained, it would appear that the negative answer given by the witness cannot be deemed prejudicial, for as stated by the witness, his opinion was based entirely upon the fact, which both sides here agree upon, that the tariffs in question do not apply to cases where the railroad company is transporting its own property.

[12] Plaintiff further contends that in any event judgment for some amount should have been entered in its favor, since the sum for which it sued admittedly included in some instances demurrage charges for the time the cars were detained after transfer to the Belt Line and before they were unloaded at the dock, for which defendant conceded liability at the trial. However, plaintiff made no attempt whatever to show what portion of its claim was for demurrage on the Belt Line, nor on this appeal does it state the amount it claims thus to be due. In fact at the con-

clusion of the trial plaintiff's counsel stated that it would be difficult to stipulate as to the matter because in some instances there was delay both in the Bayshore yards and on the Belt Line. In that state of the record there is no way in which this court can make the segregation.

The judgment and order appealed from are affirmed.

WARD, J., concurs.

PETERS, Presiding Justice (concurring).

I concur. I agree that, if the question presented on this appeal presents a question of fact, the evidence supports the implied finding of the jury that title to these goods did not pass until they were delivered to the Belt Line Railroad. Indeed, in my opinion, a finding to the contrary would not be supported.

As the main opinion points out, appellant urges that the question of when title passed was a question of law and not of fact and should not have been submitted to the jury. There may be merit in this contention. It seems to be the rule that where the construction of a contract is involved, and there is either no extrinsic evidence or such evidence is uncontradicted, the question of construction is one of law. But it does not follow that submitting such a question to the jury was necessarily prejudicial to appellant. Under circumstances above outlined, it is the duty of the appellate court to interpret the contract independent of the construction given to it by the trier of the fact, and to make a final determination of the controversy in accordance with the applicable principles of law. In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825. If this question is one of law, and I am inclined to believe it is, it seems to be that the reasonable construction of the contract is that the parties intended title to pass only upon delivery to the Belt Line. Since this is in accord with the determination of the jury, it is obvious that whether the question is one of fact or law, since both reach the same result, no prejudice can have been suffered by treating it as a question of fact, even though it be a question of law.

Treating the question as one of law, it seems to me that the only reasonable construction of the contract of the parties, and of the uncontradicted evidence, is that they intended title to pass only upon delivery to the Belt Line. The phrase "fob your tracks San Francisco" is admittedly ambiguous as to the exact time of passage of title. But there are other provisions of the contract which clearly disclose the intent of the parties. As pointed out in the main opinion, the waybills designated the Southern Pacific Company as consignee in care of a designated steamer at a designated dock, and both parties had in mind the possibility of delay and they expressly provided that the buyer was not obligated to accept delivery when such delivery was delayed by reason of any cause beyond the control of the buyer. There are the other provisions of the contract and other evidence, quoted at length in the main opinion, that lead to the same conclusion. There is one other factor, not emphasized in the main opinion, that unequivocally shows the intent of the parties. The goods were held by plaintiff at the Bayshore yards. If title had passed to the goods, the company was obligated to charge the respondent not only demurrage, but also for the transportation of the goods from the Bayshore yards to the Belt Line. The Southern Pacific Company has a regularly published tariff for such a haul. It is a most serious offense, under both state and federal law, not to charge a tariff required to be charged by law. Yet when the appellant shipped these goods from the Bayshore yard to the Belt Line they only attempted to charge demurrage, and did not attempt o charge for the transportation of the goods to the Belt Line. This demonstrates to a certainty that appellant itself interpreted the transaction as one not requiring the payment by respondent of the tariff from the Bayshore yards to the Belt Line. It follows that appellant itself interpreted the transaction as one where title did not pass until delivery to the Belt Line. Inasmuch as appellant has itself interpreted the phrase f.o.b. plaintiff's tracks San Francisco as imposing upon it an obligation to transport the iron to the Belt Line without charge to respondent, and inasmuch as such obligation is only consistent with retention of title by appellant until that time, it seems obvious that appellant has, in effect, admitted that title did not pass until the goods reached the Belt Line. Such contemporaneous construction is entitled to great weight. Johnston v. Landucci, 21 Cal.2d 63, 70, 130 P.2d 405; Keith v. Electrical Engineering Co., 136 Cal. 178, 68 P. 598.

For these reasons I concur in the order affirming the judgment.

64 Cal.App.2d 1

SUTTER REALTY CO. v. CITY COUNCIL OF CITY OF SACRAMENTO et al.

Civ. 7015.

District Court of Appeal, Third District, California.

April 19, 1944.

1. Appeal and error ⚷989

Where record discloses ample evidence to sustain trial court's finding, appellate court's power begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support trial court's conclusions.

2. Municipal corporations ⚷434(4)

Nonprofit cemetery corporation whose property was exempt from taxation did not, by failure to protest, waive its right to cancellation of assessment for street improvements; the statutes relating to protest being limited in operation to owners of property liable to be assessed. St.1931, p. 2434; St.1941, pp. 844, 848, §§ 5220, 5258, 5259; Const. art. 13, § 1b.

3. Taxation ⚷251

In absence of specific statutory procedure to be followed in claiming exemption of nonprofit cemetery corporation's property from taxation, provisions of Constitution relating to exemption must prevail. Const. art. 13, § 1b.

4. Municipal corporations ⚷434(4)

Where nonprofit cemetery corporation's property was deleted from tax rolls of city, corporation had right to assume that its status and specific exemption granted by constitution would be respected, and corporation was not required to take notice of assessment for street improvements nor to appear before city council and protest. Const. art. 13, § 1b.

5. Municipal corporations ⚷434(1)

Where property not subject to assessment for street improvements is illegally included therein, such proceedings are void and the owner thereof is not required to appear before council and formally protest. St.1941, pp. 844, 848, §§ 5220, 5258, 5259; Const. art. 13, § 1b.

6. Municipal corporations ⚷434(4)

City council's act in assessing nonprofit cemetery corporation's tax exempt property was invalid, and, in absence of statutory procedure for complaining of such exemption, corporation's failure to appear before council did not preclude equity court from interfering by injunction to restrain collection of such void assessments. St.1941, pp. 844, 848, §§ 5220, 5258, 5259; Const. art. 13, § 1b.

◆

Appeal from Superior Court, Sacramento County; Dal. M. Lemmon, Judge.

Suit by Sutter Realty Company, a nonprofit cemetery corporation, commonly known as Odd Fellows' Lawn Cemetery, against the City Council of the City of Sacramento and others to restrain the collection and assessment for street improvements. From a judgment for petitioner, respondents appeal.

Affirmed.

Hugh B. Bradford, City Atty., of Sacramento, for appellants.

Busick & Busick, of Sacramento, for respondent.

PEEK, Justice.

This is an appeal by the City of Sacramento from a judgment in favor of petitioner and respondent, Sutter Realty Company, a nonprofit cemetery corporation.

Respondent was first incorporated in 1905 as the Odd Fellows' Lawn Cemetery, for the purpose of operating a cemetery. On November 22, 1932, its articles of incorporation were amended in order to qualify as a nonprofit corporation in conformity with the General Cemetery Act, Stats.1931, Chap. 1148, p. 2434. No By-Laws have been adopted by respondent. However, on August 2, 1932, the corporation adopted certain Rules and Regulations governing the operation of the cemetery. Its capital stock is owned by three individuals as trustees for three Lodges and one Encampment of the Independent Order of Odd Fellows, a fraternal and charitable organization. The three trustees also serve as directors of respondent corporation without pay.

On March 30, 1933, the Council of the City of Sacramento granted the application of respondent for an exemption under Article XIII, Section 1b of the Constitution, and authorized the Assessor-Collector of the city to delete from the city's tax rolls the real property used in the operation of respondent's cemetery. The section in question is as follows:

"All property used or held exclusively for burial or other permanent deposit of the human dead or for the care, maintenance or upkeep of such property or such dead, except as used or held for profit, shall be free from taxation or local assessment."

In the month of August, 1942, pursuant to the authority granted under the Improvement Act of 1911, St.1911, p. 730, and the Improvement Bond Act of 1915, St.1915, p. 1441, appellant authorized improvements upon a street bordering respondent's property.

Respondent did not protest the proposed street work nor the award of the contract, but on January 28, 1943, petitioned the city council under sections 4801 and 4802 of the Revenue and Taxation Code, St.1939, p. 1361, for a cancellation of the assessment levied against it. The petition was denied by the city council and the corporation then sought a writ of mandate in the Superior Court of Sacramento County to compel the cancellation of the alleged illegal assessments. The city by its answer denied the allegations that respondent was a nonprofit corporation entitled to the constitutional exemption previously set forth, and alleged that respondent, by failing to protest as provided in sections 5220, 5258 and 5259 of the Streets and Highways Code, St.1941, pp. 844, 848, had waived its right to the relief prayed for. After a hearing upon such issues the trial court made its findings in favor of respondent and entered judgment cancelling the street assessment levied against it.

The city now appeals contending that the evidence is not sufficient to support the finding of the trial court that respondent is a nonprofit cemetery corporation; that respondent by its failure to protest in accordance with the provisions of the Streets and Highways Code thereby waived its right to a cancellation of the assessment; that respondent by its failure to so protest also has failed to exhaust the legal remedies available to it, and therefore has no standing to prosecute its application for a writ of mandate.

[1] The record discloses ample evidence to sustain the finding of the trial court that the Sutter Realty Company was and is a nonprofit corporation. Under such circumstances the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the conclusion reached by the trial court. Estate of Bristol, Cal.Sup., 143 P.2d 689.

We pass then to the second contention of appellants, that even though respondent is a nonprofit corporation and thereby comes within the constitutional exemption, yet for such exemption to be effective it must be claimed before the proper administrative officer or body; that the exemption here at issue corresponds in principle to Section 3612 of the Political Code as it affects Article XIII, Section 1¼ of the Constitution (citing Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106), and that in failing to protest in accordance with the sections of the Streets and Highways Code respondent has waived its right to a cancellation of the assessment.

It would be of little value to the conclusion reached herein to discuss at length the innumerable cases cited by appellants in substantiation of this contention.

Suffice it to say that each of the cases so cited arose under Article XIII, sections 1a, 1¼ and 1½ of the Constitution and the related sections 3611, 3612 and 3613 of the Political Code. Each of the code sections referred to by appellants specifically provide that unless the exemptions therein set forth are claimed in accordance with procedure therein outlined such exemptions shall be deemed to have been waived.

In Chesney v. Byram, supra, the petitioner therein claimed an exemption under Article XIII, section 1¼, of the Constitution but admittedly had filed no application therefor under section 3612 of the Political Code. It was his contention that the constitutional provision was self executing and therefore the code section was an attempt to limit the constitutional right of exemptions given to veterans. The court held that even assuming the constitutional provision was self executing it necessarily does not follow that the legislature does not have the power to enact legislation providing for reasonable regulation of the right to such exemption so granted by the Constitution. Such case falls short of the authority which is given to it by appellants.

[2] The sections of the Streets and Highways Code cited by appellants cannot be construed as setting up rules and regulations for the exemption of cemetery property from taxation and therefore comparable to the regulations contained in the sections of the Political Code under discussion in the Chesney case. Section 5220 comes within the chapter of the code designated "Protest and Hearing" and refers to the manner of protesting proposed street work

or the extent of the district to be assessed. Nothing therein relates to a claim of exemption by a cemetery. Section 5258 and section 5259 are found within the chapter entitled "Award of Contract". The first section refers to irregularities in the award and the last section provides that such protests shall be waived if not seasonably made. Again nothing is said concerning a claim of exemption "from taxation and local assessment" by a nonprofit cemetery. It should be noted further that rather than providing a reasonable regulation of the right to claim an exemption in accordance with the decision in the Chesney case as regards the cited sections of the Political Code, the sections of the Streets and Highways Code are limited in operation by the wording thereof, to the owners of property "liable to be assessed" [section 5220], and owners of property "liable to assessment" [section 5258].

The only enactment by the legislature relating to the particular question here at issue is contrary to the contention made by appellants, and is found in section 8561 of the Health and Safety Code, Stats.1939, p. 704, which provides in part that: "All [cemetery] property dedicated pursuant to this chapter, * * * is exempt from public improvement assessments * * *." It is not disputed that respondent's property was dedicated in accordance with the provisions of section 8551 of the Health and Safety Code, St.1939, p. 703, and the trial court so found.

[3] In the absence, therefore, of specific statutory procedure to be followed in claiming such an exemption, the provisions of Article XIII section 1b of the Constitution must prevail. Under such circumstances there can be no question of waiver or the exhaustion of administrative remedies.

[4] The sole qualification contained in the constitutional exemption was first complied with by respondent in 1932 when its property was deleted from the tax rolls of the City of Sacramento. That there has been no change since then in its nonprofit status is evidenced by the finding of the trial court. Respondent had the right to assume that its status and the specific exemption granted by the Constitution would be respected and it was not required to take notice of the assessment nor to appear before the city council. Shannon v. Wilson, 38 Cal.App.2d 219, 101 P.2d 116; Seattle & Puget Sound Packing Co. v. City of Seattle et al., 51 Wash. 49, 97 P. 1093; Rosehill Cemetery Co. v. Kern, 147 Ill. 483, 35 N.E. 240.

[5] Where property, not subject to an assessment, is illegally included therein, such proceedings are void and the owner thereof is not required to appear before the council and formally protest. St. John's Church v. County of Los Angeles, 5 Cal. App.2d 235, 42 P.2d 1093; City Securities Co. v. Harvey et al., 176 Cal. 682, 169 P. 380; Northern Pac. Ry. Co. v. City of Walla Walla, 114 Wash. 153, 194 P. 962.

[6] Not having the power to so assess the property of respondent, the act of the council in so doing was clearly unconstitutional and in the absence of statutory procedure for the claiming of such an exemption respondent's failure to appear before the council does not preclude equity from interfering by injunction to restrain the collection of such void assessment. Pacific Paving Co. v. Verso, 12 Cal.App. 362, 107 P. 590; Penrose v. Whitacre, 61 Nev. 440, 132 P.2d 609; Rosehill Cemetery Co. v. Kern, supra.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

MORELLO v. METZENBAUM et al.*

Civ. No. 3326.

District Court of Appeal, Fourth District, California.

April 13, 1944.

Hearing Granted June 8, 1944.

1. Licenses 🔑18½, 39

A deed and assignment conveying portion of oil royalty, purchased by grantor from landowner, as security for payment of grantor's note to grantee, constituted "certificate of interest in oil lease" and "security" of grantor's issue within Corporate Securities Act, and hence was void because of grantor's failure to secure permit from Commissioner of Corporations for transfer of such security, though landowner had secured permit for transfer of royalty interest to grantor. St.1933, p.

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* Subsequent opinion 154 P.2d 670.

2316, § 16; St.1937, pp. 1428, 1431, § 2(a), subds. 3, 6, 7(c); St.1941, p. 2064, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Certificate of Interest in Oil Lease" and "Security".

2. Licenses ⟹39

Notice to grantee of portion of oil royalty that no permit for transfer thereof had been issued to grantor by Commissioner of Corporations, as shown by inclusion of grantor's application for such a permit with deed and other papers deposited in escrow for delivery to grantee if grantor's note, secured by such deed, were not paid, did not render grantee equally culpable with grantor in failing to secure permit, so that grantee was not precluded from recovering balance due on note after application of amount paid by him for such royalty interest at sale on foreclosure of lien created by transaction. St.1933, p. 2316, § 16; St.1937, pp. 1428, 1431, § 2(a), subds. 3, 6, 7(c); St.1941, p. 2064, § 3; Code Civ.Proc. § 580d.

3. Licenses ⟹39

One to whom portion of oil royalty was conveyed as security for payment of note, without permit from Commissioner of Corporations, did not ratify transaction by attempting to foreclose purported lien on oil interest, and hence was not precluded thereby from recovering balance due on note after application of amount paid by him for such interest at foreclosure sale. St.1933, p. 2316, § 16; St.1937, pp. 1428, 1431, § 2(a), subds. 3, 6, 7(c); St.1941, p. 2064, § 3; Code Civ.Proc. § 580d.

4. Licenses ⟹39

One to whom portion of oil royalty was conveyed as security for payment of note, without permit from Commissioner of Corporations, received nothing under purported deed and assignment of such security, so that his action for balance due on note after application of amount paid by him for such royalty interest at sale on foreclosure of lien was not barred, though he gave no notice of cancellation of deed and made no offer to restore what he received. St.1933, p. 2316, § 16; St.1937, pp. 1428, 1431, § 2(a), subds. 3, 6, 7(c); St.1941, p. 2064, § 3; Code Civ.Proc. § 580d.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action on a note by E. Morello, also known as Eugenio Morello, against M. Metzenbaum and another. Judgment for defendants, and plaintiff appeals.

Reversed.

F. W. Docker and Matt Goldstein, both of Fresno, for appellant.

Thos. F. Lopez and Lawrence W. Young, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment in an action on a promissory note for $6,000, dated December 15, 1941, and due one day after date.

One Johns was the owner of real property in Fresno County which he had leased to Loren L. Hillman, Inc., for the purpose of drilling for oil. In December, 1941, defendant Metzenbaum negotiated for the purchase of certain of the landowner's royalty from Johns who transferred this royalty to Metzenbaum for $12,000. $6,000 of this purchase price was borrowed from plaintiff on the promissory note involved here. Johns secured a permit from the Commissioner of Corporations of the State of California which authorized the transfer of this royalty to Metzenbaum.

The note to plaintiff was not paid and in February, 1942, he pressed defendants for payment. This resulted in contracts dated March 13, 1942, whereby the parties agreed to an extension of the note in consideration of Metzenbaum conveying to plaintiff one per cent outright and 11½% of the production from the Johns property as security for the payment of the note.

The transfer of the oil interest was to be effected by an instrument called a "Deed and Assignment" which purported to grant, sell, assign and transfer the royalty to plaintiff and an agreement, executed concurrently with the deed, which recited the fact of the unpaid note, the extension of the due date, and that the oil royalty was given as security for the payment of the note and giving plaintiff full power "to at any time, and from time to time sell, assign and transfer the whole of said security property, or any part or parts thereof, at any public or private sale, at the option of Morello, and without advertising the same and without any notice except by registered letter mailed to Metzenbaum addressed to Metzenbaum at 625 Safford Avenue, Fresno, California, at least five days before each of such sale or sales, and with the right of Morello to be a purchaser at any such sale or sales, and in the event of any sale or purchase hereunder, no matter by or to whom made, all notice thereof, except as herein provided, and any and all equity or right of redemption, whether before or after the sale hereunder, is hereby expressly waived." The agreement also contained a provision that Metzenbaum was obligated to secure a permit for the transfer of the mineral rights and that such permit had been obtained and issued.

These documents, with a petition by Metzenbaum and his wife to the Department of Investment, Division of Corporations, praying for a permit authorizing the transfer of the royalties to plaintiff, were placed in escrow with instructions which, among other things, directed the escrow holder to deliver the documents to plaintiff if the note should not be paid.

The promissory note was not paid and the documents were delivered to plaintiff who recorded the deed and assignment on April 9, 1942. He then proceeded to foreclose the lien created by the transaction on the 11½% royalty under the provisions of the power already quoted. No attempt was made to conform to the provisions of section 2924 et seq., of the Civil Code in making the sale. Whether or not this rendered the attempted foreclosure void under the provisions of section 2953 of the Civil Code need not be decided here.

At the sale plaintiff bid in the royalty for $2,000 which was credited on the principal of the note and brought this action to collect the unpaid balance. It is fair to remark that up to this point the parties were represented by counsel other than those now appearing for them.

An amended complaint was filed upon which the case went to trial. In the first cause of action the execution of the promissory note was alleged together with the transaction of March 13, 1942, which was claimed to be void as being in violation of the Corporate Securities Act as was the purported sale of the security under the power. Judgment was sought against defendants in the principal sum of $6,000 and accrued interest, attorneys' fees and costs. The amended complaint contained a second cause of action which was subsequently dismissed.

While the defendants filed separate answers they may be considered identical for the purposes of this appeal. They admitted the due execution of the note, alleged its extension and the transactions of March 13, 1942, the sale of the royalties for $2,000 under the power given in the contract and pleaded the bar of section 580d of the Code of Civil Procedure. It was admitted that no permit had been obtained for the transfer of the oil royalty from Metzenbaum and his wife to plaintiff.

The theory on which the trial court gave judgment for defendants clearly appears in the findings. The due execution of the note was found, as were the transactions which culminated in the documents of March 13, 1942, the non-payment of the note, the delivery of those documents to plaintiff, the recording of the deed and assignment, and the purported sale under the power given in the contract with the sale price credited on the principal of the note. It was particularly found that Metzenbaum was the owner of the oil royalty he obtained from Johns under the permit from the Commissioner of Corporations; that no permit was obtained authorizing the transaction between plaintiff and defendant; that no permit was necessary for that transaction; that the deed and assignment was not a security as defined in the Corporate Securities Act; that it was not a security of the issue of Metzenbaum or his wife; that it transferred the interest therein described to plaintiff, who, through the sale became the lawful owner thereof; that as the security had been sold under the power of sale no judgment could be obtained for any deficiency remaining after crediting the sales price on the note. Sec. 580d, Code Civ.Proc.

A study of the record, especially the findings, shows that the most important question for our consideration is the necessity for a permit authorizing the transfer of the oil royalty from Metzenbaum and his wife to plaintiff.

Section 3 of the Corporate Securities Act, Stats.1917, p. 673, as amended, Stats. 1941, p. 2064, provides in part:

"No company shall sell any security, except upon a sale for a delinquent assessment against such security made in accordance with the laws of this State, or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do. Such application shall be in writing, shall be verified as provided in the Code of Civil Procedure for the verification of pleadings, and shall be filed in the office of the commissioner."

Individuals are brought within this prohibition against selling securities without a permit by the provisions of subsections 3 and 6 of section 2(a) of the act, St.1937, p. 1428.

Subsection 7 of section 2(a), as far as material here, provides as follows: "The word 'security' shall include any * * * certificate of interest in an oil, gas or mining title or lease * * *."

Section 16 of the Corporate Securities Act, St.1933, p. 2316, provides in part as follows: "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, * * *."

Thus the principal question addressed to us on this appeal, on which the decision of the case depends, is this: Is the deed and assignment, whereby Metzenbaum and his wife purported to convey to plaintiff a fraction of the production of the oil produced from the land therein described, a security of their own issue?

The deed and an assignment certainly attempted to convey to plaintiff an interest in an oil or gas lease so on its face it would seem to come within the definition of a "security" as set forth in subsection 7 of section 2(a) of the Corporate Securities Act. The instrument was signed by Mr. and Mrs. Metzenbaum so, if it was a security, it should follow that it was a security of their own issue.

Defendants argue that the transfer of the oil interest from Johns to Metzenbaum was under authority of a permit and was therefore legal; that the transfer from Metzenbaum to plaintiff amounted to an assignment of an interest in the same oil production for which no additional permit was necessary under the following provisions of subdivision (c) of section 2 of the Corporate Securities Act:

"Except as herein expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions: * * *

"The sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this act."

It is not claimed that the transfer of the oil royalty from Metzenbaum and wife to plaintiff was made for the benefit of Johns so that question is eliminated from the case.

The Ninth Circuit Court of Appeals had before it the case of Cecil B. De Mille Productions, Inc., v. Woolery, 61 F.2d 45, which requires our consideration because of the similarity of some of the issues there decided with those presented here.

The Elmer Company had an oil lease on property near Venice, California, upon which it drilled two wells that produced oil. On each of three separate occasions it borrowed $50,000 from Cecil B. De Mille Productions, Inc., and gave three promissory notes in the principal sums of $50,000 evidencing the debts. In each note there was an assignment of a fractional interest in the production from the wells as security for the loans. To this extent the cases are similar as no permits were secured authorizing the giving of the security for the debts. There were other written instruments executed by the Elmer Company recognizing the assignments for which no permits were obtained. The cases differ in this: In the Cecil B. De Mille Productions, Inc., case there was no intermediate assignee from the Elmer Company (assignor to Cecil B. De Mille Productions, Inc.) who took the assignment from the Elmer Company under authority of a permit prior to assignment to Cecil B. De Mille Productions, Inc., while in the case before us the assignment from Johns to Metzenbaum was made under authority of a permit.

The Elmer Company ran into financial difficulties and only one of the notes was fully paid and only partial payments on another. Cecil B. De Mille Productions, Inc., brought action against the receiver for the Elmer Company to compel him to pay the value of the portion of the production of two wells represented by the assignments. The trial court held that each assignment of the oil interest was a security as defined in the Corporate Securities Act; that each was a security of issue of the Elmer Company; that the failure to secure a permit for their issue rendered them void and unenforceable. In a carefully considered opinion this holding was affirmed on appeal, and, on the question of each assignment being a security of the issue of the Elmer Company, has been followed or cited with approval in several California cases. See Domestic and Foreign Pet. Co., Ltd., v. Long, 4 Cal.2d 547, 51 P.2d 73; In re Hatch, 10 Cal.2d 147, 73 P.2d 885; California Western Holding Co. v. Merrill, 7 Cal.App.2d 131, 46 P.2d 175; Julian v. Schwartz, 16 Cal.App.2d 310, 60 P.2d 887.

The case of Domestic and Foreign Petroleum Co., Ltd., v. Long, supra, involved the question of the issuance of certificates in private transactions to 10½% of the production from an oil lease. In holding that such certificates were securities and that a permit was required before such certificates could be issued lawfully, the Supreme Court said [4 Cal.2d 547, 51 P.2d 77]:

"Indeed, in the absence of any specific provision in the Corporate Securities Act expressly bringing oil interests within the definition of 'security,' the individual owners of an oil lease who, as in the instant case, transfer to others the right to participate in the proceeds from an oil production enterprise to be conducted by the lessees, create an investment contract, or certificate of interest or participation, as those terms are defined and explained in the cases cited in the above paragraph. * * * In 1929 instruments formerly included within the definition of 'security' only when they were offered to the public (St.1925, p. 963 * * *) were listed together with other securities in a single paragraph, section 2(a) 7, with no specification in said section as to any of the instruments listed requiring an offer to the public. * * * We are of the view that the elimination of the phrase 'offered to the public' as to other securities evinced a legislative intent to define as securities all instruments listed, although disposed of in private transactions. The federal Circuit Court of Appeals thus interpreted the act in Cecil B. De Mille Productions, Inc., v. Woolery, [supra,] which involved fractional interests in gross proceeds from oil produced. * * * the State may control the issuance of securities by corporations under its power to regulate corporations, which exist under charter from the state. Its right to regulate the individual issuer of securities presents a different problem. It is settled by our decisions in People v. Craven, supra, [219 Cal. 522, 27 P.2d 906], and In re Leach, 215 Cal. 536, 12 P.2d 3, that the state may require an individual who issues securities to the public to obtain a permit. See, also, People v. White, [supra,] 124 Cal.App. 548, 12 P.2d 1078; People v. Oliver, [supra,] 102 Cal.App. 29, 36, 40, 282 P. 813. We are of the view that the State may also require a permit although the individual proposes to issue securities in private transactions. Cecil B. De Mille Productions, Inc., v. Woolery, supra. By providing for the investigation of proposed securities before they are issued our legislation aims 'to regulate and control the class and character of securities and investments that might be offered to the public.' Hayden Plan Co. v. Friedlander, 97 Cal.App. 12, 275 P. 253. Securities originally issued in bona fide private transactions may subsequently be offered to the public."

The case of Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 86 P.2d 102, 107, involved a real estate subdivision trust. In defining a security the court said:

"The declaration of trust issued by California Trust Company named Bayly Brothers, Inc., and Edwards & Wildey Company as beneficiaries and vested in them the entire beneficial interest in the trust. They in turn sold and delivered to the plaintiffs and others certificates executed by them but not by the trust company. That sold to the plaintiffs purported to transfer to Mary Pickford Company an undivided 25/490 of the beneficial interest of Bayly Brothers, Inc., and Edwards & Wildey Company in the trust. This constituted the issuance of a security; it was a new interest created by Bayly Brothers, Inc., and Edwards & Wildey Company in the property owned by them. Unquestionably the certificates executed by Bayly Brothers, Inc., and Edwards & Wildey Company were securities within the meaning of the Corporate Securities Act."

[1] Under the foregoing authorities we must conclude that the deed and assignment constituted a "certificate of interest in an oil * * * lease," Subsec. 7, Sec. 2(a) Corporate Securities Act, and was a security under the act. This instrument created a new interest in the oil lease and, as held in Mary Pickford Co. v. Bayly Bros., supra, was a security of the issue of Metzenbaum and his wife. That being the case the attempted issue of the certificate without a permit was void and, on the election of plaintiff, conveyed no in-

terest in the lease to him. Sec. 16, Corporate Securities Act; Mary Pickford Co. v. Bayly Bros., supra.

The fact that there was a permit authorizing the transfer of the royalty interest from Johns to Metzenbaum cannot aid defendants. Metzenbaum and his wife did not attempt to assign to plaintiff the oil interests acquired from Johns under authority of the permit. The deed and assignment to plaintiff created a new and independent interest in the oil lease and a permit for its issuance was necessary.

[2] Defendants argue that it was as much the duty of plaintiff, as it was of Metzenbaum, to secure the permit; that an application for a permit, duly executed by Metzenbaum and his wife, was included in the papers deposited in escrow on March 13, 1942, to enable plaintiff to secure the permit and validate the transfer; that this must have been sufficient notice that no permit had been issued. In this connection it should be observed that another of those papers placed in escrow contained the declaration that a permit authorizing the transfer had been issued.

This argument is answered in Randall v. California L. B. Syndicate, 217 Cal. 594, 20 P.2d 331, 332, as follows:

"Although the parties seeking affirmative relief, i. e., the buyers of such stock, may be in some degree guilty with the parties against whom the relief is sought, they will be denied relief only where the record shows that they are equally culpable (Campbell v. Julian Merger Mines, 111 Cal.App. 649, 295 P. 1040); and, considering the object and purpose of the Corporate Securities Act, mere knowledge of the terms of the permit, or of the fact that no permit has been issued, may not alone be sufficient to raise the guilt of the purchaser or subscriber to that degree."

A further answer to this argument is set forth in Mary Pickford Co. v. Bayly Bros., Inc., supra, where it is said:

"Although by these decisions the common-law warranty applicable to a sale of securities was limited in this state, nevertheless because of the provisions of the Corporate Securities Act, supra, in effect at the time of the transaction here in controversy, a seller of securities necessarily warranted that the duties therein imposed upon him had been performed. Such a warranty is based upon the obligation to secure a permit which the law enjoined upon the seller. * * * Whenever, therefore, an issuer or underwriter of securities offers them for sale to the public, he impliedly represents that the applicable provisions of law have been complied with. The falsity of that representation may give rise to an action either for breach of warranty or for fraud depending upon the culpability of the seller in the particular transaction. 'The representation of fact which induces a bargain is a warranty. In truth, the obligation imposed upon the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement. The obligation in such a case is quasi contractual, and at least if the seller knows the falsity of his representation there is also a tort.' Williston on Contracts, Revised Ed., vol. 5, sec. 1505, p. 4198."

[3] Nor can it be argued that the acts of plaintiff in attempting to foreclose his purported lien on the oil interest amounted to a ratification of the transaction. In Mary Pickford Co. v. Bayly Bros., supra, it was said:

"It is likewise clear that a fraudulent transaction can be ratified by acquiescence of the party defrauded with full knowledge of the facts, but a purchaser of void securities is given relief against the seller notwithstanding acquiescence with full knowledge. The seller cannot assert that the purchaser has ratified the void transaction."

[4] Defendants urge that the action cannot be maintained because plaintiff still retains the fruits of the transaction, gave no notice of cancellation and did not offer to restore that which he received.

The issuance of the security without a permit was made void by the provisions of the Corporate Securities Act so plaintiff received nothing under the purported deed and assignment. The authorities cited support this conclusion. The amended complaint alleged the transaction was void, which, in effect, was an allegation that plaintiff received nothing of value from Metzenbaum and his wife. Where a plaintiff receives nothing in a transaction, a notice of cancellation and an offer to restore is unnecessary. Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478; Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038; Browne v. T. J. Lawrence Co., 204 Cal. 424, 268 P. 631.

If the plaintiff should recover judgment on a retrial of the case, the trial judge might, if he deems it advisable, require plaintiff to clear the record title to the oil royalty by a quitclaim deed to Metzenbaum upon satisfaction of his judgment. This was done in Moore v. Stella, 52 Cal. App.2d 766, 127 P.2d 300, and the Supreme Court denied a petition for hearing.

As plaintiff received nothing under the deed and assignment, he had nothing to sell in the purported foreclosure of the security. As the note was unsecured, and as nothing was sold, section 580d of the Code of Civil Procedure was no bar to this action.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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63 Cal.App.2d 812

GORDON et al. v. CITY OF LOS ANGELES et al.

Civ. 14224.

District Court of Appeal, Second District, Division 3, California.

April 17, 1944.

Hearing Denied June 15, 1944.

1. Municipal corporations 🔑523(1)

The statute providing that city's legislative body "may, in its discretion", refund assessments made for improvement of major streets, by use of quoted words emphasizes that statute is discretionary and not mandatory. St.1941, p. 869, § 5551.

2. Statutes 🔑181(1)

The legislative intention must be determined from language of the statute.

3. Constitutional law 🔑70(1)

A court cannot depart from meaning of unambiguous statutory language.

4. Municipal corporations 🔑523(2)

Under statute authorizing city to refund assessments made for improvement of major streets, city did not become obligated to make refund because a boulevard had been classified as a "major street" and because of council's resolution expressing desire to apply funds available equitably, since city's discretionary power continuous until final official action has been taken by legislative body. St.1941, p. 869, § 5551.

5. Mandamus 🔑154(4)

Mandamus did not lie to compel city to refund assessments for improvement of a major highway, where petitioners' lot was one of many against which assessments had been placed, contemplated survey was to include all projects which would be eligible for relief, and petition did not show that survey had been completed or that any available funds had been apportioned as required by statute. St.1941, p. 869, §§ 5551, 5552.

6. Municipal corporations 🔑523(1)

The statute authorizing a city in its discretion to refund assessments for improvement of major highways does not contemplate a separate appropriation for benefit of single parcel of land to exclusion of other parcels similarly situated. St.1941, p. 869, §§ 5551, 5552.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Petition by John D. Gordon and another against the City of Los Angeles and others for a writ of mandate to compel defendants to refund a special assessment placed against petitioners' lot for the improvement of a major highway, wherein defendants filed a demurrer. From a judgment of dismissal based upon an order sustaining defendants' demurrer, and from the order sustaining the demurrer without leave to amend and from the order discharging the alternative writ of mandate, the petitioners appeal.

Judgment affirmed and appeals from orders dismissed.

Edward C. Purpus, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., and Robert J. Stahl, Bourke Jones, and Edward J. Olstyn, Deputy City Attys., all of Los Angeles, for respondents.

PARKER WOOD, Justice.

Petitioners appeal from a judgment of dismissal which was based upon an order sustaining defendants' demurrer to the amended petition without leave to amend.

Petitioners sought a writ of mandate to compel the City Council to refund a special assessment, "or remove" the lien therefor, placed against their lot for the improvement of a major highway. The amended petition was based upon the provisions of amendments made in 1935 to the Improvement Act of 1911 and to the Opening and Widening Act of 1903. The provisions thereof pertinent to this case are now embodied in section 5551 of the Streets and Highways Code, St.1941, p. 869.

The amended petition for a writ of mandamus alleged in substance: That petitioners owned a certain lot in the City of Los Angeles, on which the principal and interest on the assessment bonds amounted to $9755.50; that the defendant City of Los Angeles was a municipal corporation, and the individual defendants were members of the city council, the mayor, city clerk and the city treasurer; that on November 23, 1936, the Bureau of Assessments of the City of Los Angeles wrote to petitioner John Gordon, stating the "California State Legislature, at the 1935 Session, amended the Improvement Act of 1911 (Paving, etc.) and the Opening and Widening Act of 1903, to permit the re-assessing, and the refunding of assessments levied upon Major Traffic Arteries under these two acts," that the electorate of California had validated the legislation in the November, 1936 election, the city council had passed a resolution expressing the desire to apply any "funds available for the purpose in the fairest and most equitable manner possible," and under the council's instructions the bureau of assessments was at that time preparing a detailed survey of all projects in the city which would be eligible under the law for the special assessment relief, that it would be unnecessary for petitioner to employ counsel—that he would be "thoroughly and impartially represented by the City" and that petitioner should "not become too optimistic, as no one can forecast the final result"; that on September 1, 1942, petitioners wrote and presented a letter to the city council requesting relief from the assessment, together with penalties, and accrued interest and taxes, which then totaled $9755.50; that on September 2, 1942, the city clerk replied by letter and stated that the council had referred the matter to the finance committee; that on October 15, 1942, the city clerk wrote another letter to petitioners advising them that their (the petitioners') communication was being "received and filed, the City having no funds available for this purpose"; that on February 15, 1943, the city engineer wrote to petitioner John Gordon to the effect that Laurel Canyon Boulevard had been classified as a major street, "under which classification 1/4 cent Major Street Gasoline Tax Funds" were available both for acquisition and improvement. The petitioners further alleged that section 5551 of the Streets and Highways Code is mandatory; that the city treasury "according to the last figures of the City Treasurer" had available for use in paying "any claims or moneys herein, the sum of $49,630,527.49, unallocated revenue to reserve funds under budgetary and charter appropriations according to the budget estimate is $1,335,759.43, and under bond redemption and interest funds up to June 30, 1942, and according to information and belief, the allocation in budget will be even higher than this figure, to wit, $2,543,499.54; that the assessed valuation of the City of Los Angeles in the year 1942-43 is $1,365,765,665.00"; and that petitioners have been materially injured, and have no plain, speedy or adequate remedy at law, and prayed that a writ of mandamus be issued.

[1-3] Petitioners' principal contention is that the provisions of said section 5551 of the Streets and Highways Code are mandatory. That section provides as follows: "Whenever the legislative body determines that the work for which an assessment was previously made was for the construction, alteration, repair, improvement or betterment of any major traffic artery, designed for or generally used by the people of the city as a whole, *the legislative body may, in its discretion,* determine to aid the same by appropriating any funds available for such purpose. It shall not be necessary to set forth or give notice of such contribution in the resolution of intention or other proceedings hereunder." (Italics added.) The legislative body is not required by the provisions of said section to make any determination as to whether the work was or was not for the improvement of a major traffic artery. In the event, however, the legislative body does determine that the work was for the improvement of a major traffic artery, those provisions permit the legislative body, *in its discretion,* to give aid provided there are funds available for that purpose. The Legislature emphasized that said statute was discretionary by using the words *"in its discretion,"* in addition to the word "may" which is ordinarily used as a permissive

term. In the case of McGinnis v. Mayor and Common Council, 1908, 153 Cal. 711, 96 P. 367, 368, the petitioners sought to compel the council to advertise the sale of a franchise, under a statute which provided that upon the filing of an application for a franchise the governing body "shall, in its discretion, advertise the fact of said application, together with the statement that it is proposed to grant the same." The court said at page 714 of 153 Cal., at page 368 of 96 P.: "The Legislature has been careful to expressly provide that such body, upon the filing of the application, shall '*in its discretion* advertise,' etc. This, of course, does not mean that the body may, in granting such a franchise, in its discretion dispense with advertising, but it does undoubtedly mean that it may, in its discretion, refrain from taking any step toward granting a franchise for the thing asked. In other words, the question whether any such franchise shall be given to any one is, notwithstanding the presentation of the application, solely with such legislative body, to be determined by it in its discretion." The intention of the legislature must be determined from the language of the statute. People v. Pacific Guano Co., 1942, 55 Cal. App.2d 845, 848, 132 P.2d 254. A court cannot depart from the meaning of language which is free from ambiguity. Seaboard Acceptance Corp. v. Shay, 1931, 214 Cal. 361, 366, 5 P.2d 882.

[4-6] Petitioners' assertions that the writ should issue because "an amount sufficient to refund the bond" is in the city treasury, and that the project for which they had been assessed was classified as a "major street," are partially answered above. As above stated, the city was not required to determine that a street came within any particular classification and, even if it did make such determination it was under no legal obligation to grant relief to the property owners who had been assessed for the improvement. If it is petitioners' contention that defendants became legally obligated to grant the relief by reason of the fact that they had classified Laurel Canyon Boulevard as a "major street," and by reason of the council's resolution expressing a desire to apply any "funds available for the purpose in the fairest and most equitable manner possible," said contention cannot be sustained. The discretionary power to refuse to take any step toward granting the relief sought continues until final official action has been taken by the legislative body granting the relief, notwithstanding any previously existing intention on its part as to what its final action would be. McGinnis v. Mayor and Common Council, 1908, supra, 153 Cal. at page 714, 96 P. at page 368. Furthermore, the petition shows that petitioners' lot was but one of many lots against which assessments had been placed to pay for certain projects, and that the contemplated survey was to include "all projects in the City of Los Angeles which would be eligible under the law for the special assessment relief." The petition does not show that the survey had been completed, and it does not show that any available funds had been apportioned, as required by section 5552 of the Streets and Highways Code, "pro rata between all properties assessed * * * in the same ratio that the original assessments bore to the total assessment against all properties assessed." In other words, although the petition further alleged that "according to the last figures of the City Treasurer, there is available for use in paying any claims or moneys herein, the sum of $49,630,527.49," etc., the petition does not show what proportion thereof the petitioners herein were entitled to receive, or have applied against the assessment on their lot. The matter of granting aid is discretionary with the legislative body, but the manner of apportioning appropriated funds is not discretionary. As shown above, section 5552 of the Streets and Highways Code required that any such appropriation must be apportioned in a certain manner. The statute does not contemplate a separate appropriation for the benefit of a single parcel of land to the exclusion of other parcels of land similarly situated.

The judgment is affirmed. The appeals from the order sustaining the demurrer without leave to amend, and from the order discharging the alternative writ of mandate are dismissed.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; CURTIS, CARTER, and SCHAUER, JJ., dissenting.

63 Cal.App.2d 772

CARPENTER (PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA, Intervener) v. CITY OF SANTA MONICA.

Civ. 11986.

District Court of Appeal, First District, Division 1, California.

April 17, 1944.

Rehearing Denied May 17, 1944.

Hearing Denied June 16, 1944.

1. Navigable waters ⚷37(8)

Under statute granting to city of Santa Monica all right and title of state in and to tidelands and submerged lands within boundaries of city and situated below mean high tide of Pacific Ocean, the submerged and tidelands are held in trust by city for the public and control of state and its grantees could not be lost except as to that portion that may be disposed of without impairment of public interest and then only upon express legislative authority. St.1917, p. 90.

2. Navigable waters ⚷39(5)

In action for damages for city's construction of breakwater in harbor resulting of erosion of large portion of beach in front of intervener's property located on seashore, evidence justified denial of recovery on ground that the beach was not a prograding beach and that all of the eroded area was artificially accreted beach.

3. Navigable waters ⚷44(3)

Where intervener's title to land on seashore was predicated upon a Mexican grant and the issuance of a patent by United States thereafter pursuant to an act of Congress, confirmatory of the Mexican grant, the United States never had true ownership of the property and was not grantor or source of title, and the question whether accretions formed by action of waters belonged to upland owner was not governed by federal law but rather by state law.

4. Navigable waters ⚷44(3)
Waters and water courses ⚷93

Statute relating to accretions applies only to accretions upon bank of a river or stream and to accretions from natural causes. Civ.Code, § 1014.

5. Navigable waters ⚷44(3)

Accretions to seashore, formed gradually and imperceptibly by natural causes, belong to the upland owner.

6. Navigable waters ⚷44(3)

Accretions to seashore formed gradually and imperceptibly, but caused entirely by artificial means, such as wharves, groins, piers, and by dumping of material into ocean, belong to the state or its grantee and not to the upland owner.

7. Navigable waters ⚷39(5)

Where city of Santa Monica constructed breakwater in harbor which interfered with currents of ocean and caused erosion of large portion of beach in front of intervener's property, but the entire area eroded was created artificially by works of man and by dumping of material into ocean and thus belonged to city as grantee of state, intervener suffered no legal damage and was not entitled to recover. St.1917, p. 90.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as conservator of the Pacific Mutual Life Insurance Company of California, against the City of Santa Monica, in which the Pacific Mutual Life Insurance Company of California intervened, for damages for the taking or damaging of real property alleged to be owned by the insurance company and alleged to have been caused by the construction of a breakwater by the city. From a judgment for defendant, intervener appeals.

Affirmed.

See, also, 147 P.2d 976.

Hanna & Morton, Byron C. Hanna, and James Kirby, all of Los Angeles, for appellant.

Hill, Morgan & Bledsoe, Kenneth K. Wright, Vincent Morgan, and Stanley S. Burrill, all of Los Angeles, for respondent.

PETERS, Presiding Justice.

The plaintiff, the insurance commissioner of the State of California, as conservator of the Pacific Mutual Life Insurance Company of California, instituted this action against the city of Santa Monica for damages for the taking or damaging of the real property alleged to be owned by the insurance company and alleged to have been caused by the construction of a breakwater by the city in the harbor. The insurance company intervened and is the appellant. The parties stipulated that the issue as to the amount of damages should not be tried until after the court had first determined whether there was any liability on the part of the city in the circumstances. The trial court determined that the city was not liable for the alleged damage, and, as a result, that issue was not tried.

The appellant acquired title to certain beach properties in the city of Santa Monica in October of 1934. The property is improved with a nine-story building, designed and used exclusively as a beach club. The southwest boundary of this land is the mean high tide line of the Pacific Ocean. Prior to July of 1933 there was a wide beach between the club house and the water. In that month the city commenced the construction of a breakwater in the harbor some 2000 feet offshore and north and west of the property of appellant. The breakwater was completed in July of 1934. By reason of the construction of this breakwater the currents of the ocean have been interfered with, and the water has been so quieted that sand which would otherwise be carried to appellant's property no longer is carried there. The result has been that erosion has taken place which has washed away a large portion of the beach in front of the appellant's property. In 1936 appellant acquired assignments from its immediate predecessors in interest of all claims that they might have against the city for damages resulting from the construction and maintenance of the breakwater. In October of 1936 the insurance commissioner, as conservator, filed a written claim with the city for the damages, and, upon its rejection, this action was commenced in November of 1936. The prayer of the complaint is for $178,000 damages.

The trial court found that the city was not liable for the erosion caused by the construction of the breakwater. It based this conclusion on several theories. It held that in the construction of the breakwater the city acted in its governmental capacity and under its police power, exercised for the purpose of protecting its harbor and property, and to promote and accommodate commerce and navigation. It also determined that the city had the legal right to protect its harbor and its property and the property of others within its boundaries from the action of the ocean, and that the city constructed the breakwater for such purposes; that in doing so it was protecting itself and its property owners from a common enemy; that any damages arising from the construction and maintenance of the breakwater were and are damnum absque injuria. So far as these theories are concerned, the problems involved are similar to those involved in Miramar Co. v. City of Santa Barbara,' 23 Cal.2d 170, 143 P.2d 1, recently decided by the Supreme Court. In that case, three of the justices held that damages caused to the upland owner by the construction of such a breakwater were damnum absque injuria; three held that the upland owner was entitled to damages; and one held that the claims statute was applicable to such a proceeding. Subsequently, the Supreme Court in the case of Natural Soda Prod. Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12, by a six to one vote, determined that the claims statute has no application to such cases. Inasmuch as the Supreme Court was equally divided on the issues above set forth it is obvious that the decision in that case does not constitute a decisive or even helpful authority in the instant case.

In the present case, the trial court, in addition to the theories above mentioned, based its judgment denying recovery to appellant on another theory not discussed in the Miramar case. It made detailed findings to the effect that all of the eroded beach had been artificially created by man made structures erected in Santa Monica Bay, and held that accretions so formed do not belong to the upland owner but belong to the state or its grantee as the owner of the tide and submerged lands bordering the ocean. If these findings are supported, and if the legal conclusion based thereon is sound, they alone support the judgment regardless of the correctness of the other holdings of the trial court above mentioned.

[1] The property here involved is within the city limits of the respondent city. In 1917 the state legislature granted to the respondent city "all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands, within the present boundaries of said city, and situated below the line of

mean high tide of the Pacific Ocean, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions following, to wit:

"(a) Said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor and for the establishment and construction of bulkheads or breakwaters for the protection of lands within its boundaries, or for the protection of its harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion or accommodation of commerce and navigation, and the protection of the lands within said city * * *." Stats. of 1917, Chap. 78, p. 90. The city is prohibited from conveying the lands away, but may grant franchises or leases for periods not to exceed twenty-five years for purposes consistent with the trusts upon which the lands are held by the state. The submerged and tide lands so conveyed to the city are, of course, held in trust by it for the public under this grant from the state. The control of the state, and its grantees, for the purposes of the trust can never be lost except as to the portion that may be disposed of without impairment of the public interest, and then only upon express legislative authority. People v. California Fish Co., 166 Cal. 576, 138 P. 79; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063; Forestier v. Johnson, 164 Cal. 24, 127 P. 156; People v. Kerber, 152 Cal. 731, 93 P. 878, 125 Am.St.Rep. 93.

It is an admitted fact that the appellant deraigned its title from a United States patent issued by act of Congress confirming a prior Mexican grant entitled to confirmation under the Treaty of Guadalupe Hidalgo, 9 Stat. 922, and that the oceanward boundary line of appellant's property is described in the original patent as the line of ordinary high tide of the Pacific Ocean.

In its amended findings of fact the trial court found that "the shore of Santa Monica Bay extends southeasterly in a long shallow crescent from Point Dume on the north to Point Vicente on the south; that the prevailing westerly winds create a wave action in the bay which meets the shore obliquely, resulting in a gentle and almost continuous shore current or littoral drift southerly along the shore. As the breaking waves stir up the sands of the beaches this shore current picks them up, holds them in suspension long enough to deposit them southerly along the shore, where the process is repeated continuously. When not artificially interfered with the effect of this continuing erosion is constantly overcome by the supply of new sand material seasonably washed down from the hinterlands by the run-off of storm waters through canyons and creeks. Since the year 1900 and possibly for some years prior thereto, this sand supply has been increased from time to time by man's operations along the shore line, such as the construction of roads and the blasting out of cliffs. Man's activities in the hinterlands in the building of cities, roads and other improvement[s] have, in some instances, caused a greater run-off of storm waters than formerly and has created a greater supply of sand materials than was the case before such operations became extensive on the Pacific Coast.

"Where groins, piers and other structures are built into the ocean from the beach, they interfere with the littoral drift and cause the drifting sands to be trapped and deposited on the shore immediately to the north thereof, where such structures are impervious, but if not impervious, as in the case of piers, the piling of the piers interferes with the littoral drift, causing a similar deposit of sand, but much sand passes through the piling and is deposited on the shore immediately to the south of such structures, thus building out the beach on both sides thereof. In a short time the groins become filled with sand, but the beach to the northerly thereof continues to accrete and gradually fill out, in the case of groins, as much as thirty times the length of the structure from the mean high tide line seaward. The space between the pilings under large piers fills up more slowly but as it fills up it makes the pier more or less impervious to the flow of sand through it, whereupon it becomes effective as an impervious groin. After the groin or other structure has been filled to capacity, the sands again drift around the end of the groins and supply the beaches to the south.

"Since the year 1870 there have been numerous structures erected along the shore line of the City of Santa Monica, which have interfered with the littoral drift of the ocean and have caused the shore line to accrete because of the entrapment of the sands by reason of the structures.

"That none of the activities of man in the hinterlands hereinbefore referred to, was conducted or carried on, and that none of said structures hereinbefore referred to was erected or maintained by the intervener, or by intervener's predecessors in interest, and that neither intervener nor intervener's predecessors in interest has or have done anything whatsoever to contribute in any manner to such accretions. That such accretions have formed gradually and imperceptibly." Finding XI.

In Finding XII, after finding that the boundary of appellant's property is a meander line along the line of ordinary high tide of the ocean, and that the present location of the meander line is indefinite, the court found:

"That in the year 1876, or shortly prior thereto, the federal government, through its Coast and Geodetic Survey, caused a survey to be made of the shore line of Santa Monica Bay, including the shore line as it then existed in front of the properties now owned by the intervener. That said survey was and is subject to a possible error of 33 feet on either side of the mean high tide line as plotted on the map thereof due to the conditions under which it was made and the methods used in making it. * * *

"That by 1933, the year in which the construction of the breakwater commenced, there was a sandy beach of approximately 185 feet in depth seaward of that portion of the Promenade between Pico Boulevard and Vicente Terrace in the City of Santa Monica, between which streets the property of the intervener hereinbefore described is located. Said Beach was formed gradually and imperceptibly between the year 1876 and the year 1933.

"That the beaches in Santa Monica Bay and those in front of said property of the intervener were in a state of equilibrium for a long period of time prior to 1876, and now would be, in a state of nature, in a state of equilibrium.

"That along the shore line of Santa Monica Bay it is only where there have been groins, piers, and other structures erected by man which have trapped the sand being conveyed by the littoral drift or current, that there has been any prograding of the beaches, and throughout the bay area where the shore has not been affected by such activities of man, the beach remains in a state of equilibrium and has not prograded seaward from the line of 1876.

"That the property of intervener lies approximately 2000 feet southerly of the southerly end of the breakwater. That by reason of the construction of the breakwater the currents of the ocean have been interfered with and the littoral drift or current has been so quieted that it does not carry the normal amount of sand along the shore, but has caused a large amount of sand to be deposited northerly of the location of the property of intervener, and as a result thereof, the normal amount of sand has not been carried to or upon the shore line in front of the property of intervener which has caused an erosion of the shore line at that place.

"That all of said property which has been so eroded consists of artificial accretions due to the activities of man, and particularly the construction of piers and other structures in and along Santa Monica Bay in the vicinity of the property of intervener. That such accretions were formed gradually and imperceptibly and that none of said activities was conducted or carried on and that none of said piers or other structures was erected or maintained by the intervener or intervener's predecessors in interest, and that neither intervener or [sic] intervener's predecessors in interest has done or have done anything whatsoever to contribute in any manner to such accretion."

Based on these findings, the trial court, in its conclusions of law, found:

"That the intervener is not the owner of any lands claimed to have been injured by erosion, but that said property so eroded is artificially accreted land and constitutes filled tide lands belonging to the defendant City of Santa Monica" under the provisions of the 1917 statute above referred to, "and that none of the lands of intervener have been damaged by reason of the construction of the breakwater of the City of Santa Monica, but that the lands so eroded by reason of said construction of said breakwater are, as aforesaid, tide lands belonging to the City of Santa Monica." The judgment follows almost exactly the terms of the conclusion of law above quoted.

Appellant seriously challenges most of the findings above quoted, contending that insofar as it is found that in 1876 the beach was in equilibrium, that the beach is not naturally a prograding beach and that all of the eroded area was artificially accreted beach, the findings are totally unsupported. There can be no doubt but that some of appellant's experts testified that the beach here involved is a naturally prograding beach. It was their theory that the eroded area was composed of natural accretions, and that the erection of piers, wharves and groins, and the other activities of man described in the findings, only had a slight effect on the rate of accretion. The appellant, by relying heavily on the testimony of its own experts, and by quoting isolated sentences from the testimony of respondent's experts, creates the impression that all of the experts were more or less agreed that the accretions in front of this property were the result of both natural and artificial causes, differing only as to the degree each cause affected the area. However, a fair reading of the testimony of respondent's experts, all men of wide experience and training in this highly technical field, demonstrates that they testified that this beach, in a state of nature, was in equilibrium, was not prograding, and that all of the accretions affected by the erosion were artificially created as described in the findings. In fact, several of appellant's witnesses testified that the area involved was not one of accretion under natural conditions. Respondent's witnesses were positive that all of the accretions were artificially caused by the works of man. Thus Howard D. Carter, city engineer of the City of Santa Monica, who has an intimate knowledge of the Santa Monica area, testified as to the location of the many piers and wharves in the area here involved, and further testified:

"I have studied the effect which the various structures that are in Santa Monica Bay had upon the beaches lying immediately north and south of these piers and between them, and have come to a conclusion as to the cause of the accretions that existed between these piers and structures. The cause of these accretions has been the slowing down of the littoral drift due to the number of pilings in each pier. * * * The different surveys made following 1876 show that between 1876 and 1933 the beach had been built seaward, or, in other words, had accreted, at the property of the intervener. I would say that all structures placed there by man had considerable influence on the building up of the beach.

"In my opinion the accretions which lie in front of the plaintiff's property would not have accrued to that property by reason of the forces of nature alone. The line of mean high tide in 1933 and at the present time, if the man made structures that I have referred to had not been constructed, would in my opinion have been along the 1876 line, considering the error that the United States Coast Geodetic Survey remarked about. In my opinion, the beach in the vicinity of the plaintiff's property has not been a prograding beach, because the condition as shown on the 1876 line must surely have been a condition which was established over a great many years, probably ten thousand. If it had been a prograding beach I would not have expected to have found that narrow width of beach which the line of 1876 purports to show it had."

This witness described in detail the condition of the beach over the years, and then testified: "When you try to analyze the reason for the accretion of the beach between 1876 and 1921, I think there must be something of an artificial nature that caused it. If it had been going on for centuries, I can't see why we would not have beaches five miles wide. If we had a naturally prograding beach in this bay, which must have continued for thousands and thousands of years, this bay would have a beach approaching a line between Point Dume and Point Vicente." The witness then described the vast quantities of material that were dumped into the bay during the development of the various subdivisions in Santa Monica and as a result of the building of the coast highway and the railroad. He estimated that seven million cubic yards of material were dumped into the sea during the construction of the state highway in this area, and that a half million cubic yards were deposited therein as the result of slides in the first three years after its construction. He again stated positively that the beach at Santa Monica was not a prograding beach, and that such beach, in a state of nature was in equilibrium, and pointed out: "If the beach prograded only an inch a year we would have a wide expense [expanse] of beach in the eighty thousand years geologists ascribe to the recent epoch." He then pointed out that on other beaches where there were no man made structures there was either erosion behind the 1876 line, or at least there were no accretions beyond that line. In this connection he mentioned particularly Manhattan Beach, a short distance south of the area in dispute, where there was a portion of the beach where the piers are separated by a distance of three miles. In that area there was erosion rather than accretions. Various early subdivision maps of the general area were introduced during this witness' testimony. They demonstrated that all of the early subdividers had located the seaward boundary lines of their subdivisions within 20 to 30 feet of the 1876 line of mean high tide, allowing for the possible error of 33 feet above mentioned. Various deeds of about 1900, or thereabouts, fixed the seaward boundary line of appellant's property, or of adjacent property, within only a few feet of the 1876 line.

The witness A. G. Johnson was an expert of wide experience and training in this field. He also testified that where man made structures had not interfered with the littoral drift in this area the beach was either eroded, or the mean high tide line was as fixed in the 1876 survey. He stated positively that the accretions attaching to this beach were caused by the piers, wharves, etc., and by the material dumped into the sea during the construction of the highway, and concluded with this opinion: "If none of the structures here mentioned had been erected by man and the beach from Santa Monica Canyon to Playa del Rey was in a state of nature, the 1933 line of mean high tide would, in my opinion, be in approximately the same position as in 1876."

The respondent's witnesses Morrough Parker O'Brien, chairman of the department of Mechanical Engineering at the University of California, and an engineer of wide experience and training, and Major George Elliott Verrill, a civil engineer connected with the United States Engineering Service for many years, corroborated these two witnesses in all particulars. They likewise concluded that this beach was not a naturally prograding beach, and that the accretions accruing since 1876 were the result of the many activities heretofore described and were therefore artificial accretions.

[2] The testimony of these witnesses amply supports the findings heretofore quoted. Appellant attacks their testimony and requests this court to set these findings aside, claiming that the conclusions are unsound and contrary to some physical facts of which it requests this court to take judicial notice. The questions as to whether this beach, in a state of nature, was in a state of equilibrium, or whether it was a prograding beach, whether the eroded area was built up by natural or artificial accretions, or was the result of both natural and artificial causes, were questions the answers to which lay peculiarly within the knowledge of experts in this field. The experts for respondents were amply qualified to give their opinions on this subject. After reading all of the evidence on this issue, we are convinced that the findings are not only amply supported by substantial evidence, but that the great weight of the evidence supports the opinions given by respondent's witnesses upon which the findings are based.

From this analysis of the facts, it must be taken as established on this appeal:

1. That the beach in front of appellant's property is not a prograding beach;
2. That in a state of nature the beach from 1876 to the time of this trial was in a state of equilibrium;
3. That all of the accretions that occurred between 1876 and 1933 were artificial accretions caused by the man made structures and the activities heretofore described;
4. That all of the area that has been eroded as a result of the construction of this breakwater was artificially accreted land;
5. That neither appellant nor its predecessors contributed to the activities causing these accretions;
6. That such accretions formed gradually and imperceptibly.

The legal problem presented by these facts is who owns that portion of the beach formed by such artificial accretions below the line of mean high tide as such line would exist in a state of nature? Appellant, assisted by counsel appearing as amicus curiae on behalf of the California Land Title Association, argues that accretions formed gradually and imperceptibly, whether caused naturally or artificially, belong to the upland owner, as against the state or its grantees. Respondent argues that the holding of the trial court that such areas formed by artificial accretions belong to the state, or its grantees, is amply supported by reason and authority.

At the threshold of this discussion we are met by the contention of amicus curiae that the federal and not the state cases govern the determination of this question. This contention is based on the admitted fact that appellant deraigns title from a United

States patent confirming a prior Mexican grant. Starting from this premise, amicus curiae argues that the patent describes the seaward boundary as being the ordinary high tide line of the Pacific Ocean; that when the grantor is the United States and the grant is executed pursuant to an act of Congress, the question of the meaning and effect of the grant, that is, the question of the intent of Congress, is strictly a question of federal law, on which the decisions of the federal courts are controlling and binding regardless of what the state courts may have said upon the subject. The next step in the argument is the contention that when a federal grant of upland is bounded by navigable waters, accretions formed by the action of the waters by gradual and imperceptible degrees are included in the grant and belong to the upland owner, regardless of whether they have been caused or contributed to by artificial structures created by anyone other than the upland owner.

If it be assumed, for the moment, that the federal rule is as contended, the foundation for this argument is that appellant holds title through a federal grant—in other words, that the original grantor was the United States. Where title is deraigned from the United States it is settled that the question as to the extent of the grant is to be governed by federal and not by state law. Thus in Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9, the city brought an action to quiet its title to the alleged tide lands of Mormon Island in San Pedro Bay. The city asserted title under a legislative grant from the state similar to the one involved in the instant case. The defendant claimed under a patent issued by the United States to their predecessors in interest. The patent from United States was not simply a confirmation of a prior Mexican grant, but an outright grant by United States of public lands owned by it. The question as to the boundary of the patent turned upon the meaning of the phrase "mean high tide line." The Borax Company contended that the California courts had defined that phrase as the line of the "neap tides." The United States Supreme Court held that inasmuch as the Borax Company claimed under a federal grant the question as to the extent of that grant "is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." 296 U.S. at page 22 56 S.Ct. at page 29, 80 L.Ed. 9. The court expressly refused to follow the California cases as to the meaning of the phrase "mean high tide line," held that such phrase did not mean the mean of the neap tides, but meant a mean of all high tides.

[3] Under the authority of this case, if appellant claimed through a federal grant in the proper sense, there could be no doubt that the question involved would be governed by the federal and not the state law. But that rule only applies where title is derived from the United States. In the present case appellant did not deraign title from the United States at all. The title was predicated upon a Mexican grant. The issuance of the patent thereafter pursuant to an act of Congress was but confirmatory of the Mexican grant in performance of our government's obligations assumed under the Treaty of Guadalupe Hidalgo. The United States never had the true ownership of the property, and in no proper sense was it the grantor or the source of appellant's title. This exception to the rule announced in the Borax case, supra, is well settled. Thus in Los Angeles Farming & M. Co. v. City of Los Angeles, 217 U.S. 217, 30 S.Ct. 452, 54 L.Ed. 736, the Supreme Court of United States had under consideration a proceeding to review a decision of the Supreme Court of this state. That decision had affirmed a judgment quieting the title of the city to the use of certain of the waters of the Los Angeles river. Both the city and the company claimed under patents issued by the United States, confirming certain Mexican grants. In the proceeding before the United States Supreme Court it was asserted that several federal questions were involved, including the claim that the California courts had interfered with the disposition of public lands by the United States. The Supreme Court dismissed the writ for want of jurisdiction. In doing so it discussed at length the question as to what law governs federal patents confirming Mexican grants, and held that the state and not federal law governs. Quoting from Adam v. Norris, 103 U.S. 591, 593, 26 L.Ed. 583, the court stated:

"'But the United States, in dealing with parties claiming under Mexican grants, lands within the territory ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the government issued a patent, it was in the nature of a quitclaim,—an admission that the rightful ownership had never been in the United States, but had passed at the time of the cession to the claimant, or to those under whom he claimed. * * *'

"It is perhaps more accurate to say that the action of the United States in such cases is a confirmation rather than a quitclaim." 217 U.S. at page 227, 30 S.Ct. at page 456, 54 L.Ed. 736.

Referring to the contention of the company that its rights were secured under the treaty of Guadalupe Hidalgo and the federal statute passed pursuant thereto, the court, 217 U.S. at page 227, 30 S.Ct. at page 456, 54 L.Ed. 736, stated: "The contentions as to the supposed rights derived under that treaty and act have been before this court in a number of cases, in which it has been uniformly held that rights alleged to have arisen thereunder, in the manner claimed by the present plaintiff in error, are not rights of Federal origin which, when denied, lay the basis for the review and reversal of the judgment of the state court." The court quoted at length from the decisions in Townsend v. Greeley, 5 Wall. 326, 18 L.Ed. 547, and Hooker v. City of Los Angeles, 188 U.S. 314, 23 S.Ct. 395, 47 L.Ed. 487, 63 L.R.A. 471, both holding that the extent of rights gained under confirmatory patents were to be determined by state law. In the Hooker case the precise problem here under discussion was involved. In the Los Angeles Farming & M. Co. case, 217 U.S. at page 230, 30 S.Ct. at page 457, 54 L.Ed. 736, the court repeated with approval the following statement from the Hooker case. "'Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, [the extent of certain water rights] was one of state law and of general public law, on which the decision of the state court was final.'" See, also, Devine v. City of Los Angeles, 202 U.S. 313, 26 S.Ct. 652, 50 L.Ed. 1046; California Powder Works Co. v. Davis, 151 U.S. 389, 14 S.Ct. 350, 38 L.Ed. 206; Hardin v. Jordan, 140 U.S. 371, 11 S.Ct. 838, 35 L.Ed. 428.

The United States Supreme Court in the Borax case, supra, the sole federal case relied upon to establish the rule contended for, did not purport to overrule or limit the well settled rule established by the above cases, and many more that could be cited, but in fact recognized this rule. California is in accord with these many cases. Teschemacher v. Thompson, 18 Cal. 11, 22, 79 Am.Dec. 151.

The only other case cited by amicus curiae on this point is Bolsa Land Co. v. Vaqueros Major Oil Co., 25 Cal.App.2d 75, 76 P.2d 519. That case involved a dispute between the owner of the upland on one side, and the state and its lessee on the other over the seaward boundary of the upland. That question turned upon the meaning of the phrase "ordinary high water mark." California has held that this phrase limits the boundary to the mean of the "neap tides," while the federal cases hold that the mean of all high tides must be included. At page 77 of 25 Cal.App.2d, 76 P.2d at page 520, the court stated: "Wherever the lands are granted by the federal government, a federal question of course is involved, and the rule adopted by the Supreme Court of United States is controlling." Later the court cited and followed the rule of the Borax case, supra, (25 Cal.App.2d at page 80, 76 P.2d at page 522). The exact nature of the federal grant to the upland owner is not noted in the opinion. Counsel on both sides of the present controversy are agreed that the record shows that the upland owner deraigned title from a federal patent confirming a Mexican grant. The briefs in that case show that both counsel assumed that the rules applicable to federal grants, in the proper sense, were applicable. No one cited or discussed the rules established by the many cases above referred to. It is elementary, of course, that a decision which fails to consider a point of law cannot be considered as authority on that point. Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, 114, 64 P.2d 138, 108 A.L.R. 1080; Oakland Pav. Co. v. Whittell Realty Co., 185 Cal. 113, 119, 195 P. 1058; Hahn v. Kelly, 34 Cal. 391, 404, 94 Am.Dec. 742. Moreover, if there were a real conflict between the Bolsa Land Co. case and the Los Angeles Farming & M. Co. case, and the other federal cases cited, supra, on this subject, the federal cases would control. They determine that as to patents confirmatory of Mexican grants the state and not the federal law controls.

From what has been said it is quite obvious that the California decisions control the problem here presented as to whether accretions artificially caused belong to the upland owner or to the state. For this reason we do not find it necessary to decide what the federal rule may be on this subject. There are no doubt many federal cases, following the leading case of St. Clair County v. Lovingston, 90 U.S. 46, 23 L.Ed. 59, relied upon by appellant which hold that as between competing upland owners, or as between upland owners and others not claiming tide lands as successors of the state, artificial accretions belong to the upland owner. This is the general common law rule and probably the rule in this state. Forgeus v. Santa Cruz County, 24 Cal.App. 193, 140 P. 1092. An entirely different rule may apply, however, where the upland owner attempts to assert title to lands formed by artificial accretions against the claim of the state, or its successor in interest, that such lands are tide lands. This distinction was clearly recognized in this state in the case of Patton v. City of Los Angeles, 169 Cal. 521, at page 525, 147 P. 141, at page 142. However, inasmuch as the California cases are decisive on the problem now before us, it is unnecessary to decide the interesting and confusing question as to what the federal or general common law rule on this subject may be.

When the California cases are considered there can be no reasonable doubt but that the rule in this state is that in a controversy between the state, or its grantees, and the upland owner, artificial accretions belong to the state, or its grantees, as the owner of the tide lands.

[4] There is no statute in this state dealing with the doctrine of accretions in relation to tide lands. Section 1014 of the Civil Code provides: "Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank." The statute is limited by its very terms to accretions upon the "bank of a river or stream," and by statutory limitation only applies to accretions "from natural causes."

This statute codifies the California view of the common law of accretions upon rivers or streams. In Strand Imp. Co. v. City of Long Beach, 173 Cal. 765, 161 P. 975, it was held that the failure of the section to treat of alluvion forming upon the seashore did not warrant an inference that the common law rule of accretions had been to that extent abrogated in this state. The exact holding in this case was that the common law rule applied to the seashore just as it does by virtue of § 1014 of the Civil Code to the banks of river or streams. The court expressly refused to follow the federal case of Western Pac. R. Co. v. Southern Pac. Co., 9 Cir., 151 F. 376, which had held that § 1014 of the Civil Code by failing to mention accretions attached to the seashore, had to that extent, abrogated the common law rule.

So far as the opinion discloses, the accretions involved in the Strand Improvement Co. case, supra, were natural accretions, formed gradually and imperceptibly. The case stands for the proposition that the common law governs the ownership of accretions to the seashore, and that where such accretions occur naturally, they belong, in accordance with the common law rule, to the upland owner. It is true that Judge Shaw, the author of the opinion, does not use the word "natural" in discussing the rule, but the opinion indicates that the accretions there involved had been formed naturally. When the same author, some six months later, found it necessary to interpret his opinion in the Strand Improvement Co. case he clearly stated that the rule was limited to accretions from natural causes. In Curtis v. Upton, 175 Cal. 322, 334, 165 P. 935, 940, Judge Shaw, speaking for a unanimous court, stated: "The question of the effect of gradual accretions may become important with regard to the lines of surveys Nos. 10 and 34 bordering upon the sandspit. Recently, in Strand Imp. Co. v. [City of] Long Beach, 173 Cal. 765, 161 P. 975, the court decided that the common law *that gradual accretions from natural causes* to land abutting upon water belong to the owner of the upland applied to lands fronting upon tidal waters and to the shores of the ocean." (Italics added.)

[5] Thus we start this phase of the discussion with the proposition that accretions to the seashore, formed gradually and imperceptibly by natural causes, belong to the upland owner. It is also admitted by all concerned that artificially filled tide lands, filled rapidly and not gradually and imperceptibly, belong to the state or its grantees and do not belong to the upland owner. The problem we are presented with falls between these two well defined groups—who owns artificially filled or accreted tide

lands, formed gradually and imperceptibly, as between the state, or its grantees, and the upland owner?

In every case where this problem has been considered where the state, or its grantees, were parties, it has been held that artificial accretions, forming gradually and imperceptibly, belong to the state, or its grantees, and do not belong to the owner of the upland. Patton v. City of Los Angeles, 169 Cal. 521, 147 P. 141 (also written by Judge Shaw), was an action to quiet title to a tract of land, a part of which was located within San Pedro Bay, containing about seven acres, and to enjoin the city from removing soil therefrom. The city claimed a portion of the area as owner of the tide lands as grantee of the state. The trial court quieted the plaintiff's title to the upland, but quieted the city's title to the tide land. On appeal the plaintiff urged that the land south of his boundary was not tide land but was in fact artificially accreted land, which accretions were caused by the erection of a railroad embankment from the upland across part of the bay, and contended that such artificial accretions belonged to him as upland owner. The court disposed of this contention in the following language (169 Cal. at page 525, 147 P. at page 142): "Regarding this and other claims of accretions by and additions to the upland, or because of erections and embankments of others, it is sufficient to say that the point assumes that it was once tideland, and that, this being so, it was reserved from sale, and was not alienable by any state officer under any law, during the time when the alleged accretions occurred, and therefore no artificial embankment, made by third persons, or made or suffered by state officers or agents, nor any accretion to the adjacent upland caused thereby, could operate to divest the state of its title to the tideland so reserved. * * * We can see no plausible reason for the contention that the making of such embankments, or accretions caused thereby, would operate in favor of third persons to divest the state of its title to tidelands covered by the embankment and accretions extending out over it from the adjacent upland, and transfer the title to the owner of the upland."

The court went on to discuss Ledyard v. Ten Eyck, 36 Barb., N.Y., 102, which holds that artificial accretions belong to the upland owner. It held that such case, and the rule there applied, have no application where the state is a party. At page 526 of 169 Cal., 147 P. at page 142, it is stated: "That was a controversy between the owner of the upland and the owner of other land in the vicinity. What the court decided was that the possession of the accretions by the owner of the abutting upland could be disputed by no one except the state." The court went on to hold that no title against the state could be acquired by adverse possession. Appellant contends that the case only involves deliberately filled tide lands. While it is true that some of the accretions involved were of this type, the language of the opinion above quoted demonstrates to a certainty that the court was not only concerned with the artificially constructed embankment, but also concerned with the accretions to the adjacent land "caused thereby." These last mentioned accretions are exactly of the type involved in the present action. The case directly stands for two propositions. (1) That reclaimed tide lands belong to the state or its grantees, and (2), that accretions to adjacent lands caused thereby belong to the state or its grantees.

Another important case on the subject is City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789. The decision in this case was based on two theories—either the accretions involved were not gradual, or if they were, they were artificial. In either event, says the court, they belong to the state, or is grantees. This action was brought by the city, the grantee from the state of the tide lands, to recover a small piece of land to which defendant claimed title by prescription. A 1908 survey demonstrated that at that time the questioned area was tide land. A breakwater was extended and completed in 1912. The area involved was between the old and new high tide line, and was based on the breakwater. At page 664 of 206 Cal., 275 P. at page 790, the court stated: "It is plaintiff's contention that this parcel of land, though resulting from accretions, was not of such imperceptible formation as to constitute alluvion belonging to the owner of the upland, but was, in fact, created and formed by artificial means, namely, the deposit of foreign substances against the breakwater, and therefore retains its character as tideland, title to and possession of which remains in it as successor to and grantee of the state * * * subject only to certain trusts for the public use. On the other hand, the several defendants insistently urge that accretions occurring on the shore line of the ocean belong, under the authorities, to the owner of the abutting upland, thus precluding the plaintiff city—it having neither title to nor interest in the upland—from successfully prosecuting these several actions for possession of accretions thereto." The witnesses had testified that the high tide line remained as fixed in the 1908 survey until the breakwater was completed in 1912; that in the fall of 1912 a small accretion occurred at the root of the breakwater on the south; that the bluff caved in five or six hundred feet south of the breakwater and that some of that material lodged at the breakwater "making a small fraction of an acre of accretion"; that this was increased by some material dumped over bluffs; that the accretion was created by the breakwater. After discussing the common law rule, and the Strand Improvement Co. case, supra, and after holding that the common law of accretion applies in this state, the court (206 Cal. at page 667, 275 P. at page 791) stated:

"In giving application to this rule, the authorities have consistently declared, in conformity with the common-law acceptation thereof, that, for the owner of the upland to be entitled to the accretions thereto, such accretions must have resulted from natural causes and been of gradual and imperceptible formation. * * * Where, however, the accretions have resulted, not from natural causes, but from artificial means, such as the erection of a structure below the line of ordinary high water, there is made out a case of purpresture, or encroachment, and the deposit of alluvion caused by such structure does not inure to the benefit of the littoral or upland owner, but the right to recover possession thereof is in the state or its successor in interest, as the case may be. * * *

"The formation of the triangular shaped piece of land here in controversy having resulted, as found by the trial court on abundant evidence, not from natural causes and by imperceptible degrees, but from the deposit and lodgment of foreign materials, as distinguished from the ordinary wash of the ocean, against the artificial obstruction offered by the government breakwater below the mean high tide line, such parcel does not attach as alluvion to the ownership of the upland, but retains its character as public land, being in the nature of reclaimed or filled-in tideland."

The same rule was announced in City of Newport Beach v. Fager, 39 Cal.App.2d 23, 102 P.2d 438. The factual situation was one where tide lands had been reclaimed. It was held, of course, that such tide lands belong to the state, or its grantees. After first holding that the upland owner has no legal right of free access to the water as against the state or its grantees where the state or its grantees put the tide lands to a lawful use (citing Koyer v. Miner, 172 Cal. 448, 156 P. 1023; Henry Dalton & Sons Co. v. City of Oakland, 168 Cal. 463, 143 P. 721; City of Oakland v. Buteau, 219 Cal. 745, 29 P.2d 177; people v. Southern Pac. R. Co., 169 Cal. 537, 147 P. 274; Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; San Francisco Sav. Union v. R. G. R. Petroleum & Mining Co., 144 Cal. 134, 77 P. 823, 66 L.R.A. 242, 103 Am.St.Rep. 72, 1 Ann.Cas. 182), the court stated (39 Cal.App.2d at page 301, 102 P.2d at page 442): "The fact that tideland is artificially raised above the line of mean high tide does not operate to divest the state of its title thereto nor does it change the character of such tideland." At page 31 of 39 Cal.App.2d, 102 P.2d at page 442, it is stated:

"Defendants assert that the effect of the judgment was to deprive them of their property rights without due process and without compensation, contrary to constitutional guarantees. It must be borne in mind, however, that the littoral rights of an upland owner who does not own title to the submerged land or tideland in front of his property are, under the law in this state, subject to being terminated at will by any disposition which the state may choose to make of such submerged lands or tidelands [citing cases]. * * *

"In order for a littoral owner to be entitled to accretions which may form upon the upland, such accretions must have been the *result of natural causes and must have* been formed gradually and imperceptibly. * * * Accretions which have been added to the upland by artificial means do not inure to the benefit of the littoral owner but remain in the state or its successor in interest."

All of the more recent cases on the subject cite and rely upon the early case of Dana v. Jackson St. Wharf Co., 31 Cal. 118, 89 Am.Dec. 164. This was an action in ejectment between two private parties. The plaintiff was the owner of an upland lot. Defendant erected a wharf adjoining the water lot of plaintiff. As a result by natural and artificial means a permanent accretion formed on the water lot of plaintiff. It was held that the state was the proper party to object. At page 120 of 31 Cal., 89 Am.Dec. 164, it is stated: "As to the lands gained from the sea by alluvion, i.e. by the washing up of sand or earth, so as in time to make terra firma, the law is held to be that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. (2 Bl.Com. 61.) The findings, however, make a case of purpresture, or encroachment, by the erection of a wharf in a public harbor, and not a case of marine increase by alluvion, within the definition of that term as fixed by the foregoing citation."

Appellant and amicus curiae place considerable reliance upon the case of Forgeus v. Santa Cruz County, 24 Cal.App. 193, 140 P. 1092. That case merely determined that artificial accretions as between the upland owner and one not an upland owner belong to the upland owner. Neither the state nor its grantee was a party to the action. The facts were that plaintiff owned a tract of land abutting on Monterey Bay. Plaintiff's predecessors had granted the county an easement across this tract. A raised road was constructed thereon. The plaintiff fenced in the portion of the tract lying south and oceanward of the right of way. The county claimed this area was accreted land caused by the roadway, and belonged to it as owner of the right of way. The court held that if accretions were formed they were "due to the act of the county in raising the roadbed along said right of way. It could hardly be contended that the county by such artificial means could secure the fee to the alluvion as an addition to its right of way. The alluvion would be an accession to the fee and not to the easement." 24 Cal.App. at page 199, 140 P. at page 1094. The court then cites several out of state cases holding that artificial accretions, as between two private litigants, belong to the owner of the upland, if he did not create them. The court gave point to the distinction between such cases and cases where the state, or its grantees, claim such artificial accretions, stating (24 Cal.App. at page 200, 140 P. at page 1095): "Clearly, there is a distinction between this case and that where a structure is erected, by the state or municipality, on land below the line of ordinary high water. In the latter case the deposit of alluvion caused by such structure would not inure to the benefit of the riparian owner," citing the Dana case, supra.

[6] From these cases it must be accepted as settled in this state that accretions formed gradually and imperceptibly, but caused entirely by artificial means—that is by the works of man, such as wharves, groins, piers, etc. and by the dumping of material into the ocean—belong to the state, or its grantee, and do not belong to the upland owner. In addition to the many reasons for this rule suggested in the opinions above referred to the following thought may be added. If accretions along an entire bay caused by the construction of a pier or wharf were held to belong to the upland owners as against the state, or its grantee, it would mean, in some cases, that the power of the municipality to improve its harbor would be cut off unless the accreted areas were condemned. It would mean that every time the state or its grantee determined to build a wharf or pier, or to grant a permit or franchise for such construction, it would be granting away a material portion of the tide lands along the entire bay that might later be covered by artificial accretions. Such a rule would mean that the state or its grantee could thus grant into private ownership tide lands which it holds under an irrevocable trust. Such rule would permit the state or its grantees to thus indirectly convey away these tide lands, held in trust, when it cannot do so directly. Such a rule would be violative of fundamental concepts of public policy.

[7] It should be noted that we are not presented in this case with the problem as to what is the proper rule where such accretions are the result of both natural and artificial causes. On that subject we express no opinion. The trial court has found that the entire area eroded by the building of the breakwater was created artificially by the means heretofore described. This area belonged to respondent. Appellant has suffered no legal damage to its lands by the erosion. The trial court correctly so held.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

Hearing denied; CURTIS, CARTER, and SCHAUER, JJ., dissenting; EDMONDS, J., not participating; SPENCE, J., acting pro tem.

63 Cal.App.2d 795

LOS ANGELES ATHLETIC CLUB v. CITY OF SANTA MONICA.

Civ. 11898.

District Court of Appeal, First District, Division 1, California.

April 17, 1944.

Hearing Denied June 16, 1944.

1. Navigable waters ⚷44(3)

Accretions formed along seashore by artificial means, caused by construction of municipal and so-called pleasure piers and by dumping of debris into ocean, did not belong to upland owner, but belonged to city as grantee of state.

2. Navigable waters ⚷39(1, 5)

Where plaintiff's lands in 1933 no longer bordered upon sea but bordered upon artificially accreted area owned by city, plaintiff's lands were not "littoral lands" and plaintiff was not entitled to recover for construction of breakwater by city which caused further accretions, since plaintiff was not legally damaged.

See Words and Phrases, Permanent Edition, for all other definitions of "Littoral Land".

3. Navigable waters ⚷39(2)

The littoral rights of an upland owner who owns no title to tidelands adjoining his property are subject to termination by whatever disposition of the tidelands the state, or its grantees, in exercise of their trust, choose to make.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by the Los Angeles Athletic Club against the City of Santa Monica for alleged injury to its real property caused by the building of a breakwater by the defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

David E. Hinckle, of Los Angeles, for appellant.

Cornelius W. McInerny, Jr., of Santa Monica, and Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for respondent.

PETERS, Presiding Justice.

The Los Angeles Athletic Club instituted this action against the city of Santa Monica for damages for the alleged injury to its real properties caused by the building of a breakwater by the city in the harbor. The action arose out of the construction of the same breakwater discussed in Carpenter v. City of Santa Monica, 147 P.2d 964. Most of the legal problems involved are identical with those discussed in that case. As was done in the Carpenter case, the parties stipulated that the issue as to liability should be tried separately from the issue of damages, this last issue to be tried only in the event it was held there was liability. Inasmuch as the trial court determined that the city was not liable for the alleged damage, the issue as to the amount thereof was not tried. There is, however, one factual distinction between the two cases. In the Carpenter case, supra, the appellant complained of erosion caused by the breakwater; in the instant case the appellant complains that its beach properties were rendered less valuable by accretions caused by the breakwater.

The appellants, in 1929 and 1930, acquired two beach club properties within the city limits of Santa Monica, one known as the Santa Monica Athletic Club and the other as the Santa Monica Deauville Club. These properties are about 550 feet apart, and each has been improved with a beach club building and equipment, and each is used as a single beach club enterprise. The seaward boundary of each parcel is the mean high tide line of the Pacific Ocean. A survey of the shore line had been made by the city engineer of Santa Monica in 1921. For the purpose of determining liability it was stipulated that the line of mean high tide as established by that survey was the mean high tide line as of 1921, and was the seaward boundary of the appellant's properties as of that date. The evidence shows, and the court found, that in 1911 or 1912 there was constructed, about 250 feet southeasterly of the Deauville property, a municipal pier, thirty feet wide, and extending into the ocean. Adjacent to this pier on the southeast side is a privately owned pier known as the "Pleasure Pier," which is 300 feet wide, and which extends into the ocean for a considerable distance. Between 1921 and prior to July, 1933 (the last date being when construction of the breakwater commenced), these two piers, together with certain concrete debris dumped into the ocean when the municipal pier was rebuilt, so interfered with the littoral drift that it caused accretions to attach themselves to appellant's properties seaward of the 1921 line. These accretions, so caused, averaged between 50 to 155 feet in width, and all occurred as the result of the construction of the two piers and the debris above mentioned.

In 1917 the legislature granted the tide and submerged lands within its boundaries to the city of Santa Monica, upon certain trusts and conditions set forth in the Carpenter case, supra. Purporting to act under the trusts thus created, the respondent commenced the construction of a breakwater in July of 1933. This breakwater was of the rock mound type, was about 2,000 feet long and was constructed parallel to the shore and about 2,000 feet from the 1921 line. Both of appellant's properties are behind this breakwater. The breakwater was completed in July of 1934. The breakwater further interfered with the wave action and the littoral drift, so that, subsequent to its construction, further accretions were formed by imperceptible degrees to the lands in front of appellant's properties. These accretions formed so rapidly that by May, 1939, the mean high tide line had moved seaward from the 1933 line about 277 feet at the northwesterly line of the Santa Monica Athletic Club property and about 588 feet at the southwesterly line of the Deauville property. At one point in front of the Deauville property the mean high tide line moved oceanward 667 feet between 1933 and 1939. The accreting continued beyond 1939, but at a slower rate.

The trial court, as did the trial court in the Carpenter case, found that in constructing the breakwater the city acted in its governmental capacity and in the exercise of its police power, exercised for the purpose of protecting its harbor and property, and to promote and accommodate commerce and navigation, and held that any damage suffered by appellant by the construction of the breakwater was damnum absque injuria. However, the trial court also relied upon an entirely different theory. It found that the seaward boundary of appellant's properties was the line of mean high tide as established by the 1921 survey; that the area formed by the artificial accretions that accrued in front of appellant's properties between 1921 and 1933 "was not owned by the said plaintiff but was land which had been built up by artificial accretions during the years between 1921 and 1933"; that the area created by the artificial accretions that formed prior to 1933 belongs to the city and does not belong to appellant; that because there existed this artificially accreted area between the seaward boundary of appellant's properties and the ocean prior to 1933 when construction of the breakwater commenced, appellant's properties at that time were not littoral properties; that the artificial accretions caused by the breakwater between 1933 and 1939 attached themselves not to appellant's properties but to the accreted tide lands already existing in front of appellant's properties. The court's findings on this issue are summarized in the following portion of Finding XI: "The court further finds that at the time of the commencement of the construction of said breakwater the said plaintiff's lands, described in plaintiff's third amended complaint, were not littoral lands in that they did not border upon the line of mean high tide of the Pacific Ocean and further finds that all of the deposits of accretions complained of were upon tide lands and submerged lands owned by the said defendant by virtue of the act of the legislature of the State of California hereinbefore referred to in these findings, and that at no time did the said plaintiff have any right, title or interest in and to said tide lands or submerged lands." If this last theory is correct it is unnecessary to pass upon the correctness of the other theories relied upon by the trial court, because the last named theory alone sustains the judgment.

Appellant's position on this appeal is that the artificial accretions that attached themselves to its properties between 1921 and 1933 belonged to it; that the artificial accretions that formed by reason of the construction of the breakwater and which attached themselves to the already artificially accreted area likewise belonged to it; that these last mentioned accretions were forced upon it by the acts of the respondent and against the will of appellant, and after appellant had warned the city of the effect on its properties of the construction of the breakwater; that these last mentioned accretions, although increasing the area of appellant's properties, have rendered such properties less valuable for the purposes for which they are intended and for which the improvements thereon have been designed to appellant's damage in a large amount.

[1, 2] The basic premise of this argument is, of course, that appellant's proper-

ties were littoral lands in 1933 and 1934 when the breakwater was constructed. Unless such lands were then littoral lands, appellant cannot legally complain of any acts committed by the city that did not affect its properties. As already pointed out, in 1933 there was a strip of land varying in width from 50 to 155 feet seaward of the 1921 line of mean high tide that had been formed by artificial accretions caused by the construction of the municipal and so-called "pleasure" piers, and by the dumping of debris into the ocean near the municipal pier. Appellant does not complain of these accretions, but claims the area so formed as part of its properties. For reasons fully discussed in the Carpenter case, supra, it is obvious that this artificially accreted area does not belong to the appellant but belongs to the city as grantee of the state For the reasons stated in and upon the authority of the Carpenter case, supra, it must be held that in 1933 appellant's properties no longer bordered upon the sea, but bordered upon this artificially accreted area owned by the city. Appellant's properties were not, in 1933, littoral lands. This being so, appellant has no legal grounds to complain of the construction of the breakwater and was not legally damaged by the further accretions.

[3] Although appellant does not complain of the 1921–1933 accretions, it should be pointed out that it has no legal ground of complaint because it was thus cut off from contact with the sea. It is well settled that the littoral rights of an upland owner who owns no title to tide lands adjoining his property are subject to termination by whatever disposition of the tide lands the state, or its grantees, in the exercise of their trust, choose to make. Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 102 P.2d 438; People v. California Fish Co., 166 Cal. 576, 138 P. 79; City of Oakland v. Buteau, 219 Cal. 745, 29 P.2d 177; People v. Southern Pac. R. Co., 166 Cal. 627, 138 P. 103; People v. Banning Co., 167 Cal. 643, 140 P. 587; Henry Dalton & Sons Co. v. City of Oakland, 168 Cal. 463, 143 P. 721; Koyer v. Miner, 172 Cal. 448, 156 P. 1023; Muchenberger v. City of Santa Monica, 206 Cal. 635, 275 P. 803.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

Hearing denied; CURTIS, CARTER, and SCHAUER, JJ., dissenting; EDMONDS, J., not participating; SPENCE, J., acting pro tem.

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24 Cal.2d 141

PICKERING v. STATE BAR OF CALIFORNIA.

L. A. 18843.

Supreme Court of California.

April 20, 1944.

Rehearing Denied May 18, 1944.

1. Attorney and client 🔑32

An attorney's presentation to court of statement of facts known to be false violates provision of the Business and Professions Code prohibiting attorney from seeking to mislead judge by artifice or false statement, since intent to secure determination based on false statement is presumed. St.1939, p. 355, § 6068.

2. Attorney and client 🔑42, 58

An attorney who filed complaint alleging that husband was deprived of wife's services and consortium for two weeks, although attorney knew that parties were not legally married and had been separated during such two weeks, violated the Business and Professions Code, and was suspended for one year. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

3. Attorney and client 🔑32

An attorney's presentation to court of statement of fact which is known to be false and which tends to mislead court violates the Business and Professions Code whether or not attorney is successful in misleading court. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

4. Attorney and client 🔑53(2)

In disciplinary proceedings against attorney for filing complaint containing false statements, lack of direct evidence of intent to deceive or of malice or hope of profit did not compel determination in attorney's favor. St. 1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6108.

5. Attorney and client 🔑46

In disciplinary proceedings against attorney for filing complaint containing false statements, that no one was deceived or damaged was no defense. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

6. Attorney and client 🔑58

In disciplinary proceedings against attorney for filing complaint containing false statements, mitigating circumstances, such as attorney's disclosure of falsity of allegations on negotiations for settlement of action wherein complaint was filed, could be considered in determining discipline to be imposed on attorney. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6106.

7. Attorney and client 🔑53(2)

In disciplinary proceedings against attorney, evidence which bears earmarks of private spite should be scrutinized most carefully and accepted with caution, but motive for instigation of proceedings is immaterial where the facts independently disclose that attorney is subject to discipline. St.1939, p. 357, § 6103.

CARTER, J., dissenting.

In Bank.

Petition by George A. Pickering against the State Bar of California to review a recommendation of the Board of Governors of the State Bar that petitioner be suspended from the practice of law for one year.

Recommendation adopted.

J. Howard Sullivan, of Los Angeles, for petitioner.

Guy Knupp, of Los Angeles, for respondent.

PER CURIAM.

By writ of review, George A. Pickering has challenged the recommendation of the Board of Governors of The State Bar in a disciplinary action.

In an order to show cause, the petitioner was charged with having violated his oath and duties as an attorney at law within the meaning of the Business and Professions Code, as the same are prescribed by sections 6067 and 6068, St.1939, pp. 354, 355, and committing acts involving moral turpitude, dishonesty and corruption within the meaning of section 6106, St.1939, p. 357, in that he prepared, signed and filed a complaint asserting facts he knew to be untrue. The petitioner denied the charges and the matter proceeded to a hearing before a local administrative committee.

The evidence presented in behalf of the complainant was not controverted in any essential particular and shows the following facts:

The petitioner and James F. Norris met in July, 1941. At that time they were both employed by the All State Insurance Company as adjusters. During the remainder of the year, Mr. and Mrs. Pickering often saw Norris and his wife Lynette. The two couples visited in each other's homes.

Lynette Norris was out of the state for the first eight months of 1942. In September, she returned to California and filed suit for divorce. Pickering agreed to represent Norris in that action. When Pickering, in November, 1942, filed an answer on behalf of Norris, he believed that Lynette Norris was the wife of his client. And although from the time of the commencement of the divorce action until a few weeks prior to the hearing of the disciplinary matter by the local committee, Pickering had a number of conversations with Lynette Norris and her attorney relative to a property settlement and the support of the minor children of the marriage, he never questioned her marital status. Apparently he accepted as true the allegation of the divorce complaint, later established by uncontradicted testimony, that, in 1933, she was married to James Norris and the marriage had never been dissolved.

In April, 1942, during the absence of Lynette Norris in Nebraska, Norris introduced Pickering to Patricia Keller, as she was then known. Two months later Pickering was told by his wife that Patricia Keller and Norris claimed to have been married in Mexico and were then living in San Diego. Pickering saw them on two or three occasions when they returned to Los Angeles for week ends; they then represented to him that they were married. In the early part of December, 1942, Norris enlisted in the United States Army and went to Texas for training.

The present proceeding is based upon the allegations of the complaint to recover damages for personal and other injuries filed by Pickering as the result of an accident which occurred when Patricia Keller was operating the automobile of Norris with Pickering and another as passengers. Because of injuries then sustained by Patricia Norris, the complaint alleged, "James F. Norris, who is the husband of plaintiff, Patricia Norris, was deprived of the services and consortium of his wife for the period of two weeks." According to Pickering's testimony before the committee, at the time he filed this complaint, which was verified by Patricia Keller, under the name of Patricia Norris, before him as a notary public, he doubted that Norris was married to either woman but he considered that Lynette had "the edge" over Patricia. Pickering, however, then knew that James Norris was, and for a time commencing prior to the date of the accident, had been in Texas.

Upon this evidence the committee found that Pickering, at the time of preparing and filing the complaint, was fully informed as to the falsity of its allegations concerning the marital status of Norris. More particularly, said the committee, Pickering knew that at all times mentioned in the complaint the woman referred to as Patricia Norris was not and had not been the wife of Norris. The petitioner also had knowledge concerning the absence of Norris from the state at the time of the accident and until the date the complaint was filed. When Pickering prepared and filed the complaint he knew that Norris was the husband of Lynette C. Norris, whose divorce action was then pending, and that Norris had not been deprived of the "services and consortium" of his wife or of Patricia Keller, by reason of the asserted accident, nor had he been damaged in any amount. Because of these facts, the findings conclude, Pickering, at the time Patricia Keller verified the complaint before him as a notary public, knew that she swore falsely.

In consonance with these findings, the committee determined that Pickering had violated his oath as an attorney and, as discipline, recommended suspension from practice for a period of eighteen months. The Board of Bar Governors adopted the findings of the local committee but modified the latter's recommendation to suspension for one year.

The petitioner contends that the recommendation of the Board of Governors should be reversed or modified upon the grounds that the findings are outside the allegations of the notice to show cause and insufficient to support a disciplinary action of any kind. The finding as to intended deceit is not supported by the record, he asserts, and in preparing and filing the complaint he had no intention to deceive anyone. He denies that he acted out of malice or for profit, or that anyone was in fact deceived or damaged, and he takes the position that at most he merely violated the marital rights of Lynette Norris, complainant in the disciplinary proceeding, who acted entirely out of spite.

Section 6103 of the Business and Professions Code, St.1939, p. 357, provides that any violation by an attorney of his oath or professional duties constitutes cause for suspension or disbarment.

[1] And section 6068 of that code prescribes, in part, that it shall be the duty of an attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." The presentation to a court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of the quoted provision.

[2] The charges against Pickering alleging such conduct state grounds for disciplinary action and the findings and conclusion of the Board of Governors are fully sustained by the evidence. Beyond any doubt, the petitioner, in filing a complaint based upon a marital status which he knew did not exist and asserted loss of consortium by a man who, to his certain knowledge had been out of the state for the entire time mentioned in the pleading, sought to mislead the court.

[3] The conduct denounced by the Business and Professions Code is not the act of an attorney by which he successfully misleads the court, but the presentation of a statement of fact, known by him to be false, which tends to do so. It is the endeavor to secure an advantage by means of falsity which is denounced.

[4-6] The lack of direct evidence of an intent to deceive or that the petitioner acted out of malice or with the hope of profit does not, as contended by him, compel a determination in his favor. Nor is the fact that no one was deceived or damaged a defense to the charges of The State Bar. Mitigating circumstances may be considered in determining the discipline to be imposed upon an attorney (Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403), and undoubtedly the petitioner's actions in disclosing the falsity of the allegations of the complaint at the time of negotiations for settlement influenced the local committee in recommending a suspension of eighteen months and the Board of Governors in reducing that period to one year.

[7] Although it is true, as Pickering, contends, that in disciplinary proceedings evidence which bears the earmarks of private spite should be scrutinized most carefully and accepted with caution (Peck v. State Bar, 217 Cal. 47, 17 P.2d 112), whatever may have been the personal motive for the instigation of State Bar proceedings is immaterial where the facts independently disclose that the attorney is subject to discipline. Rohe v. State Bar, 17 Cal.2d 445, 110 P.2d 389; Geibel v. State Bar, 14 Cal.2d 144, 93 P.2d 97; and Tapley v. State Bar, 8 Cal.2d 167, 64 P.2d 404.

It is ordered that George A. Pickering be suspended from the practice of law for a period of one year commencing thirty days after the date of filing of this opinion.

CARTER, Justice (dissenting).

I dissent. In my opinion the facts stated in the majority opinion are insufficient to justify a judgment of suspension of petitioner from the practice of law for the period of one year or any other period. While I do not wish to be understood as condoning the conduct of an attorney in the insertion in pleadings of statements which he knows to be untrue, I think it is clear that the conduct of petitioner in this case was no different than that of a very large percentage of practitioners before the bar of this state, and if he is to be disciplined, then all of these practitioners are likewise subject to discipline. In my opinion there is no distinction between a false allegation in a complaint and the denial in an answer of an allegation in a complaint which the person answering knows to be true. In other words, it requires an allegation and a denial to create an issue, and while it may be conceded that in most cases both allegations and denials are made in good faith and in an honest belief that the pleading states the truth, it is a matter of common knowledge that attorneys in the preparation of answers permit their clients to deny allegations in the complaint which they know to be true, and which they do not intend to offer evidence to rebut.

In my experience as a practitioner before the bar of this state I have examined many pleadings prepared by lawyers of the highest ethical standing containing allegations and denials which I knew that the lawyers preparing such pleadings knew to be untrue; in fact, it is not unusual to find answers denying corporate existence, denying that the person committing the wrong was the agent of the defendant or was acting within the course of his employment as such agent; or in Federal Employers Liability cases, denying that either the employer or the employee were engaged in interstate commerce at the time of the accident which resulted in the injury to plaintiff. In many of these cases the facts with reference to the existence of the agency or that the agent was acting within the course of his duties, or that the employer and employee were engaged in interstate commerce, were matters exclusively within the knowledge of the defendant or person making the denial, and of course, the attorney preparing the answer knew of the falsity of such denial at the time the same was prepared. If petitioner in the case at bar is subject to discipline for the allegation which he placed in the complaint which is the subject of this proceeding, then every other member of the bar who prepares a pleading containing an allegation or denial which he has reason to believe is untrue, is likewise subject to discipline.

I have observed in my practice many instances much more flagrant than the one involved in the case at bar where allegations or denials were inserted in pleadings which resulted in subjecting the opposing party to delay and expense in meeting, yet I have never heard it suggested that attorneys who resort to such practices are subject to discipline for a violation of the provisions of the Business and Professions Code or the Rules of Professional Conduct of The State Bar of California.

If The State Bar desires to embark upon a program with the objective of disciplining all members of the bar who knowingly insert in their pleadings statements which they know or have reason to believe are untrue, I will wholeheartedly support such a program, but I very positively object to singling out petitioner, whose transgression, if it may be called such, is trivial and insignificant compared to the practice of many members of the bar in high places whose right to resort to such practice continues unchallenged.

Rehearing denied; CARTER, J., dissenting.

24 Cal.2d 168

PEOPLE v. NEWMAN.

Cr. No. 4523.

Supreme Court of California.

April 25, 1944.

1. Gaming 🔑98(3)

Evidence showing accused's possession of horse-racing scratch sheets, notebook, and other papers, containing several hundred entries indicating records of bets on horse races and his attempt to conceal certain papers, sustained conviction of recording an actual bet on a horse race. Pen. Code, § 337a, subds. 2, 4.

2. Criminal law 🔑449(1)

Papers and notebook apparently constituting record of wagers on horse races, and signs, symbols, letters and figures thereon, were proper subjects for opinion testimony as to meaning thereof by arresting officer who qualified as expert in such matters, and trial court erred in striking out such testimony. Pen.Code, § 337a, subd. 4.

3. Criminal law 🔑304(21)

The courts do not take judicial notice of meaning of signs and characters used by horse race gamblers. Pen.Code, § 337a, subd. 4.

4. Appeal and error 🔑989

In civil actions, reviewing court may properly consider evidence erroneously stricken out by trial court on motion of appellant in determining whether evidence is sufficient to support trial court's determination.

5. Criminal law 🔑260(11)

Where evidence was properly admitted against accused in case tried to court without jury and accused was confronted therewith after its admission up to final submission of case and made no attempt to controvert it, fact that trial court erroneously excluded such evidence did not preclude

Supreme Court on appeal from considering such evidence in determining whether conviction was supported by evidence.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Herbert Joseph Newman was convicted of recording a bet in violation of Pen. Code, § 337a, subd. 4, and he appeals.

Affirmed.

Prior opinion, 142 P.2d 55.

Robert E. Ford, of Hollywood, for appellant.

Robert W. Kenny, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

Appellant was convicted of violating subdivision 4 of section 337a of the Penal Code, which provides that every person "Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever * * * is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year."

Appellant's sole ground of appeal from the judgment is that the evidence is insufficient to support the judgment. He also appeals from the order denying his motion for a new trial. He waived a jury trial, and was tried by the court. He did not take the witness stand in his defense, nor did he offer any evidence in support of his plea of not guilty. He claims that the evidence though undisputed, fails to prove him guilty of violating the provisions of said subdivision of section 337a of the Penal Code.

It was stipulated that the evidence taken at his preliminary examination might be introduced against him at his trial in the superior court. This was done, and no further or other evidence was produced at his trial.

This evidence consisted entirely of the testimony of two police officers and certain exhibits admitted in evidence in connection with their testimony, and a stipulation that if a third police officer was present at the trial as a witness he would testify that the handwriting on Exhibit E, with certain exceptions not material here, was that of the appellant.

The evidence in the case shows that the appellant was arrested in a hotel in Los Angeles at about 3:30 p.m. on the 17th day of February, 1943. The arrest was made in Room 17, which was located at the end of the hall in the hotel. Room 18 of the hotel is directly across the hall from Room 17. Officer Fisk testified that he and another arresting officer entered the hotel through the hotel lobby, and on reaching the hall, they saw a man, whom they could not identify, enter Room 17. They immediately followed him into the room, where they found appellant and two other persons, and the arrest of appellant was then made in said room. At the time of appellant's arrest the officers searched him and found a National Scratch Sheet dated February 17, 1943. This scratch sheet was 9 inches wide and 12 inches long and "was under the defendant's coat—under his shoulder, and * * * came out when we took off his coat." They also found in Room 17, at the time of appellant's arrest, a Metropolitan Scratch Sheet to which were attached a number of pieces of paper, apparently torn from a third scratch sheet. They then entered Room 18 and found in that room a group of papers in an envelope "stuck to the bottom of the top of the dresser." These papers contained columns of letters, figures and words which the evidence showed were in the handwriting of the appellant.

There was also in evidence a memorandum notebook which appellant took from his pocket and laid on the counter at the Central Jail, where he was taken immediately after his arrest. This memorandum notebook contained a number of pages on which were entered columns of figures and words similar to those shown on the group of papers found by the arresting officers in an envelope in Room 18, all of which were shown to be in the handwriting of the appellant. Opposite many of the figures in each column were combinations of letters—some of these might appear to be initials of individuals, such as "J.B.B." "M.S." "R. J."; others were different like "W.X.X." "P.X." "X.J.N." The arresting officer who qualified as an expert in such matters testified that scratch sheets, racing forms, betting markers and other papers are commonly used by bookmakers in Los Angeles County. "Bets are commonly recorded in this County by indicating in some manner the name of the person placing the bet, and this is done either by writing the name of the person out or indicating the initials, and indicating the identity of the race horse by writing out the name of the race horse or indicating by serial number or by some code or symbol as to what the identity of the race horse is, and also indicating in some manner the amount of money and how it is bet * * * and it is the custom of some bookmakers in Los Angeles County to record their bets in code."

The officer was asked the following question: "Now, in the business of bookmaking as conducted in this County, what is the significance and meaning of the signs, symbols, letters and figures appearing on Exhibit D [the group of papers found in Room 18 in the handwriting of appellant], the symbol one in a circle placer [sic] thereon in ink, and headed on the first line with the initial in the lefthand corner 'B.A.' with reference to the line on this page which is headed with the word 'Fox' and followed by the numeral 760, in a circle,—or any other place,—." This question was objected to by counsel for appellant, on the ground that it called for the conclusion of the witness, and that it calls for an expert opinion on a matter not the subject of expert testimony. Counsel supported his objection by citing People v. Davis, 47 Cal.App.2d 331, 117 P.2d 917. The objection was overruled, and the witness proceeded to answer the question. Other but similar questions respecting an entry in Exhibit D were asked the witness. They were objected to by counsel for the appellant, the objections were overruled, and these questions were answered by the witness, and an explanation made respecting that entry similar to his explanation of the Fox entry. Motions to strike out the answers of the witness were made and denied by the court. After appellant's objection to the question quoted above, referring to the Fox entry, the witness answered it as follows:

"The name 'Fox' would indicate the name of the player. The figure 760 indicates the amount of money paid on that bet, and that is followed by the figure 223, and referring to the last figure 3, that indicates a third horse, and the next figure 2, indicates the second race, and the figure 4 indicates a $4.00 bet to win, and by comparison with People's Exhibit B, which is the National Scratch Sheet for February the 17th, 1943, we find the third horse in the second race is Ballotant, and we find on him a $2.00 bet, according to the notation, and this horse paid $3.80 to win, and the $4.00 bet would pay $7.60 to win, as indicated on the betting marker."

The witness answered the other questions respecting an entry in Exhibit D in the same detail. The witness was shown Exhibit A (the memorandum notebook, which appellant took from his pocket and deposited on the desk at the police station immediately after his arrest), and was asked if he had compared the entries therein with those in Exhibit D. He stated that he had and that there was a similarity between the two. He then went on to describe in detail one of said entries, which description followed along the same lines as the description given by the witness in describing the Fox entry.

[1] The specific objection of appellant in his contention that the evidence is insufficient to support the judgment is that it fails to show he registered an actual bet, rather than a purported bet, upon a horse race. He bases his argument on the phraseology of section 337a of the Penal Code, which by subdivision 2 provides that every person who keeps a place for the purpose of recording or regulating any bet or any purported bet upon the result or purported result of any contest mentioned in the said subdivision, is guilty of the violation of said section of the Code, while the offense under subdivision 4 of said section of the Code is that any person who records or registers any bet upon the result or purported result of any such contest is guilty of the offense denounced by said section of the Code. It will thus appear that in subdivision 2, the words "bet or purported bet" are used while in subdivision 4 only the word "bet" is to be found. In other words the appellant contends that the evidence against him must show that an actual bet was registered by him in order to sustain his conviction and that the evidence is lacking in that respect. It is true that no person testified to the making of any bet by any person with the appellant. The evidence does show however that appellant did register what purported to be a bet by a person under the name of Fox on a horse by the name of Ballotant, which was purported to have run in a race on February 17, 1943. This entry

registering the Fox bet is only one of over 400 similar entries contained in the group of papers found in Room 18, and received in evidence under the designation of Exhibit D. It is found on the first leaf of this group of papers, is the fifteenth entry on page one, and is followed by some 400 similar entries.

The memorandum notebook deposited by appellant at the police station, immediately after his arrest, contains many similar entries. The group of papers in which the Fox entry is found indicate from their size and shape that they were torn from either this memorandum notebook or from a notebook similar thereto—and that they were originally attached to a notebook merely by means of a perforated connection. The National Scratch Sheet, on which the name of the horse Ballotant appears, lists seven races which were to be run on February 17, 1943, on a certain track with the name of the horses which were to run in each race. The name of the horse Ballotant on the scratch sheet has certain notations in lead pencil, the figures 24 preceding the name, and marks around and through the name. Similar notations are found in the scratch sheet in respect to the names of many other horses appearing on this sheet. This scratch sheet, it will be remembered, was found under appellant's coat near his shoulder and was discovered when the appellant removed his coat after his arrest. The Metropolitan Scratch Sheet with a number of small papers attached, which was found in Room 17 at the time of appellant's arrest, was similar in many respects to the National Scratch Sheet, although the races enumerated thereon were on different tracks and in different localities, but all were noted as to be run on February 17, 1943. On this sheet and also on the papers attached thereto, the names of numerous horses were checked off or erased in lead pencil in a similar manner as those appearing on the National Scratch Sheet were.

From this evidence there is no doubt but that the trial court was justified in concluding that the appellant had registered an actual bet upon the result of a contest of speed between two or more horses, or in the words of common and popular parlance, upon on horse race. The registrations contained in Exhibits A and D were all in the handwriting of the appellant. Had there been a single such registration, or registrations few in number, it might be questionable whether they were registrations of actual bets. However, when they run up into the hundreds, they furnish ample justification for the trial court's conclusion that they were not idle notations on the part of the appellant, but that they were what they purported to be, actual transactions. All the paraphernalia used by bookmakers was found in the possession of the appellant at the time of his arrest, and no explanation is to be found in the record as to any reason why he had these articles or was using them in the manner shown by the evidence. Then his attempt to conceal from the arresting officers the National Scratch Sheet under his coat, and the group of papers found in Room 18 tend to show that he was not using them for a legal purpose. We are in thorough agreement with the trial court in its finding that the appellant was guilty of violating the subdivision of section 337a of the Penal Code as charged in the information filed against him.

[2, 3] As noted in the previous pages of this opinion, the trial court denied appellant's objection to certain questions asked the arresting officer as to the significance of certain "signs, symbols, letters and figures" appearing in Exhibit D. The trial court also denied appellant's motion to strike out the evidence given in response to said questions. However, at the close of the evidence and after argument of counsel and and upon the submission of the case for the court's decision, the trial judge struck out all of the testimony of the officer, wherein he "attempted to interpret and tell the Court the meaning of Exhibit—well of any of the exhibits." Notwithstanding his order striking out this testimony, the trial judge found that the evidence in the case exclusive of that stricken out was sufficient to sustain the charge against appellant.

The action of the trial court striking out this testimony was erroneous. 23 C.J.S., Criminal Law, p. 96, § 878, subsec. c; People v. Hinkle, 64 Cal.App. 375, 378, 221 P. 693; People v. Hatfield, 77 Cal.App. 212, 218, 246 P. 95; People v. Derrick, 85 Cal.App. 406, 408, 259 P. 481; Nolan v. State, 157 Md. 332, 146 A. 268; Baum v. State, 163 Md. 153, 161 A. 244; and see also, Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 571, 147 P. 238; Armstrong v. State, 53 Okl.Cr. 53, 6 P.2d 843; Wilson v. Frisbie, 57 Ga. 269.

In People v. Hinkle, supra, the defendant was charged and convicted of the violation of subdivisions 2, 3 and 4 of section 337a of the Penal Code. In that case the arresting officers testified as to the character of certain papers taken from the defendant and to the significance of the cryptic letters and figures which were written on these documents. The appellate court held that the long experience of the officers in cases of that character, and their study of race track gambling and its modus operandi as carried on at race tracks and in the haunts of bookmakers, qualified them to give expert testimony as to the meaning of said documents. The views of the court, as found on page 379 of the opinion in 64 Cal.App., on page 694 of 221 P., are quite illuminating and most applicable to our present inquiry. On that page of the opinion we find the following statement:

"Not only were the arresting officers qualified by experience to give expert testimony, but the nature of the documents taken from appellant's possession was such as to call for opinion evidence to explain their hidden meaning. Courts do not take judicial notice of the meaning of the signs and characters, used by horse race gamblers. Neither the judge nor the jury could properly speculate upon what was the peculiar significance to be given to the cabalistic letters and figures which appeared on the papers taken from appellant, or what meaning they would convey to the minds of men instructed in the bookmakers' school. But while these characters were a concealed mystery to the uninitiated, they were as an open book to those who, by their study of the methods and instrumentalities employed by bookmakers, had been inducted into the arcana of the gambler's craft. It was therefore proper to permit the officers to explain to the jury the nature and character of the papers taken from appellant and to state what, in their opinion, is the peculiar significance attaching to the letters and figures which appeared on these two exhibits. (citing authorities.)"

In People v. Hatfield, supra, we find language equally explicit respecting the same subject. That case also involved the conviction of a defendant for the violation of certain subdivisions of section 337a of the Penal Code. A witness testified that certain slips marked for identification bore the name and number of the horse, and the odds on its chances to win races, and that such was the general method of bookmakers in registering and recording bets on horse races. Another witness gave similar testimony respecting certain slips, 75 in number, introduced in evidence. On page 218 of the opinion in 77 Cal.App., on page 97 of 246 P., the court approved the admission and use of that evidence in the following language: "Appellant concedes that People v. Hinkle, 64 Cal.App. 375, 221 P. 693, has held that it is permissible for an officer to testify that certain exhibits were registers of bets. He attempts to differentiate this case from the one before us by calling attention to the fact that the defendant here was acquitted of having received and held money for bets and of recording bets. We fail to see how this fact alters the rule of evidence which permitted the admission of the testimony of an expert. We think the case of People v. Hinkle is controlling, and that further discussion of the point is unnecessary."

People v. Derrick, supra, involves the violation of subdivisions 2, 3 and 4 of section 337a, where testimony of the same character was held to be admissible. In a cigar box in the room in which the defendant was carrying on the barber business, papers were found on which were written figures and names more or less unintelligible to persons inexperienced in the methods of gambling. Two officers who had worked on gambling details in the city of the arrest and had become familiar with expressions, symbols and characters used by bookmakers in recording bets on horse races, were permitted to testify to the meaning of such symbols and characters. The appellate court held that the characters constituted a proper subject of expert testimony and sustained the admission of the testimony of the officers.

The ruling in these authorities appeals to us as most reasonable and logical, and we have no hesitancy in following it and holding that the trial court here erred in striking out the evidence as to the meaning of the letters and figures found in Exhibit D and other exhibits admitted in evidence in this action. Any language found in People v. Davis, supra, in conflict with these views is disapproved.

[4, 5] The question then arises whether this court may consider this evidence for any purpose upon the present appeal. As before noted appellant's sole ground in support of his appeal is that the evidence is not sufficient to support the judgment. The evidence in question was stricken out by the court at the close of the trial and after the case had been finally submitted by the court for its decision. No effort had been made during the trial by appellant to controvert or impeach this evidence or to

show in any manner its inapplicability to the case against him. Whether under such circumstances a reviewing court could consider such evidence has never been passed upon by this court or any appellate court of the state in any criminal case so far as our knowledge goes. In civil actions the rule is well established that it is permissible for the reviewing court to consider evidence erroneously stricken out by the court on motion of the appellant in determining whether the evidence is sufficient to support the determination of the trial court. Gray v. Southern Pacific Co., 23 Cal.2d 632, 644, 145 P.2d 561. Our attention has not been called to any criminal case from any court where the present question has been given consideration. As this evidence against the appellant was admitted during the trial, the appellant was confronted with it after its admission up to the final submission of the case, and as we have seen he made no attempt to controvert it. Had the trial court not made its erroneous order, the appellant would have been in the same situation as he is now in, if we give consideration to the stricken evidence in determining the question as to whether there is evidentiary support of the judgment. Under this condition of the record we think there can be no legal objection to our giving this evidence the same force and effect as though it had not been erroneously stricken out by the court.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

24 Cal.2d 104

CONTINENTAL CAR-NA-VAR CORPORATION v. MOSELEY et al.

L. A. 18652.

Supreme Court of California.

April 11, 1944.

1. Trade-marks and trade-names and unfair competition 🔑93(3)

Evidence that defendant knew the formulae for plaintiff's products at time of leaving plaintiff's employ, and that defendant had engaged in similar work for several years thereafter up to the time of his employment by another corporation engaged in manufacturing same type of products, did not establish that defendant transgressed upon any trade secrets or secret formulae of plaintiff, in the absence of any showing that the formulae used by plaintiff had not changed and were the same as that used by defendant or that the formulae presently used by plaintiff were known to defendant.

2. Trade-marks and trade-names and unfair competition 🔑77

Where plaintiff had been in open competition with other manufacturers in a particular area for a number of years and had sold its products in an open, competitive market and there was no showing that plaintiff would have continued to sell to any of its customers on its list of customers, the use of such list by defendants, two of whom were plaintiff's former employees, did not constitute a use of "confidential information" or a "trade secret".

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Information" and "Trade Secret".

3. Trade-marks and trade-names and unfair competition 🔑67

Equity will protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should also be solicitous for the right inherent in all people, not fettered by negative covenants upon their part to the contrary, to follow any of the common occupations of life.

4. Trade-marks and trade-names and unfair competition 🔑77

Every individual possesses, as a form of property, the right to pursue any calling, business, or profession he may choose, and has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of former employer, provided such competition is fairly and legally conducted.

5. Trade-marks and trade-names and unfair competition 🔑77

Generally, equity will intervene to restrain an employee from divulging confidential information gained in the course of his employment or using such information to his employer's prejudice.

6. Trade-marks and trade-names and unfair competition ⚷77

The courts regard as "unfair competition" and will enjoin the use, by an employee to the prejudice of his former employer, of the confidential information gained by the employee during his prior employment as to the business secrets of such employer.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair Competition".

7. Trade-marks and trade-names and unfair competition ⚷77

Where plaintiff had been in open competition with other manufacturers in a certain area for a number of years and defendant, as plaintiff's employee, had sold such products as he could in an open competitive market, the use by defendant, upon terminating his employment with plaintiff, of plaintiff's list of customers in attempting to sell such customers products manufactured by another corporation, did not constitute "unfair competition".

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair Competition".

8. Trade-marks and trade-names and unfair competition ⚷97

An injunction, which was not merely limited to enjoining the use of trade secrets or confidential information in the solicitation of plaintiff's customers, or the use of any unfair means in such solicitation, but also constituted a blanket prohibition against any solicitation whatever of plaintiff's customers and forever barring defendants for entering into the competitive market so far as those customers were concerned, was invalid as beyond the power of the court.

9. Trade-marks and trade-names and unfair competition ⚷93(3)

Evidence failed to establish that defendants, two of whom were former employees of plaintiff, wrongfully conspired to injure or destroy the business of plaintiff.

10. Trade-marks and trade-names and unfair competition ⚷77

An employee was within his rights in sending out a form letter to certain customers of his employer advising them that he was severing his business relations with employer and would engage in business for himself at a future date.

11. Trade-marks and trade-names and unfair competition ⚷93(3)

In action against former employees for unfair competition and for damages, evidence that defendants had sold to several of plaintiff's former customers and evidence as to the net profit of such sales was insufficient basis for an award of damages in the absence of any showing that plaintiff would have made such sales had not defendants done so.

12. Damages ⚷190

The rule that evidence to establish profits must not be uncertain or speculative does not apply to uncertainty as to amount of the profits which would have been derived, but to uncertainty as to whether the loss of profits was the result of the wrong and whether such profits would have been derived at all.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Continental Car-Na-Var Corporation against L. C. Moseley and others to enjoin unfair competition and for damages. From a judgment for plaintiff, the defendants appeal.

Reversed.

Prior opinion 141 P.2d 59.

Loeb & Loeb, Dwight W. Stephenson, and Norman Newmark, all of Los Angeles, for appellant.

Mills & Wood, Edward C. Mills, and Carlton B. Wood, all of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff is an Indiana corporation engaged in the business of manufacturing, producing, buying and selling compounds for finishing, cleaning and treatment of floors and of tools and appliances for that purpose. It maintains an office in Los Angeles. From 1932 to March 31, 1941, defendant Moseley was the district manager for plaintiff under a written contract, which he terminated on the latter date. The defendant Franzus is a chemist who was employed by plaintiff in Indiana from September 1934 to July 1936. Thereafter until 1940 he was employed by Gerson-Stewart

Corporation, an Ohio corporation. Prior to March 1941, defendants Moseley and Franzus and a Mr. Gerson of Gerson-Stewart Corporation, decided to form a corporation and to acquire the Bobrick Manufacturing Company, a concern doing business in Los Angeles. The Gerson-Stewart Pacific Corporation was formed in March, 1941, and commenced its business on April 1, 1941, the day following the termination of Moseley's contract with plaintiff.

About March 20, 1941, defendants Moseley and Franzus mailed a form letter to a large number of plaintiff's customers, advising that Moseley was leaving plaintiff's employ and would in the future be sales manager for defendant corporation, thanking them for past patronage and assuring them of "the same conscientious treatment and careful attention" to their future needs. Thereafter defendant Moseley and the new corporation solicited a large number of plaintiff's customers, to eighteen of whom they sold merchandise of the new corporation, the purposes of which products were the same as those of the products manufactured and sold by plaintiff in the territory.

Plaintiff by its action sought damages and an injunction against defendants' use of plaintiff's customers list and alleged trade secrets. Defendants answered. Under the pleadings the only issues involved were whether the list of customers of plaintiff was private and confidential and a trade secret; whether the use of the list by defendants constituted unfair competition; and whether plaintiff had been damaged by the activities of defendants.

The trial court found in favor of plaintiff on all issues. A special finding was made that plaintiff suffered damage in the sum of $343.34 by the acts of defendants in selling to eighteen of plaintiff's customers merchandise in the amount of $3,433.42, based upon its conclusion that defendants' net profit averaged 10 per cent of the amount of sales. The decree, in addition to the award of damages, permanently enjoined defendants from soliciting as a customer any person, firm or corporation in the given territory "who was, on or prior to March 31, 1941, a customer of plaintiff" for specified merchandise; from using any information or knowledge concerning plaintiff's customers or in any manner soliciting or taking away such customers of plaintiff, or in any manner attempting to induce said customers to withdraw their business from plaintiff; from divulging any information concerning any customers of plaintiff who were such on or prior to March 31, 1941; and from using or divulging any trade secrets regarding the composition of the products manufactured or sold by plaintiff.

[1] With reference to the last portion of the injunction, there is nothing in the evidence to support the finding of the trial court that defendants used or might use any "secret process" of plaintiff. The mere fact that defendant Franzus was employed for twenty-two months by plaintiff, and as a result of that employment knew the formulae for plaintiff's products when he left plaintiff's employ in 1936 is not sufficient evidence from which an inference could be drawn that he was using or intended to use such formulae on behalf of the defendants. Plaintiff overlooks the fact that from 1936 to 1940 Franzus was a chemist in the employ of Gerson-Stewart Corporation, engaged in work similar in character to that done for plaintiff. The testimony of Franzus was that it was his practice to make improvements and changes in the formulae from time to time. There is nothing in the evidence to show that the formulae used by plaintiff at the time of the commencement of this action were the same as those in use at the time Franzus was employed by it, or that the same as now used were known to Franzus. That defendant Franzus was entitled to make use of his general knowledge of chemistry to manufacture floor wax and kindred commodities for the defendant corporation so long as he did not transgress upon the "trade secrets" or secret formulae of plaintiff, may not be questioned. That he did any more than that is not borne out by evidence of any character in this case.

[2] The question to be determined is whether a list of customers of plaintiff, compiled by defendant Moseley throughout the period of his association with plaintiff, which consists of 3 by 5 inch cards each bearing a customer's name, address and purchases of products, is "confidential" or a "trade secret" within the meaning of the California cases and under the circumstances here disclosed.

Under his contract with plaintiff, Moseley was designated a "contractor" and is so referred to in correspondence with plaintiff. He was specifically given the right to carry on his work by such method as he chose and to regulate his own working time. His compensation was in the form of commissions for sales made. He had no "route." During the years of his work for plaintiff, the latter supplied him with certain leads as to customers, and through personal solicitation Moseley procured other customers. He made a card index showing the name, address, date and amount of purchase and product purchased by each person to whom he made a sale. At the termination of his contract with plaintiff, there were between 500 and 600 of such cards. It is not contended that Moseley copied this list. It is conceded that from it he selected the names of many such firms and individuals and that he wrote to between 250 and 300 of them, advising that he was leaving plaintiff and assuming the position of sales manager of defendant corporation. After severing his connection with plaintiff, Moseley states that he solicited eighty-eight of the firms and individuals on plaintiff's list, out of whom he sold products to thirty-nine. Of the latter the trial court found sales to eighteen of products of the kind sold by plaintiff, and on this the award of damages was based.

The evidence was undisputed that the names and addresses of persons, firms and corporations using the type of products sold by plaintiff are commonly known to the trade, and that they are called upon by salesmen for various companies. It was also shown that plaintiff in its advertising listed users of its products, including some in the area in question.

This case is readily distinguishable from the so-called "route" cases, where the business of serving the customer is based upon regular calls at definite periods, establishing a business relationship between the customer and the company, which, unless interfered with, normally will continue. Here there is no showing that in the normal course of events, plaintiff would have continued to sell to any of its customers on the list. In the "route" cases the services rendered or the products sold were essentially the same, and the quality of the service rendered is similar. In the case of a salesman in a commercial field, there is no assurance of an order unless he can satisfy the customer that his merchandise is better, cheaper or more salable than that of his competitor. The customer usually desires to examine, inspect and compare merchandise and prices offered to him. Each sale is a distinct transaction, not necessarily implying that another will follow. Colonial Laundries, Inc., v. Henry, 48 R.I. 332, 138 A. 47, 54 A.L.R. 343.

Plaintiff's testimony did not disclose the particular time when sales were made to the purchasers listed. It merely was shown that sales had been made between April, 1937, and April, 1941, and it cannot be ascertained from the list whether one sale had been made, or whether repeat orders were received, or whether the customer was a regular user of plaintiff's products. The trial court, in its injunction decree, prohibited defendants from "soliciting as a customer of defendants any person, firm or corporation who was, on or prior to March 31, 1941, a customer of plaintiff," not distinguishing between a customer who might be deemed a regular customer and one who had perhaps made but one purchase over a period of four years.

Plaintiff had been in open competition with other floor wax manufacturers in the area for a number of years, and Moseley sold such products as he could in an open, competitive market. For this reason the list of customers could not be said to be a trade secret or to constitute "confidential" information.

The present case is similar to the case of Avocado Sales Co. v. Wyse, 122 Cal. App. 627, 10 P.2d 485, which involved competitive sales of avocados to retailers. There the court distinguished cases involving laundry, bread, ice, milk, or similar services or deliveries where but one concern is usually patronized by a customer, and lists of names and addresses were considered secret and had the character of property. It differentiated concerns selling a commodity, whose customers were open to daily changes in selection of vendors from whom they would make purchases. Such purchasers, it held, could not comprise a confidential list of customers in which a proprietary interest might be claimed. It therefore refused to extend the rule to cover a case involving an open market with daily competition in the sale and purchase of a commodity where the purchaser was normally the customer of the vendor who offered the best grade at the lowest price on any day.

[3, 4] Equity will to the fullest extent protect the property rights of employers in their trade secrets and otherwise, but public policy and natural justice require that equity should also be solicitous for the right inherent in all people, not fettered by negative covenants upon their part to the contrary to follow any of the common occupations of life. Every in-

dividual possesses as a form of property, the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided such competition is fairly and legally conducted. New Method Laundry Co. v. MacCann, 174 Cal. 26, 33, 161 P. 990, Ann.Cas. 1918C, 1022.

[5-7] Under this salutary rule, the question then is whether defendants were guilty of unfair competition in soliciting the customers of plaintiff for business in competition with the latter. It is the law that equity will intervene to restrain an employee from divulging confidential information gained in the course of his employment or using such information to his employer's prejudice. Pasadena Ice Co. v. Reeder, 206 Cal. 697, 702, 275 P. 944, 276 P. 995. The courts regard as unfair competition, and will enjoin, the use by an employee to the prejudice of his former employer of the confidential information gained by the employee during his prior employment as to the business secrets of such employer. But we are not here confronted with a situation such as existed in most, if not all, of the cases in which injunctions have been granted and in which it appeared that the business of selling and serving the various customers of the employer was primarily a matter of friendly feeling between the customer and the employee on the route delivering the commodities sold or serviced. A reading of the record here shows that Moseley while employed by plaintiff solicited customers in competition with other firms engaged in the business of selling floor wax and other commodities for the treatment of floors; that such sales were not made because of Moseley's "personal acquaintance with customers and knowledge of 'their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers'" (see George v. Burdusis, 21 Cal.2d 153, 160, 130 P.2d 399; Dairy Dale Co. v. Azevedo, 211 Cal. 344, 346, 295 P. 10), but rather upon the ability of plaintiff, through its salesman Moseley, to meet or excel, in the judgment of the customers, the quality, price and adaptability of similar products offered for sale to such customers by competitors of plaintiff. In other words, there was nothing "exclusive" in the business relationship existing between such customers and either plaintiff or its sales representative, Moseley. In New Method Laundry Co. v. MacCann, supra, 174 Cal. at page 34, 161 P. at page 993, the language of Boosing v. Dorman, 148 App.Div. 824, 133 N.Y.S. 910, is quoted with approval. In that case, as here, the names of the plaintiff's customers, all potential buyers of compounds for finishing, cleaning and treating floors in buildings, were listed in public directories, and in which cited case it was said: "'The other knowledge which Dorman acquired by calling upon these customers in the course of his employment, with regard to their habits of buying, their financial worth, and their individual characteristics and preferences, can hardly be denominated "trade secrets" which an employé is prohibited from using for his own benefit after the termination of his employment, in the absence of an express contract.'"

Under the rules laid down, and the undisputed facts in the present case, the defendants were free to solicit the former customers of plaintiff without restriction, so long as no unfair trade practices were indulged. The absence of such practices here as were present in George v. Burdusis, supra, and cases therein cited, takes this case out of the sphere of unfair competition and entitled the defendants to solicit customers of plaintiff by and through any legitimate means open to other competitors.

[8] The injunction issued by the trial court is not merely limited to an injunction against the use of trade secrets or confidential information in the solicitation of plaintiff's customers, or to the use of any "unfair" means in such solicitation. It constitutes a blanket prohibition against any solicitation whatever of plaintiff's customers and forever bars defendants from entering into the competitive market so far as those customers are concerned. This goes beyond the legitimate power of the court and the injunction should not stand.

This case is easily distinguishable from Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 218 Cal. 568, 24 P.2d 489, wherein was involved a list of "preferred customers" whose trade was especially profitable to the supplier of the service, and to whom special rates were given, knowledge of which was a trade secret and highly confidential.

The case of Gloria Ice Cream & Milk Co. v. Cowan, 2 Cal.2d 460, 41 P.2d 340, was one in which the former employee threatened to and did leave the employment and proceed to sell the products of another dairy company to the plaintiff's customers, with intent to injure the plaintiff's business. In the present case the evidence is insufficient to establish any intention to injure the business of plaintiff, except such detriment as may ensue from the exercise of legitimate trade practices.

[9] There is no evidence in the record which would uphold the finding of the trial court that the defendants "wrongfully conspired" to injure and destroy the business of plaintiff. In Fidelity, etc., Co. v. Federal, etc., Co., 217 Cal. 307, 314, 18 P.2d 950, 953, it was said: "That the defendants were free to leave the employ of plaintiff and engage in a similar business there can be no doubt. For men to agree and plan to enter business as associates, even though they have a design to draw their patronage from many rivals, or all that a particular rival may have, does not constitute them conspirators. Practically every copartnership, corporation, or private individual which enters into business does so with the intent of drawing all the business it possibly can from all competitors. If it were not so, there would be no such word as 'competition' in business." In that case, the court recognized the difficulty of drawing the line between methods or acts which may be denounced as conspiracies to acquire the business or any part of the business of competitors, and those which may be considered legitimate acts or methods of competition; also the difficulty in many cases for the law to determine whether an employee should be permitted to solicit the patrons of his former employer. As to the latter, it indicated that only where the employee is in the possession of secret information not readily accessible to others and acquired by reason of his employment, will courts afford injunctive relief.

[10] Prior to his severance of relations with plaintiff, the only activity of defendant Moseley was the sending out of a form letter to certain customers of plaintiff. Under the holding in Theodore v. Williams, 44 Cal.App. 34, 37, 185 P. 1014, it must be said that Moseley had the right to advise the customers of plaintiff that he was severing his business relations with plaintiff and was engaging in business for himself. In that case it was held that a former employee of a laundry, who had associated himself with a rival employer, was justified in driving along the streets upon which customers of his prior employer resided, with his laundry wagon plainly labeled with a notice of his new business association, and that he had a right to advertise such fact in a newspaper.

[11, 12] The award of damages is not supported by the evidence. It is true that the evidence shows that the defendants sold merchandise to eighteen of plaintiff's former customers, amounting to $3,433.42, and that defendants' net profit averaged 10 per cent of the amount of the sale. There is no evidence, however, that had defendants not made such sales plaintiff would have benefited in any amount. Former customers of plaintiff testified that they had not made purchases from plaintiff since March, 1941, for the reason that plaintiff had increased its prices; others that since that time they had not been solicited for business. Plaintiff does not contend that defendants are its only competitors in the area in question, nor does plaintiff contend that it would have made the sales had defendants not done so. Evidence to establish profits must not be uncertain or speculative. This rule does not apply to uncertainty as to the amount of the profits which would have been derived, but to uncertainty or speculation as to whether the loss of profits was the result of the wrong and whether any such profits would have been derived at all. 25 C.J.S., Damages, § 42, p. 517.

There is no substantial evidence in the record to support the findings that the defendants conspired to unlawfully interfere with or deprive plaintiff of its trade and customers, that the customers' list of plaintiff was confidential or a trade secret, that the defendants used the secret formulae of plaintiff, or that plaintiff suffered damage by reason of the actions of the defendants.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

24 Cal.2d 114

COLUMBIA LABORATORIES, Inc., v. CALIFORNIA BEAUTY SUPPLY CO. et al.

No. 18832.

Supreme Court of California.

April 12, 1944.

1. Landlord and tenant ⚷166(2)

The rule that there is no implied obligation upon landlord, in the absence of statute, to keep demised premises in repair or fit for occupation, applies only to the premises actually leased and does not free landlord from liability to tenant for injuries arising from defects in other portions of the premises of which landlord retains possession and control.

2. Landlord and tenant ⚷166(6)

Defendants' character as landlords did not exempt them from consequences of their own negligence, although the injured party happened to be defendants' tenant.

3. Landlord and tenant ⚷166(6)

That defective condition of roof on leased premises, which caused damage to tenant's property, was due to a fire without fault of landlord, did not affect question of landlord's liability for its subsequent failure to exercise care in the management of that portion of building which belonged to landlord's special supervision.

4. Appeal and error ⚷1008(1)

In action for damage to tenant's stock of goods allegedly caused by landlord's failure to repair roof following a fire, questions whether landlord was negligent in maintenance of temporary canvas covering, and whether the damage was due to rain leakage or to water seeping through the wall at time of fighting fire, were questions of fact for trial court.

5. Landlord and tenant ⚷169(7)

Evidence supported finding that landlord's negligence, in maintaining inadequate temporary roof covering following a fire and in delaying commencement of permanent repairs, was the proximate cause of water damage to tenant's stock of goods.

6. Negligence ⚷2

"Negligence" in its last analysis imports a lack of care, and both negligence and care are relative to duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

7. Landlord and tenant ⚷168(2)

By continuing to occupy demised premises in reliance upon landlord's promise to look after the repair of roof following a fire, tenants were not barred from recovery of damages to stock of goods caused by leakage and resulting from landlord's failure to repair.

8. Landlord and tenant ⚷169(9)

$1,750 for damages to tenant's stock of goods, consisting of articles and products used in the manufacture of pharmaceuticals in the beauty supply trade, allegedly caused by landlord's failure to repair roof following a fire, was not excessive.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Columbia Laboratories, Inc., against California Beauty Supply Company and another for damages to plaintiff's stock of goods while located in defendants' building. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Prior opinion 140 P.2d 429.

George Penney and Jean Wunderlich, both of Los Angeles, for appellants.

I. Charles Rubin and Joe Wapner, both of Los Angeles, for respondent.

CURTIS, Justice.

The plaintiff brought this action to recover damages which it claims to have sustained in consequence of its merchandise being injured by the defendants' negligence. The damage for which compensation is sought allegedly occurred on January 24, 1941, during a heavy rainstorm, and was caused by rain water seeping through the walls and ceiling of certain premises occupied by the plaintiff as a tenant in a building owned by the defendants. The action is based upon the alleged negligence of the defendants in caring for the roof of their building following certain fire damage to a portion thereof. The case was tried by the court sitting without a jury, the plaintiff prevailed therein, and its damages were assessed at the sum of $1,750. From a judgment entered accordingly in favor of the plaintiff, the defendants prosecute this appeal.

The building in question is a four-story loft structure, the back part of which is divided from the front part by a brick fire wall. As of January 1, 1941, the plaintiff was renting on a month to month basis one of two adjoining lofts separated by a thin stucco partition, on the second floor of the front portion of said building, and it continued to remain as such tenant for several months thereafter. This loft constituted the plaintiff's place of business for the manufacture of numerous pharmaceuticals used in its beauty supply trade, and various chemicals, cellophane labels, bottles and other essential equipment were kept on the premises. On January 4, 1941, a fire started in the hallway on the second floor, spread upstairs through the freight elevator passageway to the fourth or top floor, which the defendants had retained for their own use, and consumed a large area of the roof over the rear portion of the building. Except for some smoke damage, the plaintiff's loft in the front portion of the building was unharmed by the fire. On January 6, 1941, temporary roof bracings were installed, and on the following day a waterproof canvas covering was nailed in place. The likelihood that the damage to the freight elevator would prevent its operation for several weeks prompted the plaintiff, shortly after the fire and pursuant to an arrangement with the defendants, to move from its loft on the second story to certain allotted space on the ground floor some of its bulky merchandise —goods which could not be handled in the trade without proper elevator facilities. On January 24, 1941, as the result of heavy rains beating on the defendants' building in its partially destroyed condition and with its temporary roof covering, a large quantity of water leaked through the walls and ceiling of the respective premises occupied by the plaintiff and caused considerable injury to its stock of goods stored on the ground floor and in its second-story loft. The defendants declined to make any reparation for the damage sustained by the plaintiff.

[1-3] The defendants from the commencement of this suit have contended, and now contend, that in no event would the series of happenings above recited give rise to a cause of action in favor of the plaintiff. In this connection the defendants rely on the following undisputed facts: Plaintiff was their tenant on a month to month rental basis; there was no written lease and no contract imposing on the defendants the duty to restore or repair the demised premises or any part of the remainder of the building; and there was no agreement for the restoration or repair of any part of the building that might be destroyed or damaged by fire. But in this case the matter is not one of contract or of breach of a landlord's covenant; nor does it contemplate any theory of statutory liability. Rather the plaintiff's claim rests wholly upon the tort concept of the duty imposed upon a landlord to use reasonable care in keeping in suitable condition such portions of the premises as are subject to his control. Thus the basic principle of law is stated in 15 Cal.Jur. 706, section 116: "The rule that there is no implied obligation upon the landlord, in the absence of statute, to keep the demised premises in repair or fit for occupation, applies only to the premises actually leased, and does not operate to free the landlord from liability to the tenant for injuries arising from defects in other portions of the premises of which the lessor retains possession and control." H. C. Capwell Co. v. Blake, 9 Cal.App. 101, 98 P. 51; Rathbun Co. v. Simmons, 90 Cal.App. 692, 266 P. 369; Inglis v. Garland, 19 Cal.App.2d Supp. 767, 64 P.2d 501. In other words, the defendants' character as landlord does not exempt them from the consequences of their own negligence, although the injured party happens to be their tenant. Longbotham v. Takeoka, 115 Or. 608, 239 P. 105, 43 A.L.R. 1285; see annotation, 43 A.L.R. 1292 et seq. Here the plaintiff had no care or control of the roof of the building in question and had no right to intermeddle with it. Rather the defendants had such care and control for the benefit of all the occupants of their building, and they, in fact, exercised their right of exclusive possession of the roof incident to their undertaking to make the necessary repairs. Consistent with the scope of the fundamental legal concept above indicated as determinative of the propriety of the plaintiff's theory of recovery, the defendants' reference to the distinguishable cause of the defective condition in the roof—a fire without fault on their part—would not affect the question of their liability for any subsequent failure to exercise common care and prudence in the management and oversight of that portion of the building which belonged to their especial supervision and care. From this aspect of tort law they must respond in damages for any negligence in the dis-

charge of their obligation. See 1 Tiffany, Landlord and Tenant, 622, § 88; Sutherland, Damages, 4th Ed., vol. 3, § 872.

With this point of law decided against the defendants, there remains for consideration their argument as to the insufficiency of the evidence to support the trial court's decision of the issues of fact in this case. The judgment in favor of the plaintiff rests upon the following finding: "That it is true that on or about the 4th day of January, 1941, defendants, and each of them, did suffer damages to said building due to a fire on a portion of said building occupied other than by the plaintiff herein, and that the said defendants, and each of them, thereafter failed and neglected to repair said damage to said building, and as a direct and proximate result of such negligence and failure upon the part of the defendants, and each of them, to make the necessary repairs to the damaged portion of said building, that on or about the 24th day of January, 1941, waters due to rain did seep through the walls and ceiling of said premises occupied by the plaintiff herein, causing damage to the plaintiff's merchandise not in the amount of Two Thousand Nine Hundred Thirty Four and 29/100ths ($2,934.29) Dollars, but did sustain damages in the amount of One Thousand Seven Hundred Fifty ($1,750.00) Dollars." The state of the record herein does not permit disaffirmance of the disposition made of this case at the conclusion of the trial, as will readily appear from the following discussion of the evidence.

[4-6] Turning to the testimony, witnesses on behalf of the plaintiff attested to the following facts: That as the result of the fire on January 4, 1941, the roof on a portion of the defendants' building adjacent to the part occupied by the plaintiff was partially destroyed, but there was no damage, other than smoke, to the plaintiff's loft; that the waterproof tarpaulin installed as a temporary covering on January 7, 1941, did not at all times extend over a large part of the burned section of the roof and from the hallway on the second floor, one on occasion could see light through to the skyline; that the tarpaulin as used was not securely nailed in place and rain would cause it to collapse, a condition unavailingly called to the defendants' attention; that following the fire damage to the freight elevator in the building, the plaintiff moved part of its bulky merchandise to certain allotted space on the ground floor; that until the severe storm on January 24, 1941, no water damage was sustained by the plaintiff, but on that date the heavy downpour, beating on the damaged roof of the defendants' building with its temporary canvas covering, caused a steady stream of water to come through the walls and ceiling of the plaintiff's loft and forced even weighted merchandise on the shelves to topple to the floor; that six or eight people were required to shovel out the water which flooded the plaintiff's second-story loft; that at the same time the rain water entered the ground floor space occupied by the plaintiff, stood there two feet deep and soaked through various cartons of merchandise stored there; that a few days after the storm the defendants agreed to make some arrangement to take care of the plaintiff's damage, but that this promise never materialized; and that the permanent repair of the roof was not completed until March, 1941, though started some four or five weeks earlier. The record also includes as exhibits introduced by the plaintiff certain photographs showing the flooded condition of the premises occupied by the plaintiff—both the ground floor space and the second-story loft—following the heavy rain of January 24, 1941. Contra to the plaintiff's evidence is testimony adduced on behalf of the defendants as to these material points: That the waterproof tarpaulin was securely fastened on the roof and extended at all times over the entire burned portion thereof; that such method of installing a temporary protective covering against the weather was practical and customarily followed; that the construction of a permanent roof began on January 27, 1941, and various portions of the repair work were finished during the ensuing month; and that the claimed damage to the plaintiff's merchandise was not attributable entirely to the rain leakage through the roof as the result of the storm on January 24, 1941, but was due in part to water seepage through the walls following the fighting of the fire twenty days earlier. The conflict thus appearing in the record was for the trial court to resolve, and its decision will not be disturbed on appeal. 2 Cal.Jur. 921, § 543, and cases there cited. Choosing to accredit the plaintiff's evidence, the trial court was warranted in concluding therefrom that the defendants did not exercise common prudence in their supervision of that part of the building un-

der their exclusive control and that their negligence, both in the installation of an adequate temporary roof covering and in the delay following the fire before the commencement of permanent repairs was the proximate cause of the water damage to the plaintiff's stock of goods on the day of the storm. Such determination does not infer that the defendants were in the position of insurers of the plaintiff, for no such question arises under the facts of this case. Rather it simply serves to affirm the general doctrine that the defendants were chargeable merely with the exercise of ordinary care. Negligence in its last analysis imports a lack of care, and both negligence and care are relative to duty. Whether or not the defendants discharged their obligation to keep the roof of their building in such repair that its condition would not be a source of injury to their tenants was purely a question of fact. Suffice it to say that the record sustains the trial court's determination of the point against the defendants.

[7] Though the defendants did not plead the affirmative defense of contributory negligence, they seek to avail themselves here of that plea upon the theory that the plaintiff's own evidence establishes its failure to exercise that degree of care which was incumbent upon it to protect its property from damage in consequence of the defective condition of the building in question. 19 Cal.Jur. 681, § 104; Hoy v. Tornich, 199 Cal. 545, 250 P. 565. The circumstances of this case do not support the defendants' charge in bar of the plaintiff's recovery. Indisputably, the plaintiff, a tenant on the second floor, had no authority to make repairs to the fire-damaged roof, the control of which the defendants retained for the general benefit of the occupants of their building. But the defendants argue that the plaintiff, while complaining here of certain inadequacies of the temporary roof installation provided by the defendants, and in particular the tendency of the canvas covering to collapse, nevertheless continued to maintain its place of business on the premises and to keep its stock of goods there. However, it also appears in the record that from the date of the fire the defendants, consistent with their assumption of complete responsibility for the making of the necessary repairs on the partially destroyed roof, had assured the plaintiff that they would take care of any deficiencies in the temporary covering—though apparently they did not—and would proceed with the permanent construction work as expeditiously as possible. Furthermore, until the occurrence of the storm twenty days after the fire, the plaintiff had sustained no water damage to its merchandise as the result of the impaired condition of the roof and was unaware that its property was endangered while kept on adjacent premises. Under these various considerations it would be an extremely harsh view to hold that the plaintiff, while continuing to occupy the defendants' building in reliance upon the latter's promise to look after the repair of the premises under their supervision and management, as they were required to do, would nevertheless be barred from the recovery of damages resulting from the defendants' failure to perform their duty. The defendants may not thus escape liability for their negligence. H. C. Capwell Co. v. Blake, supra; Rathbun Co. v. Simmons, supra.

[8] The defendants finally urge that the damages awarded were excessive, but this contention is not substantiated by the record. As shown by the above-quoted finding of the trial court, the amount of damages found in favor of the plaintiff was considerably less than that sought upon the basis of an itemized list of the monetary loss sustained. It appears from the plaintiff's evidence that its stock of goods, both on the ground floor and in the second-story loft of the defendants' building, was completely ruined as the result of the water leakage incident to the storm of January 24, 1941; that such loss was attributable solely to the impaired condition of the roof at the time in question; and that the worth of the merchandise so damaged was identified at the trial with exact reference to the above-mentioned itemized listing. The defendants did not offer any proof upon this subject. In such circumstances the facts adduced at the trial warranted the award made.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

24 Cal.2d 133

OETTINGER v. STEWART et al.

L. A. 18790.

Supreme Court of California.

April 19, 1944.

1. Negligence 🔑33(2)

A "trespasser" is a person who enters or remains upon land in possession of another without a privilege to do so created by possessor's consent or otherwise.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespasser".

2. Negligence 🔑32(2)

A "licensee" is a person who is privileged to enter or remain upon land by virtue of possessor's consent, whether given by invitation or permission.

See Words and Phrases, Permanent Edition, for all other definitions of "Licensee".

3. Negligence 🔑32(2)

A "gratuitous licensee" is any licensee other than a "business visitor", which is a person who is invited or permitted to enter or remain on land in possession of another for a purpose directly or indirectly connected with business dealings between them.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Visitor" and "Gratuitous Licensee".

4. Negligence 🔑32(1, 2)

A prospective tenant calling at apartment building to look for apartment was a "business visitor" to whom building owners and operators owed ordinary care.

5. Negligence 🔑32(2)

An invitation or permission to enter upon land, as affecting owner's liability for injuries, need not be expressed, but may be implied from such circumstances as conduct of possessor, arrangement of premises, or local custom.

6. Trial 🔑252(8)

In action against apartment owners and operators by prospective tenant who was knocked down when a defendant fell, wherein there was no evidence that plaintiff was a trespasser or licensee, instructions on care due to trespassers and licensees were improper.

7. Negligence 🔑138(3)

In action against apartment owners and operators by prospective tenant who was knocked down when a defendant fell, wherein defective condition of premises was not involved, instruction that only duty to licensee is to refrain from willful or wanton injury was erroneous.

8. Negligence 🔑32(1)

In cases involving injury resulting from active conduct, as distinguished from condition of premises, landowner or possessor may be liable for failure to exercise ordinary care toward licensee whose presence is known or should reasonably be known.

9. Trial 🔑296(3)

Error in instruction that only duty to licensee was to refrain from willful or wanton injury was not cured by other instruction that, when licensee's presence is known, licensor must exercise ordinary care to avoid injury by overt act, but the instructions were conflicting and confusing.

10. Trial 🔑252(8)

In action against owners and operators of apartment house by prospective tenant who was knocked down when a defendant fell, there was no evidence justifying an instruction on theory that plaintiff assumed the risk, in absence of special circumstances that should reasonably have warned plaintiff that defendant might fall upon her.

11. Appeal and error 🔑999(3)

In action against owners and operators of apartment building by prospective tenant who was knocked down when a defendant fell, record did not show contributory negligence as matter of law, and the issue was for jury.

12. Appeal and error 🔑930(4)

Where evidence of contributory negligence and negligence was sufficient as matter of law but not convincing, reviewing court could not assume that verdict for defendant was based on contributory negligence alone, and hence must reverse for error in instructions on negligence.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph Marchetti, Judge pro tem.

Action by Ruth V. W. Oettinger against Edwin Stewart and another for injuries resulting from fall. From a judgment for defendants, plaintiff appeals.

Reversed.

Prior opinion 137 P.2d 852.

Thurlow T. Taft, of Santa Monica, for appellant.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiff brought this action against the owners and operators of an apartment building in the city of Santa Monica to recover damages for personal injuries claimed to have resulted from the negligent conduct of defendant May Stewart. The jury returned a verdict for defendants, and plaintiff appealed from the ensuing judgment.

On the afternoon of July 10, 1940, plaintiff, a woman seventy-one years of age, called at the premises looking for an apartment. At the front of the building were three or four steps leading from the sidewalk to a small cement porch. Defendants, husband and wife, occupied an apartment near the front door of the building, using it both as living quarters and as an office. The word "office" was on a placard on the wall in the main hallway next to the entrance to defendants' apartment. Plaintiff entered the building and rang the office bell which was answered by defendant May Stewart (hereinafter called defendant). Defendant testified that in response to plaintiff's inquiry she informed plaintiff there were no vacancies at present but that there might be one in the fall, that plaintiff then stated that she felt sick and would have to sit down a minute, and that, without invitation, plaintiff entered the apartment and sat down. Plaintiff testified that defendant asked her to "come in" the apartment, and denied stating that she felt sick or was sick. She remained five or ten minutes, during which time the parties engaged in conversation. When plaintiff arose to leave, defendant preceded her and opened the door leading to the porch. Plaintiff went out first, crossing the porch and going down the steps, and at the bottom she turned around and stood in front of the lower step It is not entirely clear from the record exactly where plaintiff was standing at the time of the accident, but there is testimony indicating that she was upon a small walk or "sidewalk" between the bottom step and the adjoining public sidewalk, and the case was apparently tried on the assumption that the accident took place upon defendants' premises. Defendant followed plaintiff outside but remained standing on the edge of the porch at the top of the steps. Defendant then looked up at the sky, remarking about the beautiful day, and suddenly, without warning, lost her balance and fell forward down the steps, striking plaintiff and knocking her down. Defendant testified: "* * * I don't know what happened, except that I was just flying down the steps and my heels touched each step as I went down. * * *" She said she knew she didn't stumble but didn't know whether or not she had a fainting spell or lost consciousness. According to plaintiff, defendant had started forward to step down and the heel of her left foot caught, causing her to fall. While falling, defendant attempted to avoid plaintiff, but although plaintiff saw defendant start to fall, she, by her own testimony, did not move, saying there was insufficient time.

The grounds for reversal urged by plaintiff are based upon asserted prejudicial error in the numerous lengthy and repetitious instructions that the trial court gave the jury. At plaintiff's request, three instructions were given relating to the duty of care owed by an apartment house operator to an "invitee." Subsequently, five instructions were given at defendant's request defining the relationships and duties of a landowner or possessor toward a trespasser, a social guest or other gratuitous licensee, and an "invitee" (used in the sense of business visitor).

[1-3] The terms trespasser, licensee, and business visitor are defined in the Restatement, Torts, as follows: "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." § 329. "A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor's consent, whether given by invitation or permission." § 330. "A gratuitous licensee is any licensee other than a business visitor as defined in § 332." § 331. "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them." §

332. It should be noted that although the Restatement classified both a gratuitous licensee and a business visitor under the broad heading of "licensee," the parties herein and the trial court, following the general practice, used the word "licensee" to describe a gratuitous licensee as distinguished from a business visitor. See Prosser on Torts [1941], 625, 635.

The instructions requested by defendant contained statements and implications that the only duty owed to trespassers and licensees was to refrain from intentional harm and willful or wanton injury, and plaintiff contends that the trial court committed prejudicial error by so instructing the jury.

[4] It is clear that in this case plaintiff was a business visitor, and there was nc evidence from which the jury could have found that plaintiff was a trespasser or a licensee.

[5] An invitation or permission to enter upon land need not be express but may be implied from such circumstances as the conduct of the possessor, the arrangement of the premises, or local custom. See Tschumy v. Brook's Market, 60 Cal.App.2d 158, 165, 140 P.2d 431; Rest., Torts, §§ 330-332, Comment. Here the building was obviously an apartment house. On the outside was a sign reading "York House," and in the hall was another sign bearing the word "office."

[6] Plaintiff came upon the premises as a prospective tenant—a purpose connected with the business conducted thereon, and she, therefore, was a business visitor. See 38 Am.Jur. 754, 783, 784; 45 C.J. 808-812. Defendant contends that after plaintiff learned that there were no vacancies all business was completed, and that if she subsequently went into defendant's apartment without an invitation and for some purpose of her own, her status changed to that of trespasser or licensee. Accepting as true defendant's testimony that plaintiff entered the room without express invitation and solely because she was sick and wished to sit down, the original implied invitation or permission to enter the building included the right to depart therefrom. The accident occurred during plaintiff's departure from a portion of the premises covered by defendant's implied invitation. Plaintiff was a business visitor, therefore, and defendant owed her a duty to exercise ordinary care to avoid injuring her. Cf. Hinds v. Wheadon, 19 Cal.2d 458, 121 P.2d 724; Rest., Torts, §§ 341, 343; 19 Cal.Jur. 621. The instructions relating to trespassers and licensees indicating that a lesser standard of care might be applicable had no proper place in this action, and they could have served only to confuse the jury and mislead them as to the correct standard of care to be applied.

[7, 8] Moreover, the instructions as to licensees contain an incorrect statement of the law. The jury was told that: "An 'Invitee' who enters upon portions of the premises where she has no right to enter becomes a 'Licensee' and the *only duty to her* then is to refrain from *wilful or wanton injury.*" (Italics added.) There has been some confusion in the authorities as to the duty of care owed by a landowner or possessor to a licensee. The courts have frequently made general statements to the effect that the only duty to a licensee is to abstain from willful or wanton injury. See, for example, Powers v. Raymond, 197 Cal. 126, 131, 239 P. 1069; Giannini v. Campodonico, 176 Cal. 548, 550, 169 P. 80; Means v. Southern California R. Co., 144 Cal. 473, 479, 77 P. 1001, 1 Ann.Cas. 206; cf. Jacobson v. Northwestern Pac. R. Co., 175 Cal. 468, 472, 166 P. 3; Kennedy v. Chase, 119 Cal. 637, 642, 52 P. 33, 63 Am.St.Rep. 153; Schmidt v. Bauer, 80 Cal. 565, 568, 569, 22 P. 256, 5 L.R.A. 580; Koppelman v. Ambassador Hotel Co., 35 Cal.App.2d 537, 540, 541, 96 P.2d 196; Hall v. Southern California Edison Co., 137 Cal.App. 449, 453, 30 P.2d 1013; Goldberger v. Market St. R. Co., 130 Cal.App. 597, 604, 20 P.2d 351; State Compensation Ins. Fund v. Allen, 104 Cal.App. 400, 409, 410, 285 P. 1053; 19 Cal.Jur. 616, 623; cf. Aguilar v. Riverdale C. C. Ass'n, 104 Cal.App. 263, 267, 285 P. 889; Kneiser v. Belasco-Blackwood Co., 22 Cal.App. 205, 206, 133 P. 989. On their facts, however, all of these cases involved injuries resulting from a defective condition of the premises, as distinguished from active conduct of the possessor or his employees. In other cases it has been suggested that a duty of ordinary care is not owed to a licensee even though injury resulted from active conduct rather than mere passive condition of the premises. Brown v. Pepperdine, 53 Cal.App. 334, 200 P. 36; cf. Tharp v. San Joaquin Cotton Oil Co., 27 Cal.App.2d 554, 81 P.2d 443, 82 P.2d 21; Brown v. Feather River Lumber Co., 203 Cal. 493, 265 P. 203, 57 A.L.R.

812; Neil v. Feather River Lumber Co., 203 Cal. 502, 265 P. 207. The prevailing view is to the contrary, however, and it is now generally held that in cases involving injury resulting from active conduct, as distinguished from condition of the premises, the landowner or possessor may be liable for failure to exercise ordinary care toward a licensee whose presence on the land is known or should reasonably be known to the owner or possessor. Rest., Torts, § 341; Prosser on Torts [1941], 630; 45 C.J. 803-805. In Prosser on Torts, supra, the author explains: "Some courts have gone so far as to say that there is no duty to a licensee other than to refrain from inflicting wilful or wanton injury upon him. As in the case of trespassers, however, an increasing regard for human safety has led to a retreat from this position. It is now generally held that as to any active operations which the occupier carries on, there is an obligation to exercise reasonable care for the protection of a licensee. He must run his train, operate his machinery, or back his truck with due regard for the possibility that the permission given may have been accepted and the guest may be present." The more recent California decisions have adopted this rule. Turnipseed v. Hoffman, 23 Cal.2d 532, 534, 535, 144 P.2d 797; Demmon v. Smith, 58 Cal.App.2d 425, 432, 136 P.2d 660; Colgrove v. Lompoc, etc., Club, 51 Cal.App.2d 18, 22, 23, 124 P.2d 128; Yamauchi v. O'Neill, 38 Cal.App.2d 703, 707-709, 102 P.2d 365; Gay v. Cadwallader-Gibson Co., 34 Cal.App.2d 566, 570, 93 P.2d 1051; Lindholm v. Northwestern Pac. R. Co., 79 Cal.App. 34, 40, 248 P. 1033; Herold v. P. H. Mathews Paint House, 39 Cal.App. 489, 493, 494, 179 P. 414; Lucas v. Walker, 22 Cal.App. 296, 301, 134 P. 374, 379; cf. Smithwick v. Pacific Elec. R. Co., 206 Cal. 291, 299, 300, 274 P. 980; Hamakawa v. Crescent Wharf & W. Co., 4 Cal.2d 499, 501, 502, 503, 50 P.2d 803 [trespasser]. The cases cited herein suggesting that a lesser standard of care is applicable where injury results from active conduct of the landowner or possessor are inconsistent with the later decisions and must be disapproved.

[9] In the present case it is apparent that plaintiff's presence on the premises was known to defendant at the time of the accident and that the accident did not result from a defective condition of the premises. Accordingly, even if plaintiff were a licensee rather than a business visitor, it is clear that defendant had a duty to exercise ordinary care to avoid injuring her, and the trial court should not have given the criticized instruction. The error was not cured by the giving of another instruction to the effect that when a licensee's presence is known the licensor is bound to exercise ordinary care to avoid injuring the licensee by any "overt act." The second instruction was inadequate under the circumstances of this case and, in any event, the two instructions taken together presented conflicting and confusing statements of the law to the jury.

[10] The trial court, in addition to giving several instructions on contributory negligence, informed the jury at defendant's request that "one who for purposes of her own voluntarily places herself in a position of danger, assumes the risk of injury ordinarily incident to such a position and is charged with the responsibility of exercising that quantum or degree of care for her own safety commensurate with her danger, and therefore, if you find that at the time of, or immediately prior to, the happening of the accident complained of, the plaintiff Mrs. Oettinger voluntarily placed herself in a position of danger, or that she failed to remove herself from a position of danger, if you find she could, by the exercise of ordinary care, have done so, then she must assume the risk of injury which ordinarily may be considered as incident to placing herself in such position or in failing to remove herself from such position, if by the exercise of ordinary care she could have done so." There was no evidence justifying an instruction upon the theory that plaintiff assumed the risk by vountarily placing herself in a position of danger. In the absence of special circumstances that should reasonably have warned plaintiff that defendant might fall upon her, a finding that plaintiff assumed the risk of such a fall by standing near defendant would be unwarranted.

[11, 12] It should be noted that there is some evidence of plaintiff's contributory negligence, but we cannot say that the record shows contributory negligence as a matter of law. The issue was one of fact for the jury to determine. It cannot be assumed under the circumstances of this case that the jury's verdict for defendant was based on the evidence of contributory negligence alone; it may well have been predicated upon a theory of defense permitted

by one or more of the erroneous instructions discussed above. As stated in O'Meara v. Swortfiguer, 191 Cal. 12, 15, 214 P. 975, 976. "It is true that in determining whether or not a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to the respondent. However, in determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party." Cf. Young v. Southern Pacific Co., 182 Cal. 369, 382-384, 190 P. 36; Criswell v. Pacific Elec. R. Co., 48 Cal.App.2d 819, 823, 824, 120 P.2d 670; Galloway v. United Railroads, 69 Cal.App. 770, 774, 232 P. 491. In cases where it clearly appears that the jury did not rely upon the erroneous instructions, the judgment may be affirmed on the ground that the error is not prejudicial. This, however, is not such a case. Neither the evidence of contributory negligence nor of negligence, although sufficient as a matter of law, can be said to be convincing, and we should not speculate upon the basis of the verdict.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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24 Cal.2d 124

KRAFT et al. v. SMITH et al.

No. 18798.

Supreme Court of California.

April 17, 1944.

1. Parties ⇨25

Sections 379a, 379c, respecting joinder of defendants, were not impliedly repealed by section 427, providing that causes of action which may be joined must affect all parties to the action. Code Civ.Proc. §§ 379a, 379c, 427.

2. Parties ⇨27

Where complaint alleged that wife sustained injuries, that two physicians in separate counties were successively employed to treat the injuries, that each physician was negligent, and that as proximate result of negligence of one or the other or both wife sustained a further injury, both physicians were properly joined under statutes respecting joinder of defendants. Code Civ.Proc. §§ 379a, 379c.

3. Parties ⇨27

That physicians residing in separate counties and sued for malpractice were independent wrongdoers, and that their negligence operated successively to produce the injury, did not preclude their joinder under statutes respecting joinder of defendants. Code Civ.Proc. §§ 379a, 379c.

4. Parties ⇨27

The procedure afforded by statutes respecting joinder of defendants is intended to be available upon a showing that negligence of two or more persons, whether joint, independently concurrent, or successive, contributed proximately to cause injury for which recovery is sought, or that such injury was proximately caused by negligence of one or more persons, and that a reasonable uncertainty exists in respect to alternative or quantitative liability. Code Civ.Proc. §§ 379a–379c.

5. Pleading ⇨225(2)

That some or all of specified uncertainties in counts were justifiably urged as ground for special demurrer could not be availed of to support judgment based on order sustaining demurrer without leave to amend, where it was an abuse of discretion not to grant plaintiffs leave to amend. Code Civ.Proc. §§ 379a, 379c, 427.

In Bank.

Appeal from Superior Court, Kern County; William A. Bradshaw, Judge.

Action by Wanda Kraft and her husband against Drs. Joseph Smith and E. C. Innis for malpractice. From a judgment entered on an order sustaining the last-named defendant's demurrer without leave to amend, plaintiffs appeal.

Reversed with directions.

Prior opinion 137 P.2d 886.

Joseph D. Taylor and John S. Bolton, both of Los Angeles, for appellants.

Fred O. Reed, Richard L. Kirtland, and Henry E. Kappler, all of Los Angeles, for respondent.

SCHAUER, Justice.

This malpractice case presents the problem of proper application of the provisions of sections 379a and 379c of the Code of Civil Procedure, added to the code in 1927, relating to joinder of parties defendant, in the light of the provisions of section 427 of the same code, relating to joinder of causes of action. The latter section was enacted in 1872 and, except as hereinafter mentioned, has not been amended since 1915.

Plaintiffs, husband and wife, have joined as defendants in one action Drs. Joseph Smith and E. C. Innis, physicians and surgeons, who independently of each other, treated plaintiff wife at different times and places, but the treatment of each of whom, it is alleged, contributed to aggravating certain injuries she had previously received. Dr. Innis filed a general and special demurrer to the second amended complaint, specifying as grounds of special demurrer that there was a misjoinder of parties defendant and of causes of action and that uncertainties appeared in various particulars. From a judgment entered on an order sustaining the demurrer *without leave to amend,* plaintiffs appeal.

In count one of their pleading plaintiffs allege that on June 15, 1940, defendant Smith, practicing in Bakersfield, California, was employed to treat certain injuries which immediately theretofore had been sustained by plaintiff Wanda Kraft, including a broken ankle, a broken leg, and a fractured knee; that she received negligent and improper treatment from such defendant and thereby suffered further injury.

The allegations of count two are not here in issue and need not be discussed.

In count three it is alleged that on June 24, 1940, plaintiffs employed defendant Innis, practicing in Newhall, California (approximately 65 miles from Bakersfield and in a different county), to treat the same injuries of plaintiff wife which had been treated by defendant Smith; that she received negligent and improper treatment from defendant Innis and was damaged thereby to such an extent that, among other consequences, her right leg was made permanently shorter than her left leg; and "that the plaintiffs are in doubt as to whether they are entitled to redress from the defendant Joseph Smith or the defendant Innis, or both of them, for the resultant injuries, in that these plaintiffs are unable to presently ascertain whether or not the final result of the negligence herein alleged was caused by the negligence in the treatment by defendant Joseph Smith, or the negligence in the treatment by the defendant E. C. Innis, or the negligence of both of them and for that reason both defendants have been joined herein with the intent that the question as to whether both of said defendants are, or one of them is, liable to the plaintiffs and to what extent, and that said liability may be determined in this action and that the Court may award judgment to the plaintiffs as against the defendants either jointly, severally, or in the alternative."

Count four incorporates all of the allegations of the first and third counts, and in addition alleges that "as a direct and proximate result of the negligence and carelessness of the defendants, and each of them, plaintiff Roy Kraft has been forced to incur certain medical expenses and will be forced to incur additional medical expenses in an amount not now ascertainable, and plaintiff will ask leave to insert the amount when the same is ascertained."

Respondent (defendant Innis) contends that inasmuch as joint negligence between him and defendant Smith is not alleged and the tort of which each is accused is separate and independent, the causes of action based on such separate torts may not properly be joined in one action. We have concluded, however, that by virtue of the provisions of sections 379a and 379c of the Code of Civil Procedure joinder is now permitted under the circumstances here alleged. Those sections read as follows:

Section 379a: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgments may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

Section 379c: "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties."

[1] Respondent argues that the requirement of section 427 of the Code of Civil Procedure that the causes of action which it provides may be united "must affect all the parties to the action" controls over the more liberal and more recently enacted sections 379a and 379c. A similar contention was made in Peters v. Bigelow, 1934, 137 Cal.App. 135, 141, 30 P.2d 450, with regard to the effect to be given to section 378 of the Code of Civil Procedure, which deals with joinder of parties plaintiff and which was amended into its present form in 1927, as a part of the same procedural reform program in which sections 379a and 379c were adopted. In considering the relationship thereafter existing between sections 378 and 427, the court in that case held at page 141 of 137 Cal.App., at page 452, of 30 P.2d): "It is plain that it was the intention of the Legislature in amending section 378 in 1927 to except from the requirements of section 427 those cases coming within the provisions of section 378. To hold otherwise would give no effect whatever to the amendment of 1927 to section 378." In that case the court also held that the 1931 amendment to section 427, relating to conspiracy cases, did not serve to re-enact the requirement here under discussion or to impliedly repeal section 378. Upon the same reasoning it must be held here that sections 379a and 379c have not been repealed by the amendment mentioned. It is furthermore to be noted that section 379b, likewise enacted in 1927, expressly provides that "It shall not be necessary that each defendant shall be interested as to all relief prayed for, or as to every cause of action included in any proceeding against him * * *." This court, in Kane v. Mendenhall, 1936, 5 Cal. 2d 749, 755, 56 P.2d 498, 501, stated that "In Peters v. Bigelow, supra, where the court upheld joinder under section 378 [of the] Code of Civil Procedure, as amended in 1927 * * *, of plaintiffs who had separate causes of action against defendant for false imprisonment growing out of the same transaction, it was said that the effect of the amendment was to except from the requirements of section 427 [of the] Code of Civil Procedure, those cases coming within the provisions of section 378, as amended. It seems likely that sections 379a and 379b, added in 1927 * * *, and relating to joinder of defendants, would have a similar effect * * *."

[2] We are satisfied that the same view, applied to the instant case, is determinative of the problems here presented, and that the joinder invoked by plaintiffs falls squarely within the provisions of sections 379a and 379c. The doubt which plaintiffs allege "as to the person from whom [they are] entitled to redress" (sec. 379c), thus necessitating that relief be sought from the two defendants either "jointly, severally or in the alternative" (sec. 379a) can well be understood under the circumstances, and to require that separate actions be brought, in both of which actually, as a practical matter, both defendants would be substantially interested, would be to impose inefficient procedure and unnecessary waste of time and money upon all parties concerned and the state itself. It would appear that one of the chief purposes of the new sections—379a, 379b and 379c—is to avoid just such multiplicity of actions. As early as 1891 this court intimated the need for some such legislation in furtherance of justice. In Miller v. Highland Ditch Co., 1891, 87 Cal. 430, 25 P. 550, 22 Am.St.Rep. 254, several separate and independent ditch owners, not acting in concert of action or design, caused "foreign water" to flow onto plaintiff's land. It was held that as the law then stood an action at law for damages could not be maintained against the several defendants jointly, but in so holding the court remarked that (at page 434 of 87 Cal. at page 552 of 25 P., 22 Am. St.Rep. 254): "* * * we must declare the law as we find it. If the law were changed so that in a case like the one at bar a several judgment could be given against each defendant for the proportionate part of the joint damage which his individual acts had caused, it may be that such change would be in furtherance of justice." In the same vein are the observations in Joerger v. Pacific Gas & Electric Co., 1929, 207 Cal. 8, 19, 20, 276 P. 1017, 1023, that "One of the objects of the reformed or code procedure is to simplify the pleadings and conduct of actions, and to permit the settlement of all matters of controversy between parties in one action, so far as may be practicable. * * * To permit a joinder where possible makes manifestly for the expeditious disposition of litigation without working hardship to any party defendant, and for this reason statutes relating to joinder should be liberally construed, unless ex-

pressly forbidden, to the end that a multiplicity of suits may be prevented." See, also, Morris v. Duncan, 1936, 14 Cal.App. 2d 635, 638, 639, 58 P.2d 669.

Although the complaint before us is far from being a model of clarity, conciseness, or consistency, it does fairly appear therefrom that plaintiff Wanda Kraft sustained certain severe physical injuries, that the defendants were severally and successively employed to treat such injuries, that each defendant was negligent in the treatment he administered, and that as a proximate result of the negligence of one or the other or both of the defendants the plaintiff Wanda Kraft sustained further injury, i.e., a condition necessitating the rebreaking of one or both of her legs, the permanent shortening of one leg, etc. Certainly neither defendant is liable for any injury caused by the independent tort of his codefendant, to which he himself did not proximately contribute. If upon the trial it develops that neither defendant was guilty of negligence then no prejudice will have been occasioned by their joinder in the one action. If it develops that only one defendant was negligent in his treatment the assessment of the verdict will be simple. If, on the other hand, it appears that negligence of both defendants contributed proximately to cause an injury for which plaintiff is entitled to recover, it may be a matter entailing great difficulty of proof as to the amount in which each defendant is responsible. Cf. Slater v. Pacific American Oil Co., 1931, 212 Cal. 648, 300 P. 31. To require separate actions and separate trials in such a situation would enhance the difficulties of proof and tend to obstruct, rather than to promote, justice. The facts that defendants reside (and practice) in different counties and that one of them may have to attend court and present his defense in a county other than that of his residence, present a consideration which must be presumed to have been hypothetically weighed by the Legislature in enacting the law. The axiology of the matter was for that body; the consideration stated would not authorize this court to so circumscribe the enactment by "interpretation" as to defeat its application in such cases. Certainly there are cogent reasons why it should be applied. Through having both defendants before the court at the same time and in the same action it can be expected more sanguinely that a jury should arrive at soundly based and just verdicts.

[3, 4] The facts that defendants are not joint tort feasors but independent wrongdoers, and that their negligence operated successively rather than concurrently in time to produce the injury, are not vetitive of the right of joinder. The salutary procedure afforded by sections 379a, 379b and 379c of the Code of Civil Procedure is clearly intended to be available upon a showing *either* that the negligence of two or more persons, whether joint, independently concurrent, or successive, contributed proximately to cause the injury for which recovery is sought, *or* that the injury for which recovery is sought was proximately caused by the negligence of one or another or several of two or more persons and, as to each person who is not charged absolutely, that a reasonable uncertainty, requiring determination of some factual or legal issue, exists in respect to alternative or quantitative liability.

We find nothing in Ramsey v. Powers 1925, 74 Cal.App. 621, 241 P. 567; Busset v. California Builders Co., 1932, 123 Cal. App. 657, 665, 12 P.2d 36; or San Francisco M. Co. Ltd. v. Mordecai, 1933, 134 Cal.App. 755, 26 P.2d 669, which constitutes authority contrary to the views we have expressed hereinabove. The Ramsey case was decided in 1925, two years before the adoption of the statutes which are now controlling. In the Busset case the court, after first pointing out (at page 664 of 123 Cal.App., at page 39 of 12 P.2d) that the objection of misjoinder of parties defendant had been waived, held that no cause of action had been stated against the cross-defendant, one Clausen, on whose behalf such objection might have been urged. There was in the cross-complaint no direct allegation, such as appears in the complaint in the instant case, that such cross-defendant was guilty of negligence or of any other misconduct giving rise to liability upon his part; it was merely alleged by the defendant that plaintiff and cross-defendant Busset had claimed that Clausen, and not himself, was the negligent party. It may also be noted that the court there remarked that (at page 670 of 123 Cal.App., at page 41 of 12 P.2d): "The views expressed are not to be construed to imply that a cause of action could not have been stated conjunctively against Busset and Clausen. We have been dealing merely with the cross-complaint as it is, and deem the allegations insufficient as to Clausen to afford grounds for relief against him in the alternative." It is obvious that statements in the opinion in that case relative to the effect of sections 379a et sequitur of the Code of Civil Procedure, other than as they concern a pleading which wholly fails to state any cause of action, in the alternative or otherwise, against the challenging party, are dicta and not authority.

In the Mordecai case, 1933, supra, 134 Cal.App. 755, 26 P.2d 669, the question of improper joinder of defendants was raised incident to a motion of one of such defendants for change of venue. The District Court of Appeal describes the complaint in that case (134 Cal.App. at page 757, 26 P.2d at page 669) as "containing four separate and distinct causes of action against four separate defendants praying separate and distinct relief against each defendant upon the cause of action specially pleaded as to him." After holding that neither the first nor the second count stated any cause of action against anyone, the court continues (134 Cal.App. at page 760, 26 P.2d at page 671): "It is argued that the plaintiff was in doubt as to the defendant from whom he is entitled to redress, and that, for this reason, the joinder is permissible under section 379c [of the] Code of Civil Procedure. There is no allegation in any part of the complaint that the plaintiff entertained such doubt. On the contrary, the complaint demonstrates no doubt. * * * Now, if the plaintiff had pleaded any uncertainty as to whether the appellant or either of these named defendants [the defendants named respectively in counts three and four] was liable for the care of the cattle, the joinder of these defendants would have been permissible under the Code section. Not only does he fail to plead any uncertainty, but his allegations show affirmatively that no uncertainty exists." While further statements in the opinion disclose that counts one and two actually could have been regarded as alternative statements of the same cause of action against different defendants, and that counts three and four also could have been viewed as alternative statements of a single cause of action against different defendants, enough has been quoted to establish that upon the view of the pleading taken by the court it correctly applied the law and declared propositions of law not inconsistent with the rules stated herein. Implications contrary to such rules, which might arise if the language used were viewed as applicable to alternative statements of a single cause of action against different defendants, are disapproved.

[5] Returning to the pleading in the case before us, count three states a cause of action against defendant-respondent Innis and is not improperly joined with count one which states a cause of action against defendant Smith. The fact that some or all of the specified uncertainties in the several counts were justifiably urged as grounds for special demurrer and properly required an order sustaining the demurrer, cannot be availed of to support the judgment, which is based on the order sustaining the demurrer *without leave to amend*. The denial of permission to amend was probably based on the view that Drs. Innis and Smith could not, under the circumstances pleaded, be joined as parties defendant in the same action. That position, as we have shown, is not sustainable. Hence the judgment must be reversed because it would be an abuse of discretion not to grant plaintiffs leave to amend for the purpose of removing mere uncertainties in the phraseology of expression of their causes of action. See Guilliams v. Hollywood Hospital, 1941, 18 Cal.2d 97, 104, 114 P.2d 1; Olivera v. Grace, 1942, 19 Cal.2d 570, 579, 122 P.2d 564, 140 A.L.R. 1328; Wilkerson v. Seib, 1942, 20 Cal.2d 556, 564, 127 P.2d 904; Wennerholm v. Stanford Univ. Sch. of Medicine, 1942, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358.

The judgment is reversed with directions to the trial court to grant the plaintiffs a reasonable time within which to prepare, serve, and file a further complaint, amended in such particulars as plaintiffs may be advised.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

64 Cal.App.2d 25

PEOPLE v. DARBY.

Cr. 3766.

District Court of Appeal, Second District, Division 2, California.

April 21, 1944.

Rehearing Denied May 2, 1944.

Hearing Denied May 19, 1944.

1. Criminal law ⚿369(2)

Evidence of the commission of offenses other than offense charged in information may be received under exception to general rule where proof of circumstances of the other offenses logically tends to prove any fact necessary or pertinent to the proof of crime for which defendant is being tried.

2. Criminal law ⚿371(1)

In prosecution for feloniously employing an instrument with intent to bring about a miscarriage, the prosecution may establish intent with which defendant performed operation by proof that on previous occasions he had used the same means to produce miscarriages.

3. Criminal law ⚿369(1)

Where in prosecution for feloniously employing an instrument with intent to bring about a miscarriage no testimony was introduced showing that any instrument was used, and according to testimony of defendant treatment given by him was such as was customarily given to female patients, the admission of testimony that on two occasions prior to date of abortion charged, defendant had performed abortions upon other women, was error. Pen. Code, § 274.

4. Criminal law ⚿695(5)

In prosecution for feloniously employing an instrument with intent to bring about a miscarriage, a letter from physician stating result of examination of uterus which had been removed from woman on which abortion was alleged to have been performed should have been excluded as hearsay and for lack of foundation laid to establish physician's qualification as a pathologist, regardless of oversight of counsel when objecting to letter to add the word hearsay to statement of his objection. Pen.Code, § 274.

5. Witnesses ⚿277(4)

In prosecution for feloniously using an instrument with intent to bring about a miscarriage, permitting cross-examination of defendant in respect to cards found in his office on which were written names of several women and notations as to fees charged was error, where defendant had not been asked anything concerning cards on direct examination. Pen.Code, § 274.

6. Criminal law ⚿369(1)

In prosecution for feloniously employing instrument with intent to bring about a miscarriage, permitting further questioning of defendant concerning cards found in his office upon which were written names of several women and notations as to fees charged, after instructing jury to disregard part of subject matter of inquiries, was error as being only for purpose of inducing jury to believe that defendant was in the habit of performing abortions. Pen.Code, § 274.

7. Criminal law ⚿783(1)

In prosecution for feloniously using an instrument with intent to bring about a miscarriage, instruction respecting defendant's violation of Health Code by reason of possession of hypodermic needles in violation of law was error, in absence of evidence that needles had been used in treatment given woman on whom abortion was alleged to have been performed. St. 1939, p. 764, § 11476; Pen.Code, § 274.

8. Criminal law ⚿1186(1)

In prosecution for feloniously using an instrument with intent to bring about a miscarriage where the appellate court could not hold that a different verdict on the evidence would have been improbable if alleged errors had not been committed, reversal of the conviction was required. Pen.Code, § 274.

Appeal from Superior Court, Los Angeles County; H. B. Landreth, Judge.

Harry F. Darby was convicted of feloniously employing an instrument with intent to bring about a miscarriage, and he appeals.

Reversed and remanded for a new trial.

Joseph W. Ryan and Theodor Ira Kowan, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., and Jere J. Sullivan and Thomas W. Cochran, Deputy Dist. Attys., all of Los Angeles, for respondent.

W. J. WOOD, Justice.

Defendant was accused by information of the violation of section 274 of the Penal Code, in that he feloniously employed an instrument upon Angelina Sylvia with the intent to bring about a miscarriage. A jury returned a verdict finding him guilty and he has appealed from the judgment of conviction and from an order denying his motion for a new trial.

Defendant contends that the trial court erred to his prejudice in admitting evidence that on two occasions prior to the date of the abortion charged in the complaint defendant had performed abortions upon a Mrs. White and a Mrs. Brunton. The prosecution concedes that as a general rule evidence of the commission of crimes other than that charged in the information is inadmissible but claims that in this case the evidence of Mrs. White and Mrs. Brunton was admissible to prove the intent of defendant at the time he treated Mrs. Sylvia.

From the testimony of Mrs. Sylvia it appears that she had had an excessive menstrual flow for many years; she had consulted "many doctors in Massachusetts" before coming to California. In October of 1942 she consulted a Dr. Woods, a medical doctor, concerning her menstrual condition and on January 5, 1943, Dr. Woods performed an operation consisting of a cauterization of the cervix of her uterus. She started to flow on January 15, 1943, and continued to flow for about eight days. She first visited defendant on February 22, 1943. She had not had sexual intercourse between the date of the operation by Dr. Woods and her visit to defendant, nor for some time prior thereto. Mrs. Sylvia further testified that she called upon defendant on February 22, 1943, for the purpose of having an examination and if she was found to be pregnant her intention was "not to have it." Defendant examined her and informed her that she was pregnant and had been pregnant for about three months. She asked him, "Can you do anything about it?" and he replied, "Yes", and said that his fee would be $75.

Mrs. Sylvia went to her home, secured $75 and returned to the office. After her clothing was removed defendant placed her upon a table and covered her with a sheet. She was on the table for about five minutes at which time she felt a "very small pinching sensation" in the region of her vagina. She went home and was told to return in two days. She again went to defendant's office on February 24, removed her clothing and was again placed upon the table. Defendant's wife came in with a cloth in her hand and placed it over Mrs. Sylvia's face. The cloth "smelled like ether almost". Mrs. Sylvia became unconscious and when she regained consciousness she was wearing a sanitary pad and could feel that she was flowing. She had a dull pain in the lower part of her abdomen. After about two hours she dressed and defendant took her home. He told her to call him by telephone if she did not feel well during the night. Mrs. Sylvia did not see or feel any instrument used upon her and no medicine was given. She did not feel any foreign body inserted into her vagina.

Defendant called upon Mrs. Sylvia at her home the following morning and examined her and found that she was not doing well. He took her to his office where she remained several hours and in the evening defendant and his wife took Mrs. Sylvia to her home in defendant's automobile. At that time defendant informed Mrs. Sylvia and her husband that she would have to go to a hospital. An ambulance arrived later and Mrs. Sylvia was taken to the Park View Hospital.

Defendant testified that Mrs. Sylvia engaged his services to treat her for profuse and painful menstruation. On the occasion of her first visit, February 22, she told him that she had had this trouble over a long period. He gave her a bimanual examination and discovered that she had a retroverted uterus. She was flowing at the time. He told her that he probably could effect a cure and that it would take from six weeks to two months, for which his charge would be $75, which would cover the costs of laboratory tests. Mrs. Sylvia said she would have to talk the matter over with her husband. She returned and defendant commenced the treatment. He swabbed the uterus and the cervix of the uterus. In doing the swabbing he used water in which he had put a small amount of "B.M.120, a vitamin mineral products,—ferric sulphate". This is a substance which is in common use by chiropractors as well as by physicians and osteopaths. He used a vaginal speculum, frequently used by chiropractors and others engaged in the healing art, which enables them to obtain a view of the uterus. He did not administer an anesthetic or give any medicine and did not use any instrument to bring about an abortion. Two days later defendant found Mrs. Sylvia to be in bad condition and he told her and her husband that he did not know what was wrong with her and that she should get the services of a physician and surgeon. They did not know of any physician to employ and he gave them the name and telephone number of Dr. Joe Farber. Mr. Sylvia told defendant that he was without money and defendant stated that he would give him back what he had been paid and thereupon he gave Mr. Sylvia $80. At a later time Mr. Sylvia begged for more money to pay hospital expenses, again claiming that he was without means, and defendant loaned him $200.

Dr. Joe Farber, an osteopathic physician, testified that in the evening of February 25 he received a telephone call from Mr. Sylvia and promptly dispatched an ambulance to bring Mrs. Sylvia to the hospital. When this witness saw Mrs. Sylvia in the hospital she was in a mild state of shock and showed evidences of a recent blood loss. In examining her eyes he found the membranes were blanched and her finger tips were blanched. Her extremities were cold and she was perspiring. Dr. Farber did not make an examination at that time but after talking with Mrs. Sylvia called the police department and later talked with one of the officers who came in answer to his call. Dr. Farber explored the interior of the uterus with a blunt and rounded instrument known as spong forceps and "found an area in the right forepart of the uterus that was very suspicious of a perforation". About midnight Mrs. Sylvia was taken to the minor surgery room where a curettement was performed under an anesthetic. The following morning Dr. Farber again examined Mrs. Sylvia and performed a major operation, removing the uterus down to the cervix. He found a perforation in the uterus which in his opinion had been made with some sharp instrument. In the abdominal cavity he found segments of fetal spine near the perforation in the uterus. The uterus had the appearance of a pregnancy of about twelve weeks duration. In Dr. Farber's opinion the condition which he found was "an incomplete abortion with perforation; pelvic peritonitis; traumatic removal of a portion of an appendix, mesentery, and the serosa of a small intestine caused by a metal instrument". This opinion was based in part on a laboratory report which, as will elsewhere be seen, was improperly received in evidence.

An investigator from the police department testified concerning the finding in defendant's office of a number of surgical instruments and hypodermic needles. The uses of these various instruments was described by Dr. Farber.

Both Mrs. Brunton and Mrs. White testified that defendant had performed abortions upon them. Mrs. White testified that defendant had performed an abortion upon her and that in so doing he had inserted an instrument. Mrs. Brunton gave like testimony but added that no anesthetic was used.

[1-3] Defendant bitterly complains of the ruling of the trial court admitting the testimony of Mrs. Brunton and Mrs. White, claiming that he was unlawfully deprived of his constitutional right to be tried only for the offense charged in the information and that he had had no opportunity to prepare a defense against the additional charges. It is well established that evidence of the commission of offenses other than the offense charged in the information may be received in evidence, under an exception to the general rule prohibiting such evidence, where proof of the circumstances of the other offenses "logically tends to prove any fact necessary or pertinent to the proof of the crime for which the defendant is being tried." People v. Morani, 196 Cal. 154, 158, 236 P. 135, 137. In the Morani case the charge was murder growing out of an operation to bring about a miscarriage and the court in discussing the authorities referred to People v. Northcott, 45 Cal.App. 706, 708, 189 P. 704, stating that the Supreme Court in denying a hearing had under the circumstances of that case withheld an expression of opinion concerning the admissibility in evidence of abortion operations performed by the defendant previous to the offense for which he was on trial. The court pointed out that in the Northcott case defendant had denied that he had given any treatment whatever to the woman in the case. The court quoted with approval from People v. Seaman, 107 Mich. 348, 65 N.W. 203, 206, 61 Am. St.Rep. 326, where it was held that it is proper to characterize the act for which the defendant is on trial "by proof of other like acts producing the same result, as tending to show guilty knowledge, and the

intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain." From the Morani case and others there cited, it is evident that the prosecution may establish the intent with which defendant performed an operation in the case on trial by proof that on previous occasions he had used the same means to produce miscarriages. However, this does not mean that in all trials for abortion proof may be introduced of the performance of other abortions merely to show that it is more probable that the defendant is guilty of the crime for which he is on trial. There must be reasonable ground to argue that the intent with which the treatment was given in the case on trial was shown to be criminal by proof of the circumstances of the other offenses. Such a situation would be presented if it had been proved that the defendant in the case on trial had inserted into the vagina a certain surgical instrument under circumstances leaving the question of his intent in so doing open to doubt, and if it was also shown that on the other occasions a similar instrument had been similarly used for the purpose of bringing about a miscarriage. But we have no such situation here. No testimony was given by Mrs. Sylvia or by defendant Darby that any instrument was used. On the other hand, according to the testimony of defendant, the treatment given by him to Mrs. Sylvia was such as is customarily and frequently given to female patients. It is common knowledge that the methods claimed to have been used by defendant are those in general use by members of his profession. The conclusion is inescapable that the testimony of Mrs. Brunton and Mrs. White was placed before the jury for the sole purpose of leading them to believe that it is more probable that defendant is guilty of the crime charged in the information because he had, according to their testimony, previously performed abortions upon them. Respondent relies upon People v. Coltrin, 5 Cal. 2d 649, 55 P.2d 1161, as authority for the introduction of evidence concerning abortions other than the one charged in the information. In the Coltrin case, however, the facts were not similar to the facts in the instant case, for it was there established that the defendant had placed the woman under an anesthetic and had explored her uterus with an instrument. The decision of the court does not show what proof was offered in establishing the circumstances of the performance of the other two abortions.

The latest expression of our Supreme Court on the subject of the admission of evidence of a crime other than that charged in the information for the purpose of proving intent is to be found in People v. Albertson, 23 Cal.2d 550, 145 P.2d 7, 20, where the court at page 595 said: "The trial court, however, should be guided by the rule that such proof is to be received with 'extreme caution,' and if its connection with the crime charged is not clearly perceived, the doubt is to be resolved in favor of the accused, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt." In the Albertson case the defendant was charged with the murder of one Kmetz by sending poison to him and the trial court received evidence that about six weeks prior to the receipt of the poison a vicious assault had been made upon Kmetz with the handle of a pickaxe. The action of the trial court in receiving the evidence was held to be erroneous because the evidence of the previous offense, which was circumstantial, did not sufficiently point to the defendant as the assailant. The decision in the Albertson case indicates the attitude of the Supreme Court in safeguarding the right of an accused person to be placed on trial for the offense only with which he is charged in the information. We can see no reason why the right of a defendant in an abortion case should not be as carefully guarded.

[4] The trial court also erred in admitting in evidence a letter from Dr. Woods written to Dr. Farber in which the result of Dr. Woods' examination of the uterus which had been removed from Mrs. Sylvia was set forth and in which Dr. Woods gave his findings indicating that the uterus had been ruptured and fetal matter found therein. Respondent argues that the point may not be presented at this time for the reason that no proper objection was made to the introduction of the letter. The record discloses, however, that defense counsel objected to the introduction of the letter as "incompetent, irrelevant and immaterial; no foundation laid for it whatsoever". The letter should have been excluded as being hearsay and for the further reason that no foundation

had been laid to establish Dr. Woods' qualifications as a pathologist. We do not feel inclined to deprive defendant of his right to demand that he be tried with competent evidence because of the oversight of his counsel in the midst of a difficult trial to remember that he should add the word, hearsay, to the statement of his objection.

[5, 6] While cross-examining defendant the prosecutor questioned him about several cards which had been found in his office, upon which were written the names of several women and notations as to the fees charged. Defendant was also asked if he had performed abortions on the women named, to which he replied in the negative. The court instructed the jury not to draw any inferences from the questions asked "as to whether the defendant performed any illegal operation in any of these particular cases" but permitted the prosecutor to continue making inquiries concerning the treatment given the women and the fees charged. Defendant had not been asked anything whatever concerning these cards on direct examination and the questions asked by the prosecutor on this subject were clearly improper. People v. Gilliland, 39 Cal.App.2d 250, 260, 103 P.2d 179. The instruction of the court to the jury to disregard part of the subject matter of the inquiries did not efface the harm which had already been done. The further questioning concerning the cards, which the court permitted, could only be for the purpose of inducing the jury to believe that defendant was in the habit of performing abortions. A similar line of questions was held improperly admitted in People v. Berg, 96 Cal.App. 430, 435, 274 P. 433, 435, a case in which the charge was murder as the result of abortion, where the court said: "If we grant, for the sake of argument, what we are far from deciding, that other crimes may be proved in cases of this nature, in order to show system or intent, the questions cannot be justified on that ground, as 'it is not competent for the prosecutor to introduce irrelevant evidence falling short of crime, and designed merely to degrade and prejudice the defendant in the minds of the jury.' (8 Cal.Jur. 59)."

The trial court erroneously gave to the jury the following instruction: "You are further instructed that section 11476 of the Health and Safety Code of the State of California in force at the times charged in the information, St.1939, p. 764, provides as follows: '[Section] 11476. No person other than a physician, dentist, osteopath [chiropodist], registered nurse, veterinarian, or pharmacist, shall have in his possession a hypodermic syringe or a hypodermic needle, or any instrument or contrivance used for the same purpose, unless it was purchased by the person with a written order signed by a physician, dentist [chiropodist], veterinarian, or osteopath.' If you should find from the evidence that the defendant, Harry F. Darby, at the times charged in the information, was a duly licensed chiropractor, but was not a physician and surgeon, dentist, osteopath, chiropodist, registered nurse, veterinarian or pharmacist, and at said times used or had in his possession under circumstances indicating to you that he had used surgical instruments or administered hypodermic injections of drugs upon Angelina Sylvia, then this is a circumstance which you may take into consideration in determining the intent with which he treated said person, if you find that he did so treat her".

[7] This instruction was apparently given on the theory that evidence of defendant's possession of certain hypodermic needles was proof of his guilt of the offense for which he was on trial. But the needles were packed in their original cellophane. No evidence was presented that defendant had used any of the needles and there was no occasion for an instruction by the court that the jury should consider the circumstance of the needles if they should find that defendant "had used surgical instruments or administered hypodermic injections of drugs upon Angelina Sylvia". Defendant was not on trial on a charge of violation of the Health and Safety Code. The violation of a section of the Health and Safety Code by the improper possession of hypodermic needles should not have been shown for the purpose of proving an abortion in the absence of evidence that the needles had been used in the treatment given Mrs. Sylvia. In People v. Marineau, 55 Cal.App.2d 893, 132 P.2d 22, which is relied upon by respondent, evidence was introduced that the defendant had used a hypodermic needle in treating the woman involved.

[8] We cannot sustain the contention of defendant that the evidence is insufficient to support the conviction. The record contains sufficient evidence to support

the conviction, from a legal standpoint, if the trial had been conducted without prejudicial error. But we cannot hold that a different verdict would have been improbable if the errors above mentioned had not been committed.

The judgment and the order denying a new trial are reversed and the cause is remanded for a new trial.

MOORE, P. J., and McCOMB, J., concur.

64 Cal.App.2d 96

In re WOOTEN'S ESTATE.

WOOTEN v. WOOTEN.

Civ. 14162.

District Court of Appeal, Second District, Division 1, California.

April 26, 1944.

Rehearing Denied May 17, 1944.

Hearing Dismissed June 15, 1944.

1. Husband and wife 🔑273(12)

The evidence was sufficient to show that cost of repairs to, expenses of, and taxes on, realty constituting husband's separate property at time of his death, were paid out of rentals therefor or profits from such rentals, so as to preclude allowance to his widow of lien on property of his estate for alleged advancements from community fund and widow's private funds to pay bills for repairs, taxes, etc.

2. Husband and wife 🔑273(12)

On widow's petition to determine her interests in deceased husband's estate and set apart certain realty to her as homestead, evidence was sufficient to support superior court's finding that there was no agreement between spouses to convert husband's separate property into community property.

3. Executors and administrators 🔑314(12)

On widow's petition to determine her interests in deceased husband's estate and set apart certain realty to her as homestead, whether taxes and other incumbrances or liens on realty were paid off with widow's separate funds or out of spouses' community funds was fact question for trial court, whose finding on conflicting evidence as to such matter may not be disturbed on appeal.

4. Husband and wife 🔑265

The rule allowing reimbursement of wife for community funds expended on husband's separate estate applies only where such application or expenditure is made without wife's consent.

5. Husband and wife 🔑265

A wife may agree that community property shall be applied to husband's separate estate and become part thereof.

6. Husband and wife 🔑273(12)

On widow's petition to determine her interests in deceased husband's estate and set apart certain realty to her as homestead, evidence was sufficient to support trial court's finding that spouses' private funds were not commingled together or used to improve husband's realty or pay mortgages or liens thereon during marriage, but that cost of improvements, repairs or liens on such realty were paid from husband's separate property.

7. Appeal and error 🔑1008(1)

On widow's petition to determine her interests in deceased husband's estate, whether funds in bank account, originally opened by spouses as joint account, but standing in husband's name alone at time of his death, were community property or husband's separate property, was fact question for trial court.

8. Husband and wife 🔑273(1)

Where superior court found on sufficient evidence that husband's lot, on which there were three houses, in one of which he and his wife resided, was his separate property, and there was no evidence that husband consented to declaration of homestead recorded by wife on entire premises, house occupied by spouses could be set aside to wife only as probate homestead after husband's death. Probate Code, § 661.

9. Executors and administrators 🔑194(6)

A judgment, setting aside to decedent's widow as probate homestead one of three houses on decedent's lot and "land on which the same is situated and necessarily used in connection therewith," was void as too uncertain to permit definite determination of extent of homestead, thus casting doubt on title to entire property. Probate Code, § 661.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Proceeding by Jessie H. Wooten for determination of her interests in the estate of William L. Wooten, petitioner's deceased husband, and an order setting apart certain realty to petitioner as a homestead, contested by Leslie Wooten. From a judgment directing distribution of the estate and setting apart certain realty to petitioner as a probate homestead, she appeals.

Affirmed in part, reversed in part, and remanded.

Austin & Austin, of Compton, for appellant.

W. Blair Gibbens, of Santa Monica, for respondent.

DORAN, Justice.

Appellant, the surviving widow of William L. Wooten, deceased, petitioned the superior court for a decree determining the interests in the estate of said deceased and for an order to set apart as a homestead certain real property upon which appellant had filed a declaration of homestead during the lifetime of said decedent. The court decreed that one-third of the real property and cash in said estate be distributed to appellant on final distribution of the estate, together with certain household furniture and furnishings; that a particular house "and the land on which the same is situated and necessarily used in connection therewith" be "carved out" of certain described real property and set apart to appellant as the surviving widow for and during the term of her life as a probate homestead. Two-thirds of the real property, subject to the probate homestead, and two-thirds of the cash was ordered to be distributed to the children of decedent upon final distribution of the estate. It is from this judgment that appellant has appealed.

The court found that all the real property and cash described in the inventory and appraisement of the estate was the separate property of decedent at the time of his death; that although appellant filed a declaration of homestead against certain of the real property, the decedent did not join therein or consent thereto. But the court found that decedent, in his lifetime, had with appellant occupied one of three houses on the parcel against which the declaration of homestead had been filed, and that the other two houses located on the said property were rental units. The court set apart, as the probate homestead, the house which had been so occupied by decedent and appellant, together with the land on which the same was situated, and necessarily used in connection therewith, as above mentioned.

Appellant contends that the evidence shows an oral agreement to convert the separate property of William H. Wooten into the community property of William H. Wooten and appellant, as his wife; that in any event, if a finding that the property was not community property is proper, then appellant should be given a lien on the property of the estate for advancements from community funds and appellant's private funds in the payment of bills for repairs, additions to properties, taxes and encumbrances during the married life of decedent and appellant. The court expressly found that said property had not been converted into community property, by mutual agreement or otherwise; and that while the property had been improved and repaired during decedent's marriage to appellant, the costs of any improvements, repairs or liens upon said property were paid from the separate property of decedent.

[1] The real property in question was acquired by William L. Wooten prior to his marriage to appellant, and stood in his name both at the time of his marriage to appellant and at his death. Testimony of conversations between Mr. Wooten, the decedent, and appellant, which might tend to indicate an intention to convert the property into community property, was given only by appellant. This testimony was controverted by that of respondent. Numerous checks offered in evidence by appellant with regard to payment of taxes were drawn upon a joint bank account of appellant and her husband, the deceased. Respondent testified that the taxes on decedent's separate properties were paid from rentals received from the said properties.

There was put in evidence a statement dictated by appellant showing that rentals from certain of the separate property brought in a profit of $2,964.14, after repairs and taxes were accounted for; and when asked if it were not true that all expenses were deducted from rents that came in, appellant said, "I don't know how to answer that." Appellant also made the following answer immediately thereafter, to a similar question.

"Q. By Mr. Bayley: Isn't it a fact, Mrs. Wooten, that when these repairs or changes were made, that in general they were deducted from the rent that came in from the places? A. We hoped they would be, if we got our rents, but we did not always get them."

In general, there is sufficient evidence in the record from which to infer that repairs, expenses and taxes upon the properties were paid out of rentals or out of profits from rentals. There is one instance in which a house, erected upon community property, was moved by appellant and decedent to premises which were the separate property of decedent. The original cost of this house was $460.

[2] As to an agreement to convert decedent's separate property into community property, appellant cites Marvin v. Marvin, 46 Cal.App.2d 551, 116 P.2d 151. In that case there was strong evidence of an executed oral agreement, where funds for the purchase and for payment of taxes and assessments were paid out of community funds. Moreover, in that case the wife's testimony on these matters was corroborated. It is also there stated (46 Cal.App.2d at page 557, 116 P.2d at page 154): "Whether or not these statements and the conduct of the deceased during this long period indicated an intent on his part to transmute any separate interest he may have had in this property into a community interest with his wife was, at least, a question of fact for the trial court." The other authorities cited by appellant upon this point are all consistent with the rule thus enunciated; and the evidence in the present case is sufficient to support the finding that there was no agreement to transmute the separate property interest of Mr. Wooten into a community interest with his wife. In fact, the evidence in the record might well be held insufficient to support a finding that there was such an agreement.

[3] Appellant contends that if this court should hold that the real property in question was not transmuted into community property, then the court should order reimbursement to the widow of all community funds and her separate funds used in improving and adding to the property, paying taxes, liens and encumbrances. The trial court found, "That it is not true that the private funds of petitioner and decedent during marriage were commingled together or were used to improve the said real property or to pay mortgages or liens or otherwise against the said real estate, but it is true that the cost of any improvements repairs or liens made on said property were paid from the separate property of decedent." It has already been pointed out that there was sufficient evidence from which to infer that repairs and expenses upon the properties were paid out of rentals received from the separate estate of decedent. As already indicated, the evidence as to the source of the funds from which taxes were paid is conflicting; and the court's finding in this respect may not be disturbed. The evidence did not unequivocally establish the fact that any encumbrances or liens were paid off with appellant's separate funds or out of community funds. The question of the source from which any such items against the property were paid was one of fact for the decision of the trial court.

[4-6] Although there is no specific finding as to the house which was moved upon the husband's separate property, there is at least a basis for an implied finding that this house became a part of the separate estate and that appellant intended this result. It is to be noted that this house was moved upon Mr. Wooten's separate property after the sale of the property on which the house had originally stood; and the funds received from the sale of the latter property were deposited in the joint bank account of appellant and decedent. Moreover, it is also plain that any funds or any property here involved, which might be held to be community property or the separate property of appellant, were applied to the separate estate of Mr. Wooten with the consent of appellant. The rule allowing reimbursement to the wife of community funds expended upon the separate estate of the husband appears to apply only in cases where such application or expenditure has been made without the wife's consent. This is plainly indicated by the language in Wheeland v. Rodgers, 20 Cal.2d 218, 124 P.2d 816, in Dunn v. Mullan, 211 Cal. 583, 590, 296 P. 604, 77 A.L.R. 1015, and in Provost v. Provost, 102 Cal.App. 775, 283 P. 842. It has in effect been stated that the basis for al-

lowing such reimbursement is to prevent a husband in his control of the community property from taking advantage of his position by divesting the wife of her interest. See Provost v. Provost, supra, 102 Cal.App. at page 781, 283 P. at page 844. The Provost case, supra, also clearly indicates that the wife may agree to the application of community property to the separate estate of the husband and that the community property should become a part thereof. The finding of the court above quoted may not be said to lack support in the evidence.

[7] The bank account, the funds from which appellant contends are separate property, was an account standing in decedent's name at the time of his death. The funds therein had originally been in an account opened by decedent and appellant in the form of a joint account, as "William L. or Jessie Hamblin Wooten". Later, the word "or" was crossed out and the word "and" inserted in the title of the account in the bank book. Thereafter the funds in the account were divided equally between decedent and appellant, one-half being placed in the name of each party. The trial court found that the funds in question were the separate property of decedent. Under the circumstances, the question of the character of the funds standing in decedent's bank account at his death was one of fact (see Wheeland v. Rodgers, supra, 20 Cal.2d at page 222, 124 P.2d at page 819); and there is sufficient evidence to support the finding of the court.

[8] The house set apart by the court as a probate homestead is one of three houses standing on a lot 66 feet wide by three hundred feet deep. This house is numbered 1928, and has a frontage of 27 feet 6 inches, facing on the street. There is a second house, numbered 1926, beside the first mentioned house, with a driveway between the two houses. A third house, numbered 1928½, is in the rear of the first house; and there is a garage that extends between the first and third houses. Number 1928 was occupied by appellant and Mr. Wooten as their home. This house is a little larger than the other two; but none of them are large. As to the use of the surrounding grounds, appellant testified that, "Everybody on the place uses everything, clothes lines, and so forth." The other two houses were used as rental units. The lot also contains a chicken house and some fruit trees. Upon sufficient evidence, as above mentioned, the court found this property to be the separate property of decedent. In 1938 appellant had recorded a declaration of homestead upon the entire premises mentioned; but decedent did not join therein. It does not appear that decedent ever consented to the declaration of homestead in question, and the court found that decedent did not consent thereto. Under the circumstances, the probate homestead set aside by the court was one under the provisions of section 661 of the Probate Code.

[9] Appellant contends that the judgment setting aside the probate homestead is uncertain and does not define the rights of the parties, and will lead to untold litigation if allowed to stand. As already mentioned, the court decreed that the particular house known as 1928 El Segundo Boulevard, "and the land on which the same is situated and necessarily used in connection therewith, carved out of" the described premises, be set apart as a probate homestead. Upon the facts presented, the decree of the court is too uncertain to permit a definite determination of the extent of the probate homestead, and hence casts doubt upon the title to the entire property involved. Whether it is possible to carve out a probate homestead from the parcel of land in question, without setting apart the entire parcel as a homestead, need not here be determined. That portion of the judgment which purports to set apart a probate homestead to appellant must be reversed upon the grounds of uncertainty in the terms thereof.

That portion of the judgment which determines the respective interests in the estate here involved is affirmed; but that portion thereof which purports to set apart to appellant a probate homestead is reversed, and the cause is remanded for a retrial of the issues involving the probate homestead.

YORK, P. J., and WHITE, J., concur.

64 Cal.App.2d 109

FINNEGAN v. FINNEGAN.

Civ. 14331.

District Court of Appeal, Second District,
Division 2, California.

April 26, 1944.

1. Appeal and error 🔑901

In order to obtain reversal of a judgment, it is incumbent upon the appealing party to furnish the reviewing court a record showing affirmatively that the trial court ruled erroneously to his prejudice.

2. Appeal and error 🔑907(4)

Where the agreed statement before the District Court of Appeals did not purport to contain all the evidence received by the trial court, it would be presumed that the evidence received was ample to support the finding.

3. Husband and wife 🔑298¾

In action for separate maintenance based on extreme cruelty, the court was authorized in its discretion to award all community property to plaintiff. Civ.Code, § 137.

4. Husband and wife 🔑298¾

In action for separate maintenance, a judgment awarding plaintiff all the community property would be regarded as a judgment for permanent support, although it did not specifically so state, where it was clear from reading of the entire judgment that it was so intended. Civ.Code, § 137.

5. Husband and wife 🔑300

A judgment in separate maintenance action awarding wife counsel fees of $2,000 to be paid out of the fund which the court had adjudged to be the property of the wife could not be prejudicial to husband. Civ.Code, § 137.

6. Husband and wife 🔑294
Patents 🔑204

The mere appointment of a receiver in an action for separate maintenance did not itself vest in the receiver the title to patents in the name of the husband, nor could the receiver assign patent rights so as to pass legal title unless the husband joined in the assignment. Civ.Code, § 137.

7. Husband and wife 🔑298¾

In action for separate maintenance, to make effective an award of husband's patent rights to the wife, trial court should follow practice of ordering the husband to make the proper assignment rather than to decree that the receiver make the assignment, or decree the wife be the owner thereof. Civ.Code, § 137.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Louise M. S. Finnegan against William J. Finnegan for separate maintenance on ground of extreme cruelty. From a judgment for plaintiff, and from order denying independent motion for nonsuit and a motion for new trial, defendant appeals.

Judgment affirmed in part and reversed in part, and appeals from orders dismissed.

Clarence Hansen, of Los Angeles, for appellant.

Harry M. Hunt and Frank C. Dunham, both of Pasadena (M. Everett Burton, of Pasadena, of counsel), for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to obtain a judgment for separate maintenance for herself and for her minor child, alleging extreme cruelty on the part of defendant. At plaintiff's request a receiver was appointed to take charge of the property of the parties. At the trial plaintiff was awarded all the community property of the parties and the custody of the minor child and defendant was ordered to pay to plaintiff $100 per month for the support of the child. Defendant has appealed from the judgment and from an order denying his motion made after judgment to set aside the judgment and findings and to enter a different judgment. There are also purported appeals from the order denying defendant's motion for a nonsuit and from the order denying his motion for a new trial.

[1, 2] Defendant contends that the evidence is insufficient to sustain the finding that the patents standing in defendant's name and the $6000 deposited by the parties in escrow for the purchase of a home in joint tenancy were community property. Also he attacks the finding that the parties had not become reconciled at the time of the filing of the complaint. In attempting to uphold the questioned findings he points out that the only record before the court is the agreed statement. In order to obtain a reversal of the judgment it is incumbent up-

on the appealing party to furnish the reviewing court a record showing affirmatively that the trial court ruled erroneously to his prejudice. Inasmuch as the agreed statement now before us does not purport to contain all the evidence received by the trial court it will be presumed that the evidence received was ample to support the findings.

[3, 4] In its judgment the court ordered that plaintiff "is authorized to live separate and apart from defendant." This language is followed by the award to plaintiff of the community property and the custody of the child and the order for the monthly payment for the support of the child. Defendant now argues that plaintiff was not given a judgment for permanent support and for this reason is not entitled to an award of the community property. In her complaint plaintiff set forth the various acts on the part of defendant constituting extreme cruelty and the court in its findings found these allegations to be true and in its conclusions of law stated that the "defendant has wrongfully inflicted upon plaintiff grievous mental sufferings, which amount to extreme cruelty, and that plaintiff is entitled to a decree and judgment of separate maintenance, authorizing plaintiff to live separate and apart from defendant." The cause of action being for extreme cruelty the court was, in its discretion, authorized to award all the community property to plaintiff. Civil Code, sec. 137; D'Arcy v. D'Arcy, 89 Cal.App. 86, 264 P. 497, 499. The case has several points in common with the D'Arcy case and the language there used can be appropriately applied here: "While the decree does not specifically say that the community property is awarded respondent 'for the support and maintenance of herself and her minor children,' it is clear from a reading of the entire judgment that its provisions were made for that purpose."

[5] Defendant complains of the order made by the trial court concerning counsel fees. On October 5, 1942, at the hearing on a show cause order to fix counsel fees plaintiff was awarded the sum of $500 for her counsel fees and it is now claimed that the later award of $2000 was improper, since there was no stipulation or order continuing the matter of additional fees to the time of trial. In the order of which complaint is now made the court found that the sum of $2000 is a reasonable amount to be paid to plaintiff's attorney and directed that "said sum be paid out of the $6000 fund in escrow." Clearly, defendant is not in position to complain of this order, for he was not aggrieved thereby. The court ordered that the attorney fee be paid out of the money which had been awarded to plaintiff. It merely directed her to pay the amount designated from funds which by the court's order had become her own property.

In its judgment the trial court ordered the receiver to convey and transfer to plaintiff all of defendant's title and interest in and to certain letters patent, which were specifically enumerated, and further ordered the receiver to "continue as receiver, with power and direction to retain and keep in his possession all of the patents and royalty license agreements hereinbefore mentioned." It gave the receiver power to enter into agreements for licensing under the patents and "to sell said letters patent * * * under order of court and dispose of the proceeds to plaintiff under order of court. * * *"

[6, 7] The court erred in attempting to thus dispose of the patents and the rights growing therefrom. Under the provisions of the patent law the owner of a patent may transfer his interest therein. The mere appointment of a receiver does not itself vest in him the title to the patents. Ball v. Coker, C.C., 168 F. 304. A receiver cannot assign patent rights so as to pass legal title unless the owner joins in the assignment. 48 C.J. 243. It has been held that a judgment debtor owning a patent may be compelled, upon examination in proceedings supplementary to execution, to assign by proper instrument all his right in a patent to a receiver appointed to dispose of it in aid of execution. Pacific Bank v. Robinson, 57 Cal. 520, 40 Am.Rep. 120. To make effective the award of the patent rights to plaintiff in the present action the trial court should have followed the practice of ordering defendant to make the proper assignment of his interest in the patents.

The judgment is affirmed except as to that part thereof which purports to order the receiver to dispose of the letters patent and patent rights and royalties arising therefrom. It is reversed in so far as it attempts to dispose of such patents, patent rights and royalties. The purported appeals from the order denying the motion for a nonsuit and from the order denying the motion for a new trial are dismissed. The appellant shall recover costs on appeal.

MOORE, P. J., and McCOMB, J., concur.

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64 Cal.App.2d 185

PEOPLE v. GLASS.

District Court of Appeal, Fourth District, California.
April 28, 1944.

1. Embezzlement 🔑47

Whether intention to convert house trailer, which accused had purchased under conditional sales contract reserving title in seller and which he removed from state in violation of contract and resold as his own, was formed in county of venue or in state where trailer was resold, was for jury.

2. Embezzlement 🔑44(2)

In prosecution for grand theft of house trailer which accused purchased under conditional sales contract reserving title in seller and which he removed from state in violation of contract and resold as his own, conflicting evidence and reasonable inferences therefrom sustained jury's finding that intention to convert trailer was formed in county of venue.

3. Criminal law 🔑371(2)

In prosecution for grand theft of house trailer which accused purchased under conditional sales contract reserving title in seller and which he removed from state and resold, testimony of police officer as to admissions by accused tending to show he had engaged in a scheme of going from state to state purchasing and exchanging trailers in such a manner as to obtain cash in the transactions was admissible as bearing on question of intent.

4. Criminal law 🔑673(5)

Where trial court had instructed jury to acquit accused unless it found that he formed intent to defraud or injure conditional seller of trailer by removing, concealing, or disposing of it while still in county in which venue of prosecution was laid, it was not error to instruct that police officer's testimony as to conversations with accused was admitted only for purpose of proving intent, motive or scheme and plan, and could be considered only in that respect and not as proving a distinct offense.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Richard Glass was convicted of grand theft, and he appeals.

Judgment affirmed.

Vincent Whelan, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant, having been convicted by a jury of the crime of grand theft, has appealed from the judgment.

On January 21, 1943, the appellant purchased a house trailer from a dealer in San Diego on a conditional sales contract. He turned in another trailer as the first payment and the contract called for monthly payments, and further provided that title to the trailer sold should remain in the seller and that it should not be removed from this state. About a month later, and just before the first monthly payment came due, the appellant left San Diego with the trailer and went to Hawthorne, Nevada, where he continued to live in the trailer until May, 1943, when he sold it to a resident of Nevada. He was arrested on his return to San Diego in August, 1943.

While appellant, in his brief, admits that he converted this trailer, it is contended that it does not sufficiently appear that the required criminal intent was formed in San Diego County and not in Nevada, and that the court erred in admitting certain evidence and in giving an instruction bearing upon the question of intent.

The appellant's wife testified that they left San Diego about a month after January 21, 1943, and that they went to Nevada for the purpose of benefiting the appellant's health. On the other hand, it appears that the appellant purchased this trailer and signed the contract under the name of Melvin Steele; that he left San Diego on or about the date when the first monthly payment became due; that he did not notify the dealer that he was leaving; and that he took the trailer directly out of the state although he knew that he had contracted not to do so. When arrested, he told this dealer that he had left the trailer on a side street in San Diego but did not know which street. Shortly thereafter, he told an officer that he had left the trailer on a street either in Nevada or Arizona, and that he had abandoned it because he was unable to make the payments. He later admitted that he had sold the trailer to a woman in Hawthorne, Nevada, receiving another trailer and a sum of money. An officer testified that he had a conversation with the appellant on August 9, 1943, in which he asked the appellant about a trailer that he was reported to have bought about a year previously from a company in Lincoln, Nebraska, telling him that they had a circular and were trying to locate him and that trailer. His reply was that "Their guess was just as good as his". This officer also testified as to another conversation with the appellant on August 20, 1943, in which he asked him what he had done with a trailer of which a bank in Reno was the legal owner, and also one that was owned by the Bank of America in Sacramento. He refused to tell what he had done with these trailers but asked whether any warrants had come in for these transactions. He then said "that if he had beaten these damn Jews out of anything he was not sorry, that anything he had obtained through these trailers he had obtained for his wife and baby."

[1, 2] The question as to the exact time when the intention to convert this trailer was formed was a question for the jury and the evidence, with the reasonable inferences therefrom, is sufficient to support the finding of the jury. People v. Martin, 53 Cal. App. 671, 200 P. 808; People v. Baker, 64 Cal.App. 336, 342, 221 P. 654.

[3] It is further contended that the court erred in permitting the officer to testify concerning his conversations with the appellant on August 9 and August 20, as above referred to, insofar as those conversations related in any way to trailers, other than the one here in question, and in refusing to strike out such testimony. The portions of these conversations which are objected to not only contain admissions by the appellant which were admissible in evidence, but they indicate that the appellant was engaged in a scheme or plan of going from state to state and purchasing and exchanging trailers in such a manner as to obtain cash in the transactions. This evidence was admissible for its bearing on the question of intent which was before the jury, and no error appears in this connection. People v. Lisenba, 14 Cal.2d 403, 94 P.2d 569; People v. Albertson, Cal.Sup., 145 P.2d 7.

[4] The final contention is that the court erred in giving the following instruction: "Testimony has been permitted by the Court regarding a conversation with Officer Whitney. This evidence was permitted to be introduced for the purpose, and only for the purpose, of proving the intent, motive or scheme and plan, if any, of the defendant. This evidence may be considered by you only in that respect. The evidence was not permitted to prove a distinct, separate offense, and the defendant is not on trial for other acts, other than are set forth in the amended information." While it is not contended that this instruction is erroneous in itself, it is argued that there was no testimony other than that to which we have referred, to which it was applicable, and that the giving of the instruction must have prejudicially affected the jury. Immediately prior to giving that instruction the court had instructed the jury that it must acquit the appellant unless it found that he had formed an intent to defraud or injure the complaining witness by removing, concealing or disposing of this trailer while he was still in the county of San Diego. The instruction complained of was the usual cautionary instruction and it was more favorable to the appellant than otherwise.

No error appears and the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

HOBART v. HOBART ESTATE CO. et al.*

Civ. 12383.

District Court of Appeal, First District, Division 1, California.

April 14, 1944.

Rehearing Denied May 13, 1944.

Hearing Granted June 12, 1944.

1. Appeal and error 🔑994(2), 1005(1)

In action for damages for fraudulently inducing plaintiff to sell corporate stock at less than true value, where evidence of fraud was conflicting, it was for jury, and trial judge, in passing on motion for new trial, to pass on credibility of witnesses.

2. Appeal and error 🔑987(1)

The appellate court has no power to weigh evidence and determine where truth lies.

3. Appeal and error 🔑930(1)

In reviewing evidence on appeal, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged in to uphold verdict if possible.

4. Appeal and error 🔑989

Where verdict is attacked as being unsupported, the power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

5. Appeal and error 🔑996

Where two or more inferences can be reasonably deduced from facts, the reviewing court is without power to substitute its deductions for those of the trial court.

6. Trial 🔑139(1), 140(1)

The jury is sole judge of weight of evidence and credibility of witnesses.

7. Appeal and error 🔑1001(1)

If there is material credible evidence to support verdict, appellate court is without power to disturb verdict.

8. Fraud 🔑11(1)

Generally, mere expression of opinion, no matter how positively asserted, is not actionable, but a deliberate, intentional misrepresentation of an opinion made with intent to induce action by another is actionable.

9. Fraud 🔑11(2)

Representations of value which might usually be considered expressions of opinion, when affirmed as an existing fact, may form basis for an action for fraud.

10. Fraud 🔑54, 55

In action for damages for fraudulent representation inducing plaintiff to sell corporate stock at less than its true value, evidence sustained jury's implied finding that a defendant misrepresented the value of the stock either as a fact or as a dishonest statement of opinion, and that such representations were made with intent that plaintiff should act on them.

11. Fraud 🔑58(4)

In action for damages for fraudulent misrepresentations of defendants inducing plaintiff to sell corporate stock at less than its true value, evidence sustained jury's finding that plaintiff relied on the misrepresentation and acted reasonably in so doing.

12. Corporations 🔑306

In action for damages resulting from fraudulent representations of defendant which induced plaintiff to sell corporate stock at less than its true value, evidence sustained jury's finding that individual defendant, in making the fraudulent representations, was acting on behalf of the corporate defendant, and that in making the purchase, the individual defendant was acting in the interests of the corporate defendant and within the scope of his agency.

13. Limitation of actions 🔑199(2)

In action for damages for fraudulent misrepresentation of defendants inducing plaintiff to sell corporate stock at less than its true value, under evidence and pleadings disclosing that transaction was consummated in January, 1936, that after three months plaintiff went to Europe where he remained until January or February, 1941, that plaintiff was lulled into false sense of security and did not learn of facts which would put him on inquiry until January or February, 1941, whether action which was instituted in June, 1941, was barred by statute in effect, requiring action based on fraud to be commenced within three years after discovery of fraud, was for jury. Code Civ.Proc. § 338, subd. 4.

14. Limitation of actions 🔑199(2)

In action for damages for fraudulent representations of defendants inducing plaintiff to sell corporate stock at less than its true value, whether the evidence was sufficient to support implied finding that action was not barred by statute of limitations was a mixed question of law and fact. Code Civ.Proc. § 338, subd. 4.

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* Subsequent opinion 159 P.2d 958.

15. Limitation of actions 🔑199(1)

Where issue is joined on plea of statute of limitations and evidence is conflicting as to when, with reference to the filing of the complaint, a cause of action accrued, the question is properly submitted to jury as a mixed question of law and fact. Code Civ.Proc. § 338, subd. 4.

16. Appeal and error 🔑1033(5)

In action for damages for fraudulent representations of defendants inducing plaintiff to sell corporate stock at less than its true value, instructions as to whether the action was barred because not brought within three years after discovery of the fraud stated the law favorably to defendants. Code Civ.Proc. § 338, subd. 4.

17. Limitation of actions 🔑100(13)

In determining whether action for fraud is barred by statute requiring action based on fraud to be brought within three years after accrual of the cause of action, it is only where party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part. Code Civ.Proc. § 338, subd. 4.

18. Appeal and error 🔑1064(4)

Where jury was correctly instructed on all basic issues and jury could not possibly have been misled, any slight errors that might have occurred in wording of instructions were not prejudicial to appellants.

19. Appeal and error 🔑1064(4)

In action for fraud, even if instructions expressing thought that where representation of fact within knowledge of party making it has been made, the defense that receiving party knew real facts must be clearly and conclusively established by evidence were erroneous because of the use of the word "conclusively", the error was not prejudicial where actual knowledge did not exist as a matter of fact.

20. Trial 🔑194(14)

In action against corporation and its agent based on alleged misrepresentations of agent, where jury returned verdict for actual damages only against corporation and verdict against agent for exemplary damages but not actual damages, trial judge acted properly in instructing jury that they could not find verdict against the corporation without finding a verdict against the agent, and that if the corporation was liable in any amount, the agent would be liable in the same amount and trial judge in giving such instruction did not direct a verdict against the agent. Code Civ.Proc. § 619.

KNIGHT, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Walter S. Hobart against Hobart Estate Company and A. Crawford Greene and others for damages for fraudulent representations inducing sale of corporate stock. From a judgment for plaintiff against Hobart Estate Company and A. Crawford Greene, the named defendants appeal.

Affirmed.

Dunne & Dunne, of San Francisco, for appellant Hobart Estate.

Sloss & Turner, Allan P. Matthew, and Robt. L. Lipman, all of San Francisco (McCutchen, Olney, Mannon & Greene, of San Francisco, of counsel), for appellant A. Crawford Greene.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Walter S. Hobart, brought this action against defendants Hobart Estate Company, A. Crawford Greene, and others, alleging that through the fraudulent representations of the defendants he was induced to sell 833⅓ shares of stock in the Hobart Estate Company at much less than its true value. With the exception of the two named, all the other defendants were dismissed prior to judgment. The cause was tried before a jury. The trial resulted in verdicts against Greene and the company for $32,175 actual damages, and an additional $10,000 against Greene as exemplary damages. From the judgment entered on these verdicts, and from orders denying their motions for judgment notwithstanding the verdicts, defendants have separately appealed. It should be mentioned that the trial judge denied defendants' motions for a nonsuit, for a directed verdict, for judgment notwithstanding the verdict, and for a new trial.

On these appeals, both appellants urge, as the main grounds for reversal, (1) that the evidence is insufficient to establish a cause of action for fraud and, as a matter of law, is insufficient to support the verdicts; (2) that respondent's action, as a matter of law, is barred by the statute of limitations; (3) that the court committed prejudicial error in the giving and the refusing of instructions; and (4) that the verdict against Greene resulted from coercive pressure exerted by the trial court upon the jury under circumstances which precluded the return of a free verdict. The appellant corporation, in addition, urges that, as a matter of law, the evidence shows that nothing that Greene did or said was done or said by him as agent of the company, and that for that reason the evidence, as a matter of law, is insufficient to support the judgment against the company. It is admitted that the company's liability, if any exists, is predicated solely upon the theory that in making the allegedly false representations Greene was acting as agent for the company.

[1, 2] The record is long, the briefs are exhaustive. So far as the question of the sufficiency of the evidence is concerned, we are presented with the usual fact case. One side introduced evidence which, if believed by the jury, supports the conclusions that Greene intentionally made false statements of material facts, intending Hobart to rely upon them, and that Hobart reasonably relied upon them to his damage. The other side introduced evidence which, if believed by the jury, would have supported findings of honesty and fair dealing. In such case it is for the jury, and the trial judge in passing on a motion for a new trial, to pass upon the credibility of the witnesses. It is not for the appellate court to determine where the truth lies. The appellate court has no power to weigh the evidence. The appellants, by emphasizing certain evidence, and disregarding other evidence, make a quite persuasive argument that the evidence is insufficient, as a matter of law. When the entire record is considered, however, we are convinced that the implied findings of the jury are supported.

[3-7] Although the rules applicable to the power of the appellate court in passing upon the sufficiency of the evidence are elementary and have frequently been stated, in view of the apparent sincerity with which appellants contend that the evidence is insufficient, it would appear proper to refer briefly to such rules before pointing out the evidence which supports the judgment. In the frequently cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, it is stated: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." In Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, 773, 73 P.2d 217, 229, it is stated: "Of course, the jury is the sole judge of the effect, sufficiency, and weight of the evidence, and the sole judge of the credibility of the witnesses. Whatever our opinion may be as to the weight of the evidence, if there is material, credible evidence to support the verdicts, this court is without power to disturb them." See, also, Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886; Peri v. L. A. Junction Ry., 22 Cal.2d 111, 137 P.2d 441; Atherley v. Market St. Ry. Co., 42 Cal.App.2d 354, 108 P.2d 927; Estate of Pessagno, 58 Cal.App.2d 390, 136 P.2d 644; Sunseri v. Dime Taxi Corp., 57 Cal.App.2d 926, 135 P.2d 654; Macart v. San Joaquin B. & L. Ass'n, 45 Cal.App.2d 395, 114 P.2d 395; Signorelli v. Miller, 55 Cal.App.2d 538, 130 P.2d 730; De la Motte v. Rucker, 55 Cal.App.2d 226, 130 P.2d 444.

Keeping these well settled rules in mind, what does the record show? Hobart Estate Company is a family corporation, incorporated in 1894. The properties constituting the first assets of this corporation were originally owned by Walter S. Hobart, the grandfather of respondent, who died in 1892 leaving his estate, valued at over six million dollars, equally to his three children, Walter S. Hobart, the father of respondent, and hereafter referred to as Hobart, senior, Alice Lester and Virginia Baldwin. These children decided to and did organize the Hobart Estate Company to which they transferred substantially all the assets received from the estate of their father. In 1904 there were 45,000 outstanding shares of this company, each of the three children owning 15,000 shares. In 1907 Alice Lester was declared incompetent by the Superior Court of El Dorado County, and since that date has been confined in an out-of-state hospital. Prior to 1933, several of the three original stockholders surrendered some of their stock to the corporation in payment of debts, so that in 1933, there were but 38,010 shares outstanding. Hobart, senior, created a trust of 5,000 of his shares, the income from 2,500 shares of which went equally to his three children, the respondent, Hobart, junior, Ruth Hobart Crocker and Hannah Neil Prince. Hobart, senior, died in November, 1933, and upon his death this trust terminated and there was distributed to each of the three children 833⅓ shares in the company. The shares thus distributed to respondent are the shares, the sale of which, under circumstances hereafter set forth, gave rise to this action.

In the spring of 1933 Hobart, senior, was indebted to Alice Lester in the sum of $240,000. Being pressed by Greene, guardian of the estate of Alice Lester, for payment, he agreed, and the guardianship court approved, to settle the indebtedness by transferring to Alice Lester 6,000 shares of Hobart Estate Company stock at a value of $40 per share. This was done on Greene's averment that this was the then reasonable value of the stock. After this transaction, the estate of Alice Lester owned 21,000 shares, substantially more than half of the outstanding stock.

Hobart, senior, died in November, 1933. By his will he practically disinherited the respondent. He left a substantial estate consisting, in part, of a large block of stock in the Hobart Estate Company. In the spring of 1934, one of the partners of Greene, admittedly acting as Greene's agent, gave the inheritance tax appraiser certain information about the assets of the corporation, and about the sale of the 6,000 shares to Alice Lester, which caused the stock to be appraised at $40 per share in that estate for tax purposes.

At the time of his father's death, Hobart, junior, was in New York. He had been estranged from his father and from some of the other members of his family for some time. He came to California, and, upon discovering that he had been disinherited, retained counsel, and in order to finance the contest, pledged part and later all of the 833⅓ shares of the Hobart Estate Company stock owned by him with Charles Crocker to secure such advances made for this purpose, and to secure some past debts owed to Crocker. His first counsel was attorney Lachmund, and later Lachmund was superseded by attorney George Harris. Both attorneys hired an investigator, Eugene Aureguy. The attorneys took the case on a contingent fee basis. Harris, Aureguy, and plaintiff testified that Harris and Aureguy were employed solely in connection with the proposed will contest, and that they had no authority at all in connection with the sale of the stock. The will contest was filed in June of 1934, the main ground of contest being the alleged mental incompetency of Hobart, senior, it also being alleged that the will was the result of undue influence alleged to have been exerted by the executors of the will (one of whom was Greene—the other the widow of Hobart, senior) and by the legatees.

After the will contest was filed, the proponents of the will took the depositions of Stevenson, the company's secretary, and of Hobart, junior. Lachmund was present at the taking of the Stevenson deposition, and he cross-examined Stevenson to some extent concerning the balance sheets of the company for 1932, 1933 and 1934. There is no evidence that plaintiff had actual knowledge of any of the facts there disclosed. At the taking of respondent's deposition he was represented by Harris and Aureguy. About this time Aureguy, on behalf of his client, interviewed the inheritance tax appraiser, and ascertained the facts upon which he had acted in appraising the stock at $40 a share. It was while respondent's deposition was being taken that discussions were first had looking towards a sale of the stock and the settlement of the will contest. These conversations were inspired by attorney Mannon, one of the partners of Greene.

Before directly discussing these conversations, some mention should be made of Greene's various employments. He is a partner in the law firm of McCutchen, Olney, Mannon and Greene. That firm, or its predecessors, has represented the Hobart Estate Company, and some of its stockholders, since the inception of the company. Since 1907 one of the partners of that firm has been the guardian of the estate of Alice Lester, and, on occasion, the law firm has acted as attorney for the guardian. In 1922 or 1923 Greene and one of his partners were appointed co-guardians of the estate of Alice Lester, and upon the death of his partner Greene became sole guardian. It is obvious that after Hobart, senior, transferred 6,000 shares to Alice Lester, Greene, as her guardian, had voting control of the corporation. Greene has been active in the management of that company for many years. Since 1932 he has been a director, president and general manager of the company. He was named co-executor of the will of Hobart, senior, and one of the trustees to whom the estate was distributed. His law firm was attorney for the executors, and collected normal and substantial extraordinary fees for its services.

.The deposition of Hobart, junior, in the will contest, was taken by the proponents of the will in the summer of 1935. The taking of this deposition consumed considerable time. It was during this period that Mannon suggested to Aureguy and Harris that they confer with him and Greene concerning the possibility of settling the will contest. As a result of these conferences the will contest was settled, and the 833⅓ shares owned by respondent were purchased by Greene, on behalf of the estate of Alice Lester. This transaction was closed January 16, 1936. It is respondent's contention that he sold his stock for $25 a share upon the positive representations of Greene that that was the fair value of the stock, upon which representations he relied, and that $25,000 was paid him for the settlement of the will contest. It is appellants' contentions that he was paid $55 per share for the stock, and was paid nothing for the settlement of the will contest. The respondent filed this action in June of 1941, under circumstances hereafter set forth.

At the trial Greene frankly testified that he believed the respondent was a troublemaker and better out of the company; that he felt that if respondent could be removed as a stockholder it would remove a "storm center" from the company; that "we felt clearly" that he was causing trouble; that he was likely to be a point of controversy in years to come; that by getting him out it would remove a potential source of attack; that he thought it within the possibilities that Hobart, junior, would attack the management of the company unless he were removed; that he talked the matter over with some of the other stockholders; that it was his point of view that "it was probably for the good of the corporation if his stock was purchased"; that "in general you would prefer to have stockholders of another description."

Aureguy testified that he was employed by respondent's attorney to assist in the will contest; that he was not employed in connection with the sale of the stock; that he was present at the various sessions during which respondent's deposition was taken by Mannon in connection with the will contest; that there had been several preliminary discussions with Mannon concerning the possibility of settling the will contest; that toward the close of the deposition Mannon asked Harris and Aureguy to remain after their client had left; that Mannon then told them that his people were desirous of disposing of the will contest, but that he, Mannon, was going to be absent and further discussion should be had with Greene. Aureguy then testified that Greene communicated with him and that he went to see Greene; that after some preliminary discussion Greene stated that "as a condition precedent to the settlement of this will contest, it will be necessary that Mr. Hobart sell his stock in the Hobart Estate Company"; that he told Greene that the sale of the stock was beyond the scope of his employment, but that he would report to Hobart and report back to Greene. Subsequently Aureguy had two other meetings with Greene at one of which Harris was also present, at which the problem was again discussed. At the third conference Greene told Aureguy that they were willing to pay $25,000 to settle the will contest, contingent upon the stock being sold; that they would pay $25 a share for the stock. Aureguy asked Greene how he reconciled the $25 figure with the $40 figure given in the appraisement of the father's estate. Greene, according to Aureguy, replied that the $40 figure was based on the sole sale of the stock in recent years; that that sale was an inter-family sale, and that the price paid was in excess of the value of the stock. Aureguy told Greene that if Greene could secure a purchaser for $40 a share and would pay $25,000 to settle the will contest the entire matter could be settled. Greene replied that the stock was only worth $25 per share; that the depression and the attitude of the National Administration towards such types of corporations must be considered; that the corporation owed money; that if the loans were called it would jeopardize all of the stock; that if the assets were sold and the expenses paid and the money divided each stockholder would receive $25 or less per share; that the Hobart Estate Company was in a bad financial condition.

Shortly thereafter a fourth conference was had with Greene at which Aureguy, Harris and respondent were present. Aureguy testified that at this meeting he first reviewed his prior conversations with Greene, including the offer of $25,000 to settle the will contest, and $25 a share for the stock; that Hobart demurred to the price of $25 per share, pointing out that the stock had been appraised for $40 per share and stating he had thought it was worth $100 per share; that Greene replied that the $40 figure was based on the deal between respondent's father and the estate of Alice Lester; that Hobart's father had been paid more than the stock was worth; that the corporation was in a bad financial condition; that Greene refused to disclose who was going to purchase the stock; that Greene stated "the stock is not worth over $25 a share"; that Greene expressed a friendly interest in Hobart; that he stated that he had nothing but the kindliest of feelings toward him; that Greene repeated that if the company were liquidated the stockholders would not receive $25 per share; that in that event the stock would be worth "very much less than $25 a share"; that the fair market value of the stock was $25 per share; that Hobart finally agreed to accept $25,000 for the settlement of the will contest and $25 a share for his stock.

The respondent testified that Harris and Aureguy were not retained by him to sell the stock; that their sole authority was in connection with the will contest; that he knew little or nothing about the business affairs or the assets of the company; that he had had but little business experience; that during the taking of his deposition Aureguy and Harris reported to him the results of their conferences with Greene; that finally he attended the conference in Greene's office; that Aureguy told Greene that they had no authority in connection with the sale of stock and for that reason Hobart was present; that Aureguy gave a résumé of the prior conferences with Greene as recounted above; that Greene agreed with this résumé and stated it was "absolutely essential" that the stock be sold or there would be no settlement of the will contest; that he, the witness, objected to selling the stock, stating that he was contemplating setting up a trust for his daughter, but Greene reiterated that there would be no settlement of the will contest unless he parted with his stock; that Aureguy in the presence of Greene repeated what Greene had stated about the value of the stock; that Greene refused to disclose who the prospective purchaser was, stating "that is a secret"; that when Aureguy stated in the presence of Greene that Greene had stated that the fair market value of the stock was $25 per share, he, the witness, expressed amazement, and pointed out the $40 a share figure at which the stock had been appraised the preceding year; that Greene explained that the Hobart Estate Company was in a "very bad financial condition" and that the assets had been declining in value; that if the company were forced to liquidate to pay certain loans the stock might be worth even less; that after listening to Greene, Harris asked him if he wished to take Mr. Greene's word for it or wished to investigate further; that he replied that he was sure that he could rely on the word of a man of Mr. Greene's integrity; that Greene expressed a kindly feeling toward him and stated that he wanted him to get all that he possibly could out of the stock, but his conscience would not permit him to suggest that any purchaser pay more than $25; that Greene then explained that they did not want the records to show that anything was being paid for the will contest and for that reason the papers would have to show that he was receiving $55 a share for his stock, which would be $25 a share plus $25,000 for settlement of the contest; that he took Mr. Greene at his word and, from what Greene had said, came to the conclusion and belief that the stock was worth but $25 a share; that he believed what Greene had told him; that Greene also had told him at the conference that he, Greene, knew all about the Hobart Estate Company and that there was nothing he did not know about the assets and liabilities of that company; that there was no other source from which these facts could be ascertained, and that any inquiry concerning value would be ultimately referred back to him. The witness also testified, as did Harris, that the documents by which the deal was closed were prepared by the law firm of which Greene was a member; that Harris first prepared certain papers for this purpose but they were not acceptable to that law firm. All of the closing papers referred to the transaction as a sale of the stock at $55 per share. Concurrently, however a dismissal, with prejudice, of the will contest was executed.

Harris was unable to corroborate all of the details testified to by Aureguy and respondent. He could not remember the details of the various conversations. He did testify that at the last conference Greene discussed "declining values, the depressed condition of things at the time and painted a rather depressed picture of the affairs at that time." He also testified that the recitation of $55 per share was inserted because Greene insisted that that was the only way the transaction could be handled; that, because of the feeling in the family, Greene insisted that "the record under no condition could show or should show any payment directly in connection with this will contest."

After the last conference, which took place in July or August, 1935, it took respondent several months to settle his difficulties with Crocker, who had possession of the 833⅓ shares. Crocker was claiming that Hobart, junior, owed him $25,000, while Hobart, junior, contended that he owed but $15,000. Crocker was adamant, and refused to cooperate in any way unless he received $25,000. The deal was finally consummated on January 16, 1936, by the payment to respondent of $45,833.15. Of this sum Crocker received $25,000, and Harris and Aureguy a little over $5,000 each. This last point is of some importance. Harris had a contingent contract in connection with the will contest, but no contract at all in connection with the sale of the stock. When they came to divide up the moneys received from Greene, Harris and Aureguy took a fee based on something over $20,000 in settlement of the will contest. This is corroborative of the testimony above set forth that included within the $55 a share recited in the closing papers was a substantial sum in settlement of the will contest.

The deal was closed by Greene, as guardian, petitioning for approval of the purchase of the stock by the estate of Alice Lester. In his verified petition, Greene averred that, in his opinion, the stock was reasonably worth $55 per share, and that it was for the best interests of the ward's estate that the stock be purchased. Permission was granted by the Superior Court, and the deal consummated as above indicated.

The testimony of appellants, some of which is set forth in the dissenting opinion, was directly contradictory to that presented by respondent. Greene testified, as did Mannon, that the conferences above referred to were inspired by Aureguy, and not first suggested by Mannon. These conflicts were for the jury. Greene positively and unequivocally denied that he ever represented, either as a fact or as his opinion, that the stock was worth but $25 a share; that it was his honest opinion from July, 1935, through January, 1936, that the stock was reasonably worth $55 a share; that he refused to pay anything for the settlement of the will contest, and that the $55 per share recited in the closing papers was paid solely for the stock. Both he and Mannon testified that Aureguy first offered them the stock for $40 per share, if they would pay twenty-four or twenty-five thousand dollars to settle the will contest; that later Aureguy reduced this last figure to fifteen thousand dollars. It should be noted that the amount ultimately paid to plaintiff was within a couple of thousand dollars of the amount that would have been paid had the deal been consummated at $40 per share plus $15,000 to settle the will contest. Mannon and Greene also testified that, although the stock had been offered to them at $40 per share, in their opinion it was worth $55 per share; that although the stock had been offered to them at $40 a share, they ultimately paid $55 per share for it, and that the difference between these two figures was not paid for settling the will contest, although the only condition attached to the offer of $40 per share was that $15,000 be paid to settle the will contest. Obviously, under such circumstances, it was for the jury and is not for the appellate court to say whether the recited consideration of $55 per share correctly represented the true picture, or whether in fact that figure included $25,000 or some other sum in settlement of the will contest. The attempt by appellants to demonstrate that the true price paid was $55 a share and that nothing was paid for the settlement of the will contest, is directly contrary to the positive testimony of three witnesses, and directly contrary to reasonable inferences from Greene's and Mannon's testimony, above referred to.

On the question of the value of the stock, respondent's experts testified as to values far in excess of $55 per share. Greene admitted that from July, 1935, to January, 1936, he honestly believed the stock was worth $55 per share, and testified that the company was then in good condition. As the guardian of Alice Lester, in 1933 Greene had petitioned the guardianship court to buy the 6,000 shares then owned by plaintiff's father at $40 a share, averring that this was the then reasonable value of the stock. In 1934, through one of his partners, admittedly acting as his agent, he had furnished the inheritance tax appraiser with figures justifying a $40 a share value for tax purposes. The negotiations with the plaintiff took place in July or August, 1935. In an attempt to show that nothing had been paid to settle the will contest he testified that at that time it was his honest opinion that the stock was worth $55 per share. He also testified that in 1932 the dividends on the stock were $3.52 per share; in 1933 they were $1.45 per share; in 1934 they were $1.30 per share; in 1935 they were $1.35 per share. In 1936, however, in the very year the transaction here involved was consummated, but after respondent's stock was purchased, the dividends jumped to $2.80 per share. He also testified that the income of the company was less in 1936 than in 1935, and that the balance sheet showed that the total assets of the corporation were less in 1935 than in 1933, but he thought the actual values had increased.

[8] The jury was correctly instructed at length on the elements necessary to constitute fraud, and on the differences between representations of fact and opinion. On the evidence above summarized, and on these instructions, the jury has found in favor of respondent. Appellants urge that, as a matter of law, the alleged misrepresentations were of matters of opinion, and not of fact, and that, as a matter of law, respondent had sufficient knowledge of the true facts so that it must be held there was no reasonable reliance. The dissenting opinion develops these arguments at some length, and it is not necessary to repeat them here. The complete answer to these contentions is that whether the representations were of fact or opinion, and whether respondent honestly and reasonably relied upon them, were jury questions. This being so, this court is without power to substitute its interpretation of the facts for that of the jury. In view of the jury's verdict, and without regard to whether or not a confidential relationship existed, and, assuming the parties were dealing with each other at arm's length, in support of such verdict we must assume that the jury found that Greene represented as a fact that the stock was worth $25 a share. Greene testified that at that time his honest opinion was that the stock was worth $55 a share, and that, in his opinion, the company was then in good financial condition. In support of the jury's verdict we must assume that the jury found that with intent to deceive respondent, Greene stated that the company was in a bad financial condition and that the stock was worth $25 per share when he honestly believed the company was in good condition, and that the stock was worth $55 per share. In addition, we must assume, in support of the jury's verdict, that Greene stated as facts that the stock was worth $25 or less per share; that the fair market value was $25 per share but that the liquidation value was less; that he told respondent that any inquiry as to value would be ultimately referred to him; that he knew all about the company and its assets. Appellants, and the dissenting opinion, cite many cases to the effect that a mere expression of opinion, no matter how positively asserted, is not actionable. That is, of course the general rule. But as was stated in Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 573, 126 P. 351, 356, 42 L.R.A.,N.S., 125, "the qualifications and modifications of this general rule are as important as the rule itself. Those qualifications and modifications are numerous. It is unnecessary to attempt to illustrate them all. But, bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker *believes to be* a fact, it becomes apparent that, by the expression of a dishonest opinion to one entitled to rely upon it, deceit is practiced, injury may be worked, and an action will lie." Many cases are cited in support of this elementary rule of fair dealing. To hold that a deliberate intentional misrep-

resentation of an opinion made with intent to induce action by another is not actionable is to sanction a rule of morality not approved by any court, so far as our research has disclosed.

[9] It is also elementary that representations of value which might usually be considered expressions of opinion, when affirmed as an existing fact, may found an action for fraud. See many cases collected 12 Cal.Jur. p. 727, § 14 et seq.

[10] As already pointed out, the trial court exhaustively instructed the jury on these issues. These instructions are not challenged. It seems too clear to require further comment that the implied findings of the jury that Greene misrepresented the value of the stock either as a fact or as a dishonest statement of opinion (Barron Estate Co. v. Woodruff Co., supra), and that such representations were made with the intent that Hobart should act on them, are amply supported.

[11] Much is said in the dissenting opinion about whether plaintiff reasonably relied upon the misrepresentations. This issue was presented to the jury on complete and proper instructions. Its finding that respondent did rely, and acted reasonably in so doing, is amply supported, and this is so whether or not a confidential relationship in fact, or in law, existed. Respondent testified that, after listening to Greene, his original impressions as to the value of the stock were overcome, and that he was convinced by Greene's statements that the stock was worth but $25 a share. It is true that his first counsel, prior to that date, had made some investigation as to the question of the assets of the company. But if Greene, as a fact, represented that the stock was worth $25 a share when in fact it was worth at least $55 a share, and Greene knew it was worth at least that much, he is in no position now to claim that, as a matter of law, plaintiff should not have relied upon such representation. See cases collected 12 Cal.Jur. p. 758, § 34.

There is another independent reason why the verdicts are supported, and that is that the jury was justified in finding that a confidential relationship existed, in fact, between Greene and respondent. This issue was likewise submitted to the jury on proper instructions. Its findings are conclusive on this issue. The determination of this point is not vital to this opinion, inasmuch as it has already been held that, independently of whether there was a confidential relationship, fraud existed. The point is vital to the appellants, however, because if a confidential relationship existed. respondent would be entitled to rely upon what otherwise might be considered a mere statement of opinion.

Appellants urge that, as a matter of law, these parties were adverse parties; that Greene, as a matter of law, was not acting in a confidential relationship with plaintiff, and that the implied findings of the jury to the contrary are totally unsupported. this position is concurred in by the dissenting opinion.

It is true that Hobart, junior, and Greene met but once. It is true that respondent charged, in the will contest, that Greene, together with others, had exerted undue influence upon Hobart, senior, that caused him to disinherit respondent. That evidence would have supported a finding that no confidential relationship existed. But as opposed to this testimony was the following, evidence. Respondent was a small stockholder in the Hobart Estate Company. Greene told him that he, Greene, was activated only by the kindest of feelings toward respondent; that Greene had complete knowledge concerning the assets of the company, and that any inquiry would ultimately be referred to him. Greene was president of the Hobart Estate Company. He was the general manager of that company. He was a director of that company. As the guardian of the estate of Alice Lester he controlled the majority of the stock of that company. He had been connected with the company for many years. This was not an ordinary business corporation. It was a family corporation. The stock was closely held. Greene knew what the stock was worth. According to respondent's story, which must be believed on this appeal, Greene approached plaintiff to buy his stock. When Greene purported to state the facts in reference to that corporation, or, if you will, when Greene purported to give his opinion to a stockholder about the value of the stock, was he not acting in a confidential relationship towards that stockholder? Was not the jury justified in finding that, under such circumstances, Hobart, as a stockholder, was reasonably entitled to rely on the statements of Greene, even if they were only opinions? Can or should it be the law that the president, general manager, director, and principal stockholder, as a matter of law, when he determines to deal with a stockholder about the purchase of his stock, owes no duty of good faith toward the stockholder? Can or should it be the law that the president, general manager and director of such a corporation, acting on behalf of the corporation and on behalf of its principal stockholder will be permitted to defend an action for fraud brought by a stockholder on the ground that, as a matter of law, in dealing with such stockholder in connection with his stock, in telling the stockholder the facts about his company, he is dealing at arm's length and with an adverse party? The appellants must answer these questions in the affirmative to prevail on this issue. In my opinion neither reason nor authority compels or suggests such conclusion.

It is true that in Ryder v. Bamberger, 172 Cal. 791, 158 P. 753, and in Bacon v. Soule, 19 Cal.App. 428, 126 P. 384, it was held that a director and officer of a corporation has the legal right to purchase the stock of other stockholders, and, where the transaction is free from fraud, is not bound to disclose facts which he knows which would enhance the value of the stock, and that in such situation no relationship of trust and confidence arises because the director owes no fiduciary relationship to the stockholder as such, but only to the corporation. It is very doubtful if even this limited statement of the rule is still the law of this state. The problem received exhaustive consideration by the Supreme Court in American Trust Co. v. California, etc., Ins. Co., 15 Cal.2d 42, at pages 56–62, 98 P.2d 497. The court first referred to the so-called "majority rule" embodied in the Bamberger and Soule cases. It then cited several cases from other states which support the so-called "minority rule, which recognizes the director's obligation to the stockholders individually as well as collectively, and refuses to permit him to profit at the latters' expense by the use of information obtained as a result of his official position and duties. This view, while generally conceded to be in the numerical minority, is followed by able courts, and text-writers who have examined the subject." page 56 of 15 Cal.2d, page 504 of 98 P.2d The court went on to point out that, in addition, there is a third rule adopted by many courts to the effect that even though in the ordinary case there is no confidential relationship "where special circumstances or facts are present which make it inequitable for the director to withhold information from the stockholder, the duty to disclose arises, and concealment is fraud." page 57 of 15 Cal.2d, page 504 of 98 P.2d. This is referred to as the "special facts" doctrine. Cases are cited with apparent approval to the effect that "active participation in the negotiations for a transfer of the corporate property may constitute the special circumstances to raise the duty." page 57 of 15 Cal.2d, page 504 of 98 P.2d The court cites with particular approval the case of Poole v. Camden, 79 W.Va. 310, 92 S.E. 454, 457, L.R.A.1917E, 988. The court in that case conceded the correctness of the so-called majority rule but held that where the director instead of remaining silent gives information to the stockholder, that is where he "'undertakes to speak or *become active in inducing the sale*, he must *speak fully, frankly, and honestly, and conceal nothing* to the disadvantage of the selling stockholder'." (Italics the court's.) After discussing the Bamberger and Soule cases, and also the case of McCord v. Martin, 47 Cal.App. 717, 191 P. 89, the court concludes its discussion with the statement (page 61 of 15 Cal.2d, page 507 of 98 P.2d): "the question is still open in this state as to whether we shall follow the majority rule, the majority rule as modified by the 'special facts' doctrine, or the minority rule." Under the facts there involved, even under the majority rule, there was fraud present.

I am of the opinion that no reasonable argument can be advanced against the adoption of the so-called special facts doctrine. I am further of the opinion that the Supreme Court in its discussion above referred to has indicated with unmistakable certainty that when the issue is directly presented it will look with grave doubts upon the correctness of the so-called majority rule. In the present case this issue was submitted to the jury on proper instructions. Its findings, on the special facts, are conclusive. To hold under these facts that Greene with impunity could actively misrepresent his opinion about the value of the stock without legal responsibility to a person relying on that opinion, in view of Greene's special knowledge about the affairs of the company, is to sanction a rule of law that should receive the approval of no court.

I conclude this phase of the discussion with the following observations:

1. Independently of whether there was or was not a confidential relationship, the jury was justified in finding that Greene falsely and fraudulently misrepresented material facts, and falsely and fraudulently stated something as his opinion which he knew to be false;

2. That the jury was justified in finding that such misrepresentations were made by Greene with the intent that Hobart should act upon them;

3. That the jury was justified in finding that Hobart was under no duty of investigation, and that he acted reasonably and honestly upon the misrepresentations, to his damage;

4. That the jury, under the facts, was justified in finding that a confidential relationship existed.

For these reasons all of the contentions relating to the sufficiency of the evidence are without merit.

[12] The appellant corporation makes an additional point in reference to the sufficiency of the evidence. It urges that, as a matter of law, Greene was not acting as its agent in the purchase of the stock, and that for that reason the judgment against it is unsupported. In other words, it is urged that, assuming Greene was fraudulent, he was not acting for or on behalf of the corporation in making the assumed fraudulent representations. But little need be said about this contention. The evidence has been stated. It is obvious that the question was one of fact. O'Shea v. Pacific Gas & Elec. Co., 18 Cal.App.2d 32, 62 P.2d 1066. It was submitted to the jury on proper instructions. The jury has impliedly found that Greene was acting on behalf of the company. That finding is amply supported.

Greene was president, director and managing officer of the company. As the guardian of the stockholder who owned over half the stock he could and did control the company. He testified that one of the reasons that he was interested in purchasing the stock of Hobart was because it was for the benefit of the corporation and other stockholders to get the person he considered a troublemaker out. The balance of his testimony on this issue has been quoted, supra. It is obvious that the jury could find, on Greene's testimony alone, that in making the purchase Greene was acting in the interests of the corporation, and within the scope of his agency.

We turn now to a discussion of the statute of limitations. Appellants urge that as a matter of law respondent's cause of action was barred by the statute of limitations—Subd. 4 of § 338, Code of Civil Procedure. That section requires actions based on fraud to be commenced within three years, but "the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

[13] The appellants, and the dissenting opinion, cite many cases as to what must be pleaded and proved to avoid the bar of the statute of limitations. There is no necessity of repeating those citations here. The cases cited in the dissenting opinion set forth the applicable rules. By the standards there laid down the pleading and proof in the instant case was sufficient.

[14, 15] The jury was fully and properly instructed in exact accord with those cases. Those instructions are not challenged, most of them, in fact, being instructions proposed by appellants. Under the circumstances of this case, the question as to whether the statute had run was a question of fact for the jury. Whether the complaint is sufficient, is, of course, a question of law. But whether the evidence is sufficient to support the implied findings on this issue is a mixed question of law and fact. In Mitchell v. Towne, 31 Cal.App.2d 259, 262, 87 P.2d 908, 910, the proper rule is stated, quoting from Cullinan v. McColgan, 87 Cal.App. 684, 692, 263 P. 353, as follows: "'* * * where issue is joined on a plea of the statute and the evidence is conflicting as to when, with reference to the filing of the complaint, a cause of action accrued, the question is properly submitted to the jury as a mixed question of law and fact (Pacific Imp. Co. v. Maxwell, 26 Cal.App. 265, 146 P. 900; Towle v. Sweeney, supra, [2 Cal.App. 29, 83 P. 74]; Crawford v. Duncan, 61 Cal.App. 647, 215 P. 573), and the case may not be taken from the jury where the plea of the statute is interposed and there is evidence to support the plea. (Heilbron v. Heinlen, 72 Cal. 376, 14 P. 24.)'" See, also, cases collected 16 Cal.Jur. p. 629, § 221.

As already pointed out, the jury was fully instructed on all of the elements required to avoid the plea of the statute of limitations as those elements are so clearly set forth in the many cases referred to in the dissenting opinion. At the request of appellants, some 24 instructions on this issue, covering over 13 pages of the transcript, were given to the jury. The jury was told that this defense, pleaded by appellants, was not a "mere technical defense" but should be looked upon as any other phase of the case; that such statutes "are vital to the welfare of society and are favored by the law"; that they "are to be viewed as statutes of repose and as such constitute meritorious defenses." The court then quoted the appropriate section, and instructed, in language quite favorable to appellants, that the three years from discovery provision was an exception to the general rule and cannot be invoked "unless the plaintiff brings himself within the terms of the exception. This can only be done by showing that he did not discover the facts constituting the fraud three years or more prior to the commencement of his action. This showing is an essential element of the right of action and must be affirmatively pleaded and proved by the plaintiff, and the plaintiff has the burden of making this proof by a preponderance of the evidence. If the plaintiff in this case has not made this proof and has not brought himself within the exception, it will be your duty to return your verdict in favor of the defendants." The court then went on to instruct that in order to bring himself within the exception and to show that there was no discovery within three years of the commencement of the action, the plaintiff has the burden of proving by a preponderance of the evidence, the following:

"1. He must prove first that he was in fact ignorant of the facts at the time of the closing of the transaction on January 16, 1936, and that in fact he remained ignorant of them and did not learn the true facts until three years prior to June 9, 1941.

"2. Secondly, he must prove not only that he was ignorant of the facts, but he must show that * * * the transaction of which he complains was closed in such circumstances that he would not be presumed to have any knowledge of the true facts.

"3. Thirdly, he must show that at no time prior to June 8, 1938 did he have notice or information of circumstances which would have put an ordinarily prudent person, exercising reasonable care and diligence for his own concerns, upon inquiry which would have led to knowledge of what he now claims to be the true facts, and

"4. He must show the times and the circumstances under which the facts claimed by him to constitute the alleged fraud were brought to his knowledge and must show that the circumstances were such that he is not to be charged with discovery of them prior to June 8, 1938."

The jury was then told that in determining whether a "discovery" had or should have been made actual knowledge was not required—that "something less than actual knowledge of the facts may constitute discovery. Even if a plaintiff has no actual knowledge of the facts constituting the claimed fraud, still, in applying this statute, means of knowledge may be the equivalant of actual knowledge and if it appears that a plaintiff had notice of information or circumstances which would put him on inquiry, that is, if he had notice or information of circumstances which would lead an ordinarily prudent man who was exercising reasonable care for his own concerns and for his own protection in respect of his property rights to make further inquiry, and if such inquiry, if followed, would have led to knowledge, then he is deemed to have discovered the facts constituting the claimed fraud and is to be treated in the same way as though he had actual knowledge." The jury was then told that constructive notice was all that was required, and constructive notice was properly defined. It was also told that, under the proper circumstances, knowledge of Lachmund, Harris or Aureguy was knowledge of the plaintiff, and that if plaintiff had actual or constructive knowledge "it will be your duty to return your verdict in favor of the defendants." Instructions were then given to the effect that plaintiff must show why he did not make discovery sooner, and that his failure to make sooner discovery "was not due to lack of diligence upon his part"; that the burden of proving the time and circumstances of the discovery was in plaintiff, but if the same means of discovery were available to plaintiff more than three years prior to the commencement of the action and he failed to make inquiry, through lack of diligence, the verdict must be for defendants; that if, after the conference with Greene and before the closing of the deal, the circumstances were such as to put him on inquiry, it was his duty to investigate the value, and if he did not do so the action is barred; that as a stockholder he had the right to inspect the company's books; that he was chargeable with notice of the matters contained in the inventory of his father's estate; that plaintiff could have inspected Stevenson's deposition, and that, in the will contest, he could legally have inquired into the issue of the value of the assets of the company; that after January 16, 1936, no relationship of trust or confidence existed between the parties; that "if you find that the plaintiff has failed to make a full and complete showing of the times and circumstances under which the facts claimed to have been discovered by him were brought to his knowledge, with sufficient completeness and particularity so as to enable you to determine that [sic] [what] the facts were * * * it will be your duty to return your verdict in favor of the defendants"; that the mere absence of the plaintiff from the state is immaterial and did not suspend the running of the statute.

[16] These instructions state the law quite favorably to appellants, and are in accord with the cases cited in the dissenting opinion.

The complaint as amended alleged the facts concerning the time and circumstances of the discovery of the fraud with some particularity. In some respects the evidence falls short of the pleading. It is obvious, therefore, that if the evidence is sufficient to avoid the bar of the statute, the pleading is likewise sufficient. The real question is whether or not there was any substantial evidence, contradicted or uncontradicted, or any reasonable inference from that evidence, to support the implied finding of the jury, based on the above instructions, that the statute had not run.

The evidence is uncontradicted that the transaction here challenged was consummated in January, 1936; that, thereafter, Hobart remained in this state for about three months; that he then went to Europe where he remained until January or February, 1941; that this action was filed in June, 1941. There is not one word of testimony that between 1936 and 1941 respondent acquired any information at all about this transaction, in fact, the evidence is to the contrary. In other words, after the fraud was perpetrated, after plaintiff was lulled into a false sense of security, after he was convinced by what the jury has found were the false statements of Greene that he had received a fair price for his stock, he learned of no fact that put him on inquiry until January or February, 1941. He testified that upon his return to New York early in 1941 he first received information from a friend that caused him to question the stock transaction; that he immediately came to California and retained counsel to investigate the matter; that in May, 1941, he received information, obviously from his counsel, that the value of the stock was "excessively at variance" with the statements of Greene. Until he returned to New York in 1941 he had no reason to believe he had been defrauded. Until that time he believed what he had been told by Greene.

Under this evidence the jury could, and apparently did, find that he first received some information that he had been defrauded in January or February, 1941. He then came, almost immediately, to California, retained counsel, and then made the actual discovery upon which he relies. As to what he then discovered, the evidence is as follows:

"Mr. Hallinan: Q. Well, did you then discover, or were you then informed as to some of the holdings of the Hobart Company, the values of those holdings, and whether or not any encumbrances existed against them? * * * A. Yes.

"Q. And was that information at variance with the statements that Mr. Greene had made to you? A. Excessively at variance.

"Q. And was that the first information you had that was at variance with the statements Mr. Greene had made to you as to the value of the holdings of the corporation? * * * A. That would be roughly the second, because the winter in New York that you were about to refer to, where I got the information about the stock transaction, was the first time I had heard it, but then that was not official.

"Mr. Hallinan: Q. In other words, that did not purport to give any items of the property, or anything of that kind? A. No, it was just a statement of similar character."

From this evidence the jury could find that, until January, 1941, respondent was ignorant of the true facts; that until that time he was under no duty to investigate; that after receiving certain information in New York he pursued his discoveries diligently; that he discovered the true facts in San Francisco, and immediately commenced this action. It must be conceded that the evidence as to the facts and circumstances that he discovered in San Francisco are not as clear as might be desired, but in our opinion the evidence is sufficient to sustain the implied finding of the jury that he discovered different substantial and material facts from those known to him in January, 1936, on the issue of value.

Appellants argue that respondent was put on inquiry prior to the date of the false representations, that prior to that date he had actual or constructive knowledge of facts which should have put him on inquiry, and that therefore, as a matter of law, he should have discovered the fraud before the expiration of five years. The argument is not sound, and is concluded by the verdict of the jury. The jury has impliedly found that respondent was defrauded on January 16, 1936; that, thereafter, for five years he had no reason to challenge or question the transaction; that he discovered the fraud in 1941.

There is an obvious fallacy in the argument of appellants that the knowledge gained prior to the alleged fraud was sufficient, as a matter of law, to put respondent on inquiry as of that time. That argument can be used to urge that respondent, because of such supposed knowledge, should not have relied upon Greene's statements. The jury has decided that issue adversely to appellants. But if the evidence supports the implied findings of the jury that there was fraud, and we have held it does, then we are presented with a situation where, regardless of what respondent knew prior to the date the false representations were made, he acted reasonably in relying upon such representations. Thus on January 16, 1941, he had been fully deceived—in spite of what he may have known prior to that date, on that date he honestly and reasonably believed the stock was worth but $25 a share. Is he to be required on January 17, 1936, as a matter of law, to begin to distrust the representations that induced him to sell? Without any further facts coming to his knowledge, after the sale was consummated, is he to be required to assume immediately that he has been defrauded, and to be required to launch an expensive investigation to ascertain that fact? On proper instructions, the jury has passed upon this issue.

From what has been said it follows that, regardless of whether there was a confidential relationship between the parties, the findings of the jury on this issue are amply supported by the record.

If there was a confidential relationship between the parties the rules of pleading and proof referred to in the cases cited in the dissenting opinion are much less rigid and severe than those there set forth. A few citations will demonstrate the true rule that applies when a confidential relationship is found to exist.

In Seeger v. Odell, 18 Cal.2d 409, 418, 115 P.2d 977, 982, 136 A.L.R. 1291, the rules are succinctly stated as follows: "In California the statute of limitations in an action based upon fraud begins to run from the time when the fraud was discovered or should reasonably have been discovered. Cal.Code Civ.Proc., § 338(4). It is necessary for a plaintiff to allege facts showing that suit was brought within a reasonable time after discovery of the fraud without unnecessary delay and that failure to make the discovery sooner was not due to negligence. See cases cited in 12 Cal.Jur. 795–799. The present action was brought more than three years after the date when the misrepresentation was allegedly made but only sixty days after it was discovered. Plaintiffs allege that the discovery did not occur sooner because of their advanced age, the considerable distance of the available records from their home, *and the absence of any occasion on their part to examine the records or otherwise inquire into the truth of the representation.* The alleged facts, if believed, would justify a trial court in finding that the plaintiffs were sufficiently diligent in discovering the fraud, and that the action was brought within a reasonable time thereafter." (Italics added.)

[17] The leading and frequently cited case of Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243, contains language particularly appropriate here. In that case, as in the instant case, it was urged that the plaintiff knew of facts that should have put him on inquiry. The court discussed at length the various inferences from the evidence, and at page 241 of 184 Cal., at page 249 of 193 P., stated: "Without some information which carried a direct implication or suggestion of possible fraud, the plaintiff could not be put upon inquiry. The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did

not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part."

Most of the important cases on this issue are cited and commented upon in Denson v. Pressey, 13 Cal.App.2d 472, 57 P.2d 522. In that case it was stated (page 476 of 13 Cal.2d, page 525 of 57 P.2d):

"As said in the case of Tarke v. Bingham, 123 Cal. 163, at page 166, 55 P. 759, 760: 'Where no duty is imposed by law upon a person to make inquiry, and where under the circumstances "a prudent man" would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission. Bank of Mendocino v. Baker, 82 Cal. 114, 22 P. 1037, (6 L.R.A. 833); Prouty v. Devin, 118 Cal. 258, 50 P. 380. In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry, and for these reasons, under the facts of this case, we think the finding of the court sufficient and sufficiently supported by the evidence.' See, also, Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219; Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 P. 19; Miller v. Ash, 156 Cal. 544, 105 P. 600; Teague v. Hall, 171 Cal. 668, 671, 154 P. 851; Cameron v. Evans Securities Corp., 119 Cal.App. 164, 170, 171, 6 P.2d 272; Neff v. Engler, 205 Cal. 484, 488, 271 P. 744; Adkins v. Potter, 211 Cal. 512, 520, 296 P. 285; Divani v. Donovan, 214 Cal. 447, 453, 6 P.2d 247; Grady v. Luy, 117 Cal.App. 292, 3 P.2d 577; Payne v. Clow, 114 Cal.App. 597, 600, 601, 300 P. 138.

"In the case of Teague v. Hall, 171 Cal. 668, at page 671, 154 P. 851, 852, it is said: 'This view of the law has been repeatedly declared in the decisions of this state. In Ruhl v. Mott, 120 Cal. 668, 676, 53 P. 304, 307, the court says: "it is true that where one is justified in relying, and in fact does rely upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty in law is devolved upon him to employ such means of knowledge." The same doctrine is declared in Bank of Woodland v. Hiatt, 58 Cal. 234; Wenzel v. Shulz, 78 Cal. 221, 20 P. 404; Morris v. Courtney, 120 Cal. 63, 52 P. 129; Dow v. Swain, 125 Cal. 674, at pages 683, 684, 58 P. 271; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 512, 137 P. 240; Eichelberger v. Mills L. & W. Co., 9 Cal. App. 628, 100 P. 117.'"

In Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383, the action was brought seven years after the fraud. The court, in disposing of the issue now under discussion, stated (page 485 of 11 Cal.2d, page 981 of 80 P.2d, 117 A.L.R. 383):

"It is, however, the contention of the appellant that the fraud was open and patent, that, since the slightest inquiry would have disclosed the truth, nothing but the plaintiff's inexcusable negligence kept her so long in ignorance of the fact that she had not received a fair price for her property, and finally, the additional fact, which came to light in September, 1927, was not one of the facts constituting the fraud but merely Taylor's motive for committing it. * * *

"[The court then quotes from Victor Oil Co. v. Drum, supra, and continues:] The appellant argues that the slightest inquiry would have disclosed the difference between the value of the ranch and the price offered by Finnie, the fact that the holders of the trust deed were not on the point of foreclosing and that Taylor's representations as to the bank's similar intentions were false. It is true that the plaintiff could have discovered the inadequacy of the price by inquiry but this alone would not necessarily have been sufficient to warn her of the fraud in the light of her belief in the representation, by one in whom she had implicit trust and confidence, that it was for her best interest to make the sale, even if for only $5 an acre, because otherwise she would lose everything by foreclosures. It was not until September, 1927, that she discovered this advice to have been motivated by personal gain and so was brought to question Taylor's good faith. At this point inquiry became a duty and plaintiff was chargeable with what she would discover if inquiry were made. Henigan v. Yolo Fliers Club, 208 Cal. 697, 284 P. 906; Victor Oil Co. v. Drum, supra. The fraud was in essence a concealed fraud; that is, it consisted in Finnie's procuring Taylor to represent to the plaintiff that it was his opinion as a banker and man of business that it was highly advisable for plaintiff, in the situation in which she found herself, burdened with overdue debts and with her properties encumbered as security therefor, to accept the offer made by Finnie; that the bank of which he was the managing agent, would, unless she accepted, foreclose upon one of her properties and that the holders of the trust deed upon the other, with whom the bank had negotiated the loan, would foreclose upon it. Taylor's knowledge to the contrary was concealed despite the confidential relationship found by the trial court to exist between the bank and Mrs. Rutherford. The finding of a confidential relationship is amply sustained by the evidence (Bank of America v. Sanchez, 3 Cal.App.2d 238, 38 P.2d 787), and, in view of its existence, Mrs. Rutherford cannot be charged with lack of diligence in making independent investigation either at the time or afterward. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 575–577, 126 P. 351, 42 L.R.A.,N.S., 125; Marston v. Simpson, 54 Cal. 189, 190."

In Knapp v. Knapp, 15 Cal.2d 237, 100 P.2d 759, a demurrer had been sustained on the ground the action was barred. In reversing the judgment the court referred to what must be pleaded and proved in such an action and stated (page 242 of 15 Cal.2d, page 761 of 100 P.2d):

"A further element of his cause of action is a statement of facts showing that he had no notice or means of knowledge which, if followed by inquiry, would have shown the true facts. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Turner v. Liner, 31 Cal.App.2d 196, 87 P.2d 740. However, the latter requirement has been relaxed in cases involving confidential relationship, because facts which justify investigation in the ordinary case would not excite suspicion where the circumstances show a right to rely upon the representations of another and the same degree of diligence should not be required. Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125; Tarke v. Bingham, 123 Cal. 163, 55 P. 759; Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219."

Reference should also be made to the case of Laraway v. First Nat. Bank of La Verne, 39 Cal.App.2d 718, 104 P.2d 95. After quoting with approval the portion of the Victor Oil Drum case above quoted, the court continued as follows (page 728, of 39 Cal.App.2d, page 100 of 104 P.2d): "Courts will not put their imprimatur upon a possible but antiquated authority that a person must assume that everyone with whom he has a business transaction is a rogue and act accordingly, but rather will hold that one can act upon the presumption that there exists no intention to cheat or defraud him. (Tidewater Southern Ry. Co. v. Harney, 32 Cal.App. 253, 260, 162 P. 664); or as was said in Tracy v. Smith, 175 Cal. 161, 165, 165 P. 535, 537, 'the fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity'; and again, in Togni v. Taminelli, 11 Cal. App. 7, 14, 103 P. 899, 902, we find the following: 'No one has a right, either in law or in morals, to complain because another has placed too great reliance upon the truth of what he himself has stated.'"

From what has been said it follows that appellants' contention that the action is barred cannot be sustained.

[18] Both appellants challenge some of the instructions. It is contended that some of the instructions were faulty, others erroneous, and that some were outside the issues. The instructions were exhaustive, complete, and, on the whole, correct. Although there is some ambiguous language in a few of the instructions, when the charge is read as a whole, it is obvious that the jury could not possibly have been misled, and no prejudice to appellants could possibly have occurred. On all of the basic issues the jury was correctly instructed. Under such circumstances any slight errors that may have occurred in wording were not prejudicial to appellants.

[19] The most serious objections are made to two instructions, quoted in the dissenting opinion. These are the only two instructions held in that opinion to be erroneous. These instructions expressed the thought that where a representation of fact within the knowledge of the party making it has been made, the defense that the receiving party knew the real fact "must be clearly and conclusively established by

the evidence." The challenged instructions were taken almost verbatim from 2 Pomeroy's Equity Jurisprudence, 4th Ed., §§ 895, 896, quoted with approval in Teague v. Hall, 171 Cal. 668, 670, 154 P. 851, 852. In this last-named case the jury had been instructed that before a defrauded party could recover he must show that he did not have the means at hand to acquire knowledge of the true facts. This instruction was held to be erroneous, and the giving of it held to be reversible error, the Supreme Court holding that it was not the law that a party who has relied upon a misrepresentation is precluded from recovery if he had an opportunity, but did not avail himself of the opportunity, to test the truth of the representations. The court approved the rule, and cited many cases to support it, that a man may act upon a positive representation of fact notwithstanding that the means of knowledge were specially open to him. The court then cited Pomeroy to the effect that "'whenever a positive representation of fact is made, the party receiving it is, in general, entitled to rely and act upon it, and is not bound to verify it by an independent investigation. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence. The *mere existence of opportunities* for examination or of sources of information is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact.'" Many cases are cited to support this rule.

It may be that the use of the word "conclusive" was unfortunate and does not accurately state the law. However, whether that error, if error it was, was prejudicial depends on the facts of the case. The jury was instructed at length that if plaintiff had actual knowledge of the truth of the matters alleged to have been misrepresented he could not recover. It was also instructed at length on the rule of preponderance of the evidence. The evidence shows without contradiction that the only possible *actual* knowledge that Hobart had was that he had received a balance sheet from Greene, together with a letter in which Greene stated he could not fix the value of the stock. The rest of the knowledge alleged to be possessed by Hobart was constructive knowledge, based on the alleged knowledge of his attorney and investigator. The balance sheet, according to appellants' own witnesses, did not show the true value. The doctrine of constructive knowledge, of course, has no application where actual representations of fact are made. For these reasons, since actual knowledge did not exist as a matter of fact, it is hard to see how appellants could possibly be injured by the use of the challenged word, even if erroneous. After reading the entire record, it seems clear that, even if erroneous, the jury could not possibly have been misled, and that no prejudice resulted.

The last point upon which the dissenting opinion relies for a reversal is that the jury was, in effect, coerced into returning a verdict against Greene by the asserted misconduct of the trial judge. In my opinion the point is devoid of merit.

The first verdict was in favor of plaintiff and against the company in the sum of $32,175 actual damages, but with no finding at all as to Greene. *Counsel for all the parties stipulated* that the verdict was not complete and that the jury should be instructed to return to the jury room and reconsider its verdict. The court instructed the jury as follows:

"Counsel and the Court are in accord that you have not arrived at a verdict, ladies and gentlemen of the jury. Under the law you cannot return a verdict against a principal unless you return a verdict against the agent. So you must return and continue your deliberations and either return a verdict against the agent and the principal, or in favor of the agent or the principal.

"You will now retire until you have agreed upon a verdict.

"Does that statement comply with our understanding, gentlemen, as to the instruction, as to the limited instruction to be given to the jury?

"Mr. Hallinan: Exactly.

"Mr. Dunne: [Representing both defendants.] Yes."

Ten minutes later the jury returned to the courtroom, apparently in some confusion over the forms of verdicts that had been furnished to it. The court informed the jury that such forms were furnished for its convenience, and that it was not required to use such forms. In addition to these forms the court then gave the jury a completely blank form of verdict, and then stated: "You will write in the names of the parties, the number of the action, and then whatever verdict you may agree upon. You may write upon this blank form of verdict and the foreman will sign his name, and that will be your verdict if you have or do agree upon a verdict.

"Will that assist you in any way?

"The Foreman: Yes, your Honor.

"The Court: You may retire and resume your deliberations."

The jury then retired, and the court then stated to counsel:

"I meant to ask, before the jury retired, but I neglected to do so, is there any other or different statement that either counsel desires the court to make to the jury? I am rather loathe to say too much. I prefer to say as little as possible and leave it to the jury to find their own way out.

"Mr. Hallinan: I think what you said was all that was necessary.

"The Court: Can you think of anything additional, Mr. Dunne?

"Mr. Dunne: I do not, your Honor."

It is obvious that, up until this time, no possible error had been committed. Everything that was done by the court was done with the approval and upon the stipulation of both counsel. The return of the jury for further deliberations and the instructions then given were given pursuant to such stipulation. If any "coercion" was involved it must have occurred when the second verdicts were returned.

[20] After a little over two hours further deliberations the jury returned with verdicts of $32,175 against the corporation, actual damages and no exemplary damages, and against Greene for actual damages in the sum of no dollars and exemplary damages in the sum of $10,000.

It seems quite clear that if the first set of verdicts were incomplete, as the attorneys had stipulated, that these second verdicts were likewise incomplete. The trial judge promptly so ruled, although both counsel moved that the verdicts be filed. The court then instructed the jury in part as follows: "* * * you cannot find a verdict against the principal, that is the Hobart Estate Company, a corporation, without finding a verdict against the agent, or the defendant A. Crawford Greene. If the corporation defendant is liable in any amount, likewise the agent will be liable in the same amount. You cannot hold the corporation unless you find that it acted through the agent, defendant A. Crawford Greene. It has no other way of acting other than through its agent or officers, and you cannot find actual damages against the principal, in the opinion of this Court, and exemplary damages only against the agent."

The judge then told the jury that further forms would be furnished to it, that if the jury could not agree it would be discharged, and that: "If you want to deliberate longer, the Court will permit it, and if you cannot agree, the Court will discharge you." He also told the jury that he would be glad to repeat any of the instructions if they were desired, particularly those on principal and agent. Then just before the jury retired for further deliberations, the following instruction was given: "* * * you cannot return a verdict against the defendant corporation alone but you may decide to give or not to give a verdict for actual damages against both defendants, but you cannot give a verdict against the corporation alone for actual damages. Whether you want to give any exemplary damages is entirely a matter for you to determine * * *."

It seems too clear to require extended comment that the trial judge acted properly, and in exact accord with the law. He did not direct a verdict against Greene. The jury had clearly indicated by all of its verdicts that respondent was entitled to actual damages in the sum of $32,175—that he had been defrauded, and had suffered damage in that amount. Under such circumstances, the trial judge correctly told the jury that the company was liable for actual damages only if Greene was liable, and that it could decide that either both were innocent or both were guilty of fraud. That is in exact accord with the law. Had the trial court failed to attempt to correct the incomplete verdicts it would have been derelict in its duty. Section 619 of the Code of Civil Procedure provides: "When the verdict is announced, or if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." See, also, Hallinan v. Prindle, 220 Cal. 46, 29 P.2d 202; Sparks v. Berntsen, 19 Cal.2d 308, 121 P.2d 497.

It should be noted that no contention is or could be made that the award of actual damages is excessive, and appellant Greene makes no specific objection in connection with the award of exemplary damages against him.

For the foregoing reasons, the judgment and order appealed from are affirmed.

WARD, Justice (concurring).

I concur in the order affirming the judgment and order appealed from. I agree with the conclusions in the majority opinion except on the issue of confidential relationship. The main opinion points out that there are three possible rules on this subject—the so called "majority" and "minority" rules, and the so called "special facts" doctrine. See American Trust Co. v. California, etc., Ins. Co., 15 Cal.2d 42, 98 P.2d 497. In the case last cited the Supreme Court has stated that the question as to which rule is in force in this state is still an open one. Until a definite rule is established, as a member of an intermediate appellate court I believe the so called "special facts" doctrine is the most reasonable to follow. However, I am of the opinion that, as a matter of law, the record will not sustain a finding that any confidential relationship existed between Greene and Hobart. Stated another way, even under the special facts doctrine the record shows that no confidential relationship existed, and that the parties were, in fact, hostile. Hobart had charged Greene with fraud in the will contest, and Greene did not represent that, in negotiating the sale, he was acting in any official capacity other than for the proponents of the will. Subsequent events prove that Greene purchased the stock on behalf of another stockholder.

Independently of this confidential relationship point, but based upon the facts and instructions of the court, it is my view that the evidence supports the judgment, and that the cause of action was not barred by the statute of limitations. The last question presented the most debatable point in the case.

KNIGHT, Justice (dissenting).

I dissent. It is my conclusion that the judgments should be reversed. Two of the major points urged for reversal are: (1) that the evidence is insufficient as a matter of law to establish the essential elements of a cause of action for fraud. Under this heading it is contended among other things that the asserted representations, assuming them to have been made, were as a matter of law mere expressions of opinion and were made and understood as such; also that the undisputed evidence demonstrates that the plaintiff did not rely upon the asserted representations but relied upon independent advice and independent investigations conducted by him and his attorneys and professional investigator concerning the value of the stock. (2) That plaintiff's cause of action was barred by the three-year statute of limitations. In support of this point appellants contend that plaintiff has neither pleaded nor proved facts sufficient to show that he did not have notice of and did not discover the alleged fraud until within three years of filing suit; and that the undisputed evidence shows that he had knowledge or was on notice of the facts relating to the alleged fraud long prior to the three years before the action was brought.

The main opinion fails to give a true picture of the factual situation relating to the foregoing points. It completely ignores many undisputed facts and numerous controlling legal principles which are utterly destructive of plaintiff's cause of action; moreover, it invokes language used in several cases which are based upon facts essentially different from those here presented. In support of the conclusions reached therein regarding the application of the statute of limitations a considerable portion of the main opinion is devoted to setting out a series of instructions which the court gave involving the application of the statute. But certainly a reviewing court cannot escape the duty of reversing a judgment where there is a want of indispensable facts to bring the case within the statute merely because instructions have been proposed and given upon the subject matter of the application of the statute. In short, the main opinion seems to go upon the theory that since an action for fraud involves questions of fact, and the application of the statute of limitations may involve questions of fact, and a jury has awarded the plaintiff a verdict, the case ends so far as the reviewing court is concerned, regardless of whether the evidence has established the indispensable elements of an action of that sort. I am unable to join in that view. The opinion which follows was prepared and submitted by me prior to the preparation and adoption of the main opinion, and since the views I entertain regarding the factual and legal problems presented by the case are fully discussed therein, I am setting it forth as my dissenting opinion.

This action for damages arose out of the sale by the plaintiff, Walter S. Hobart, Jr., of the 833⅓ shares of stock held by him in Hobart Estate Company. Separate judgments based on the verdicts of a jury were entered against the defendants Hobart Estate Company and A. Crawford Greene. Each has appealed therefrom and from an order denying their motions for judgment notwithstanding the verdicts.

The stock was sold by plaintiff as the outgrowth of negotiations looking to a settlement of a contest he had filed to his father's will. The appellant Greene was one of the executors, and a member of the firm of attorneys for the estate. He was also the president and general manager of Hobart Estate Company. Attorney J. M. Mannon, one of Greene's law partners (now deceased) was in charge of the will contest for the proponents, and the negotiations for settlement were opened with him; but before they reached a definite state he left on vacation and they were continued with Greene. In behalf of plaintiff the negotiations were carried on by his then attorney, George B. Harris, and a professional investigator named Eugene Aureguy; and the sale was concluded after an investigation had been made of the affairs of the company. The stock was acquired by plaintiff's aunt, Mrs. Alice H. Lester, who for many years had been under guardianship proceedings as an incompetent person. Greene was her guardian and had been so for more than ten years. She already owned a majority of the stock of Hobart Estate Company, and Greene purchased plaintiff's stock for her under the authority and with the approval of the court in which the guardianship proceedings were pending. The contemporary papers evidencing the sale show definitely that plaintiff agreed to and did sell his stock at an agreed price of $55 a share, or $45,833.15 in all. Neither Greene nor the corporation acquired any interest whatever in the stock, nor did Greene own any beneficial interest in any of the company's stock. It was purely a family corporation. Greene was a non-relative and only one share of stock stood in his name to qualify him as an officer.

The sale was consummated in San Francisco in January, 1936, and the purchase price was paid to plaintiff at that time. After selling his stock plaintiff remained in California for several months, and then went to Europe. Thereafter and for more than five years no complaint whatever was made by him or anyone in his behalf as to the fairness of the transaction; but at the end of that time he returned to California and in June, 1941, through other counsel brought this action for damages, based on allegations to the effect that through fraudulent misrepresentations he was led to part with his stock at much less than its true value. Contrary to the clear and unqualified wording of the contemporary writings, he alleged that the purchase price of the stock was only $25 a share, and that the balance of the $45,833.15 received by him, to-wit, $25,000 thereof, was paid to him in settlement of the will contest, which was dismissed; that the stock was worth much more than $25 a share, and that he was induced to sell at that price by fraudulent misrepresentations.

The complaint was based on a conspiracy theory. It charged all persons named as defendants with having conspired to defraud him of his stock. Those so accused and named as defendants, besides Hobart Estate Company and Greene, were plaintiff's sister, Ruth Hobart Crocker, her husband, W. W. Crocker, and the latter's brother, Charles Crocker; also Attorney J. M. Mannon, Flora Dean Hobart (widow of plaintiff's father), and H. N. Stetson. However, summons was served on only three of them—Hobart Estate Company, Greene, and Charles Crocker. They answered separately, denying the charges of conspiracy and fraud, and as special defenses alleged that the cause of action set forth in the complaint was barred by the statute of limitations. The defendants not served did not appear in the action.

At the trial of the action however, plaintiff made no attempt to prove the charges of conspiracy. They were expressly abandoned by his counsel before he rested plaintiff's case; and notwithstanding that plaintiff had alleged specifically that the fraudulent misrepresentations were made to him by the defendants Mannon, Greene and Charles Crocker, his counsel stated that he was unable to substantiate the charges insofar as they were directed against Mannon and Crocker; and he offered no opposition to the granting of a nonsuit as to Crocker. The cause then proceeded against Greene and Hobart Estate Company alone upon the theory that Greene made the fraudulent misrepresentations and therefore was liable in damages to plaintiff, and that in making them he was transacting the business of Hobart Estate Company and that therefore the company was liable for his wrongful acts under the doctrine of respondeat superior as declared by the provisions of section 2338 of the Civil Code.

The fraudulent misrepresentations Greene is charged with having made are set forth in paragraph VI of the complaint as follows: (1) That the Hobart Estate Company was in a bad financial condition; (2) that the assests of said corporation had declined in value to such an extent as to threaten the safety of the stock held by plaintiff; (3) that the assets of the said corporation were of such value that the actual value of the stock held by the plaintiff, as aforesaid, did not exceed $25 per share; (4) that there was no market for the said stock; and (5) that upon any dissolution of said corporation a division of the assets among the stockholders would net therefor not more than the said sum of $25 per share. And (6) by amendment, allowed at the trial over defendants' objection, plaintiff added an allegation that the defendants had stated that the "book value" of the stock was about $25 a share. The complaint then goes on to allege that Mannon and Greene stated and represented that because of certain trusts created by the will, and for other reasons unknown to plaintiff, the proponents of the will and their attorneys did not wish to settle the will contest by the direct payment of money to plaintiff, but offered to purchase his 833⅓ shares, for parties whose identity was not disclosed, "for its actual value, to-wit, the sum of $25 per share, plus the sum of $25,000 in settlement of said will contest, but * * * desired that the settlement aforesaid should be in such form as to make it appear that plaintiff was selling his said stock for a total sum of $45,833.15, that is, at the rate of $55 per share * * *." It is then alleged that plaintiff consented to such arrangement. There was but one interview between plaintiff and Greene. Attorney Harris and Aureguy participated therein; and upon the occasion of this single interview Greene and plaintiff met as strangers. They had never met before nor did they ever see each other again until the cause came on for trial. As evidentiary support for the foregoing allegations plaintiff relies upon his own testimony and that given by Aureguy. The allegations were not substantiated by Harris, who was a witness for plaintiff; and they were completely negatived by the testimony given by Greene.

After seven hours deliberation the jury manifested a desire to exonerate Greene of any charges of fraud. This is shown by the fact that at the end of that time it brought in a verdict against the company for actual damages in the sum of $32,175, but returned no verdict as to Greene. The court refused to accept the verdict, saying in part: "* * * you cannot return a verdict against a principal unless you return a verdict against the agent"; and the jury was directed to retire for further deliberations, the court adding, "* * * either return a verdict against the agent and the principal, or in favor of the agent or the principal." To this course both sides assented. After deliberating some three hours more and at 1:35 the next morning the jury brought in a verdict against the company for actual damages in the sum of $32,175, and no exemplary damages, and another verdict against Greene for no actual damages but for exemplary damages in the sum of $10,000. The court refused to accept those verdicts, and again directed the jury to retire and continue its deliberations, saying in part: "If the corporation defendant is liable in any amount, likewise the agent will be liable in the same amount. You cannot hold the corporation unless you find that it acted through the agent, defendant A. Crawford Greene. It has no other way of acting other than through its agent or officers, and you cannot find actual damages against the principal, in the opinion of this court, and exemplary damages only against the agent." At 1:47 a.m. the jury again retired to deliberate, and about fifteen minutes later brought in two verdicts which the court accepted. One was against the corporation and Greene for actual damages in the sum of $32,175, and the other against Greene alone for the additional sum of $10,000 as exemplary damages. Thereafter appellants moved for judgment notwithstanding the verdict; the motions were denied, and judgments were entered on said verdicts.

As grounds of appeal both appellants urge: (1) that the evidence is insufficient to establish a cause of action for fraud and therefore as a matter of law fails to support the verdicts; (2) that the court committed prejudicial error in giving and refusing instructions; (3) that plaintiff's action is barred by the statute of limitations; (4) that the verdict against Greene resulted from coercive pressure exerted by the trial court upon the jury under circumstances which precluded the return of a free verdict. As an additional ground the appellant corporation urges in its behalf that in nothing that Greene did or said was he the agent of Hobart Estate Company and that therefore the evidence is insufficient as a matter of law to warrant the imputation to the company of any liability for anything Greene may have said or done. The grounds so urged are fully supported by the facts and the law, and taken singly or together require a reversal of the judgments.

Except as hereinafter noted, there is no substantial dispute as to the facts of the case, and those leading up to the sale of the stock may be stated as follows: Hobart Estate Company since it was incorporated has been a family corporation. It had its origin in the fortune left by Walter S. Hobart, who died in 1892. He was survived by a son, Walter S. (plaintiff's father), and two daughters, Alice and Virginia; and the estate left by their father went to them in equal shares. In 1894 the three children formed the corporation to which they transferred the bulk of the estate left them by their father. The stock was divided equally among them, and except for two or three shares which have stood in the names of non-relatives to qualify them as directors, all of the stock has remained in the ownership of the various branches of the Hobart family. Alice Hobart became Mrs. Lester, and as stated has for many years been under guardianship proceedings as an incompetent person. Virginia Hobart became Mrs. Baldwin, and formed a stockholding company of her own. In the course of time the original shareholdings of the three children were broken up, either by transfers between them for various reasons, or by surrender to the company in payment of indebtedness to the company, so that at the time the sale transaction herein took place Mrs. Lester owned a majority of the stock. The members of the law firm of McCutchen, Olney, Mannon & Greene and their predecessors have always been the advisors of and the attorneys for the Hobart family in the management of the corporation and its affairs. For a number of years the board of directors has been composed of Greene, Farnham P. Griffiths (a member of said law firm), plaintiff's father, up to his death and since then his widow Flora Dean Hobart, T. J. Loan (Mrs. Lester's son-in-law), Mrs. Baldwin or her son; H. G. Stevenson (a non-relative and since before 1900 the secretary of the corporation); and W. W. Crocker (husband of Ruth Hobart Crocker).

Hobart, Sr., died in 1933, leaving besides his widow two daughters Ruth Hobart Crocker and Hannah Neil Prince, and a son, the plaintiff Walter S. Hobart, Jr. At the time of his father's death plaintiff was 29 or 30 years old, and was in New York. He and his father had been estranged for a considerable time, as had been the plaintiff and his sister, Ruth Hobart Crocker; and for a number of years plaintiff had been living out of California. In 1907 Hobart, Sr., created a trust of 2500 shares of the company's stock, to be divided equally among his three children at the time of his death. Plaintiff received his share of the income from the trust up to the time of his father's death and he then received unconditionally his one-third of the trust stock to-wit, 833⅓ shares. It was this stock that he sold in January, 1936. Hobart, Sr., also left a will which was admitted to probate and letters testamentary were issued to his widow and A. Crawford Greene, named therein as executors. It was a lengthy will, and thereunder plaintiff was bequeathed $100. Immediately upon the death of his father plaintiff determined to contest the will. He consulted a New York lawyer, a Mr. Steele, who wrote to California to secure information relating to the affairs of the estate; and in order to raise money to finance the contest plaintiff pledged 233 shares of his stock (which he had not yet received) to Charles Crocker. Plaintiff then came on to California, and later pledged the rest of his stock to Charles Crocker for more advances. Upon plaintiff's arrival in California he secured the services of Attorney Lachmund and those of Aureguy, who was employed by plaintiff under a contingent fee contract; but plaintiff did not file the contest to the will until June 9, 1934, which was only a day or two before the expiration of the six months period allowed by law for such proceeding. One ground of contest was that the will was the product of undue influence, and one of the charges made therein was that the executors and the legatees "over a period of years did, with intent so to do, poison the mind of said decedent" against plaintiff. In due course and before the contest was filed an inventory and appraisement was returned and filed in the matter of the estate. It showed that the principal asset was 3,289 shares of Hobart Estate Company stock, and that the state inheritance tax department had appraised the same at $40 a share. After the contest was filed the proponents of the will took the deposition of Stevenson, the company's secretary, and Hobart, Jr., the plaintiff. Attorney Lachmund was present at the taking of the Stevenson deposition and cross-examined the witness at length as to the financial affairs of the company, particularly with reference to its assets and concerning the balance sheets for the years 1932, 1933, and 1934, which were produced at the hearing. When plaintiff's deposition was about to be taken Lachmund retired from plaintiff's case and was succeeded by Attorney Harris, who was present at the taking of the plaintiff's deposition and participated therein, assisted throughout by Aureguy.

During this period also Aureguy conferred with the inheritance tax appraiser who had appraised the stock at $40 a share, for the purpose of ascertaining the basis for the appraisement; and he obtained from the appraiser such information as he had in fixing the value of the stock, which included a copy of the guardianship proceedings relating to the purchase of the 6000 shares at $40 a share by the estate of Mrs. Lester; also copies of the balance sheets and profit and loss statements of the company from 1931 to 1934, inclusive. On the balance sheet of 1934 were certain pencil notations made by Mr. Parker, one of the attorneys for the estate, bearing upon the value of the company's properties.

The taking of plaintiff's deposition extended over eight sessions, and during the intervals Harris and Aureguy had several conferences with Mannon, directed to the possibility of a settlement of the contest. Mannon's reply to these approaches was that in view of the evidence developed up to that time and of the other available material plaintiff had no contest to settle. At a later meeting it was suggested that perhaps the contest could be settled by the use of plaintiff's 833⅓ shares of stock; but all expressed the belief that since the company was a family corporation there was no general market for its stock, and it would be a difficult matter to fix its value unless a purchaser could be found. Mannon stated that he did not know what the stock was worth but that he did know that it had been appraised in the matter of the estate at $40 a share; and Harris and Aureguy remarked that they also were aware of that fact. Mannon also told them that he knew about the sale of 6,000 shares by one member of the family to Mrs. Lester for $40 a share. There were other interviews, later, in the course of one of which Aureguy and Harris proposed a settlement of the contest for $15,000 provided the stock was purchased at $40 a share, but Mannon gave no encouragement to the proposition. He told them that he had no purchaser for the stock, and that so far as the will contest was concerned he had been directed by his clients not to pay anything for the contest. He added, however, that he hoped to be able to work out some plan whereby the stock could be purchased. The result of Mannon's conversations with Harris and Aureguy was that he was to see if in any way he could make them an offer for the purchase of plaintiff's stock which plaintiff would accept and dismiss the contest. At the end of July, 1935, Mannon informed Harris and Aureguy that he was about to leave on a vacation, and that during his absence Greene would have charge of the matter, and to confer with him.

During the course of Mannon's testimony counsel for plaintiff stated that he made no claim that Mannon personally made any of the alleged representations or misrepresentations charged against him in paragraph VI of the complaint.

After Mannon left on vacation Harris and Aureguy contacted Greene and resumed the negotiations with him. All agreed that there were but four interviews with Greene. Plaintiff was not present at the first three, but attended the fourth. There is a dispute as to when this fourth interview took place; but it was not later than October, 1935. Plaintiff and Aureguy claimed that it was at that interview that

Greene made the misrepresentations and statements to plaintiff as charged in paragraph VI of the complaint. Their testimony, however, was not corroborated by that of Harris, and it was unequivocally denied by Greene. Reduced to its essentials, the testimony given by plaintiff and Aureguy was that Greene told them there could be no settlement of the will contest unless at the time of the settlement plaintiff sold his 833⅓ shares of stock; that plaintiff did not wish to sell his stock but assented to the sale when told that there was no other way of disposing of the will contest by settlement. According to their testimony Greene further stated that the stock was worth no more than $25 a share and gave his reasons therefor; and that he, Greene, was willing to pay $25,000 for settlement of the will contest, but that in order to avoid having it appear that anything was paid to settle the will contest it would be necessary that the transaction appear to be one in which the stock was sold for $55 a share. However, there was no definite agreement entered into at that time for a settlement. There were two reasons for this: first, because Greene had no purchaser at that time, and plaintiff and his advisors were so informed, as Aureguy testified. Greene indicated, according to their testimony, that he had a purchaser in mind, but declined to state who it was. Secondly, plaintiff at the time of the fourth interview could not make a sale of the stock or give good title, for all of it was pledged with Crocker and a serious dispute had arisen between them as to the amount of the indebtedness to Crocker. Crocker lived in New York, and was represented by a New York lawyer, Judge Cooper; but the matter of the adjustment of the Crocker claim was being handled locally by D. J. Murphy, vice-president of the Crocker First National Bank. Meanwhile Greene endeavored to find a purchaser for the stock. He laid the matter before Mrs. Lester's two daughters, Mrs. Loan and Mrs. Pauli, and they disapproved the purchase in behalf of the guardianship. He then sought other buyers, including the decedent's widow, Flora Dean Hobart, the president of the American Trust Company, and W. W. Crocker; and he talked with some of the directors of Hobart Estate Company, all without success. Several months intervened before, by the adjustment of the dispute with Crocker, plaintiff was in a position to make a sale and transfer of his stock, and thereupon Greene's firm was notified that plaintiff was ready to sell his stock at $55 a share and dismiss the contest. In order to obtain the approval of Judge Cooper, Attorney Harris on November 29, 1935, wrote him a letter advising him of what had been done, in which letter he stated in part: "* * * it was agreed that in consideration of our client dismissing with prejudice the pending will contest and tendering a full and complete release in and with respect to any rights and/or claimed rights in and to said estate, and in addition transferring to the nominee of the representatives of the estate eight hundred and thirty three and one-third (833⅓) shares of stock of the Hobart Estate Company standing in the name of Walter S. Hobart, Jr., the representatives of the estate would pay therefor and in consideration thereof $55.00 a share for the said eight hundred and thirty three and one-third (833⅓) shares. In short, the settlement contemplated not only a dismissal of the will contest but also a complete relinquishment of all the right, title and interest of our client in and with reference to said shares of stock." Near the end of the letter he stated: "We are fearful that if the suggestion which we have outlined is not complied with that the settlement will fall through and that the possibility of obtaining this figure for the stock will be lost."

After receiving the information that plaintiff had agreed to sell his stock at $55 a share and dismiss the contest Greene again brought the matter to the attention of Mrs. Lester's daughters, and finally, on January 10, 1936, they gave their approval to the purchase in a telegram to Greene reading as follows: "We both approve and recommend that guardianship purchase for the estate of Alice H. Lester approximately eight hundred thirty three shares of Hobart Estate Company stock from Walter S. Hobart, Junior at an approximate price of fifty-five dollars per share stop any action taken by guardian toward consummation of such stock purchase will have our full approval." Thereupon escrow papers were prepared and delivered whereunder the stock, assigned in blank, was deposited with Murphy, together with a dismissal and a retraxit of the will contest and a release of all demands. Accompanying these documents was a letter of instruction signed by plaintiff, Harris and Aureguy authorizing Murphy to turn the documents over to Greene's law firm upon the receipt from the latter of the sum of $45,833.15, and instructing Murphy to pay out of that sum $25,000 to Charles Crocker, $450 to plaintiff, and the balance amounting to $20,383.15, to Harris. In this letter of instruction to Murphy plaintiff stated: "The said certificate for 833⅓ shares I have agreed to sell to a purchaser represented by the law firm of McCutchen, Olney, Mannon & Greene, for a total of $45,833.15, representing 833⅓ shares at $55 per share." These instructions were dated and delivered to Murphy on January 14, 1936, and on the same day Attorney Harris addressed a letter to Greene's law firm reading as follows: "In accordance with our understanding for the purchase by you, or your nominee, of 833⅓ shares of the capital stock of the Hobart Estate Company, at the agreed price of $55.00 a share, together with a full and complete settlement of all of the interest of Walter S. Hobart, Jr., in the estate of his late father, I have deposited with Mr. Daniel J. Murphy, Vice President, Crocker First National Bank, this city, all of the documents which you have handed to me, properly executed, pursuant to your instructions. These papers have been deposited by me under appropriate instructions, and I trust that the only thing remaining to be done, to-wit, the payment of $45,833.15, will be made forthwith." The next day, January 15, 1936, Greene applied for and obtained an order from the superior court in the guardianship proceedings whereby he was "authorized, empowered and directed to purchase the hereinbefore described 833⅓ shares of the capital stock of Hobart Estate Company, a corporation, at a price not to exceed $55.00 per share"; and on the following day, January 16, 1936, the sale transaction was closed by delivering to Murphy a cashier's check for $45,833.15; and the stock transfer, the dismissal and the retraxit and release were delivered to Greene's law firm. The $45,833.15 was paid out by Murphy as directed by the escrow instructions; and half of the $20,383.15 received by Harris was paid by him to plaintiff. The other half was divided between Harris and Aureguy.

The elements of a cause of action for the recovery of damages for deceit are well stated in Work v. Campbell, 164 Cal. 343, 347, 128 P. 943, 945, 43 L.R.A.,N.S., 581, wherein the court said: "* * * an action for damages for deceit will lie wherever a party has made a false representation of a material fact susceptible of knowledge, knowing it to be false or not having sufficient knowledge on the subject to warrant the representation, with the intent to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived and induced to so do or refrain, to his damage." This statement of the law is substantially the same as one made by the Supreme Court of the United States in Southern Development Co. v. Silva, 125 U.S. 247, 250, 8 S.Ct. 881, 31 L.Ed. 678, 680, and quoted with approval in Colmar v. Pinckard, 3 Cal.App.2d 213, 216, 39 P.2d 262. All of the elements mentioned must be present; the absence of any one of them is fatal. Colmar v. Pinckard, supra; Hallidie v. First Federal Trust Co., 177 Cal. 600, 171 P. 431; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 137 P. 240.

As is the law generally, where the burden of proof of a fact is on the party who asserts a fact, the burden of proof of all the elements is on plaintiff. Except in cases wherein a fiduciary relationship exists, or the statute so declares, fraud is not to be presumed; it must be proved by clear and convincing evidence. Moore v. Giffen, 110 Cal.App. 659, 661, 294 P. 730; Southern Development Co. v. Silva, supra; Bryan v. Ramirez, 8 Cal. 461, 468, 68 Am.Dec. 340; People v. Swift, 96 Cal. 165, 170, 31 P. 16; Rice v. California-Western S. L. I. Co., 21 Cal.App.2d 660, 668, 70 P.2d 516. The usual rule that a party asserting a fact has the burden of proving it is fortified where fraud is charged, for not only will fraud not be presumed. but there is a presumption in favor of honesty and fair dealing which must be overcome. "The presumption is always against fraud,—a presumption approximating in strength to that of innocence of crime * * *." Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26, 29; Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114; Farmers' Auto., etc., Exch. v. Calkins, 39 Cal.App.2d 390, 393, 103 P.2d 230, 232. Because of this "strong presumption of innocence of fraud" the burden of proving his "allegations rested heavily on the plaintiff." Farmers' Auto., etc., Exch. v. Calkins, supra. A mere suspicion of fraud is not sufficient. Southern Development Co. v. Silva, supra; Moore v. Giffen, supra; Bryan v. Ramirez, supra; People v. Swift, supra; Rice v. California-Western S. L. I. Co., supra; Everett v. Standard Acc. Ins. Co., 45 Cal.App. 332, 187 P. 996, quoted in Farmers' Auto., etc., Exch. v. Calkins, supra; Truett v. Onderdonk, supra.

Furthermore, before there can be actionable fraud, there must be a statement of a material fact susceptible of knowledge. The statement of an opinion will not do. This is particularly true where the basis of the opinion is disclosed (Gleason v. McPherson, 175 Cal. 594, 166 P. 332; Penfield v. Bennett Film Laboratories, 4 Cal. App.2d 306, 40 P.2d 587; Etienne v. Kendall, 202 Cal. 251, 254, 259 P. 752), or where both parties are in a position to determine the fact (Pacific Portland Cement Co. v. Placer County Land Co., 187 Cal. 175, 180, 201 P. 126; Estate of Johnson, 134 Cal. 662, 66 P. 847), the party claimed to have been defrauded has made some investigation and has some knowledge (Hedden v. Waldeck, supra), and both parties are in possession of data which, if properly used, would lead to the forming of an opinion (Rheingans v. Smith, 161 Cal. 362, 119 P. 494, Ann.Cas.1913B, 1140; Henry v. Continental, etc., Ass'n, 156 Cal. 667, 105 P. 960; Lloyd v. Kehl, 132 Cal. 107, 112, 64 P. 125).

It is true that a statement of value may be made in such circumstances that it is a statement of fact, or for purposes of claims of fraud or deceit may be treated as a statement of fact. But when the conditions above referred to have been shown to exist, statements of financial condition (Filice & Perrelli C. Co. v. Walton, 95 Cal.App. 7, 271 P. 1096) and statements of value are statements of opinion only (Alberda v. Smith, 2 Cal.App.2d 74, 79, 37 P.2d 509; Lion v. McClory, 106 Cal. 623, 627, 40 P. 12; Gleason v. McPherson, supra; Henry v. Continental, etc., Ass'n, supra; Craig v. Wade, 159 Cal. 172, 112 P. 891; Wegerer v. Jordan, 10 Cal.App. 362, 101 P. 1066; Meeker v. Cross, 59 Cal.App. 512, 211 P. 229; Southern Development Co. v. Silva, supra.

Moreover, a statement, to be actionable, must appear to have been relied upon in fact. Hallidie v. First Federal Trust Co., supra; Rheingans v. Smith, supra; Yates v. Eudemiller, 213 Cal. 26, 29, 1 P.2d 434. There cannot be any reliance where the party claimed to have been defrauded is not ignorant of the truth. Spencer v. Anderson, 193 Cal. 1, 6, 222 P. 355, 35 A. L.R. 822; Maxon-Nowlin Co. v. Norswing, supra; Estate of Ricks, 160 Cal. 450, 461, 117 P. 532. But something less than actual knowledge of the truth will defeat a claim of actionable deceit. The reliance must be by a person who is "acting with reasonable prudence" (Work v. Campbell, supra), and the law will not assist one simply because he said he believes —he must prove that he "reasonably believed" (Southern Development Co. v. Silva, supra; Farrar v. Churchill, 135 U.S. 609, 10 S.Ct. 771, 34 L.Ed. 246; Gratz v. Schuler, 25 Cal.App. 117, 120, 142 P. 899. As said in Elko Mfg. Co. v. Brinkmeyer, 216 Cal. 658, 666, 15 P.2d 751, 754, "It is elementary, of course, that even if false representations are made, no cause of action arises unless there is reasonable reliance placed thereon by the other contracting parties." Where a statement, as a statement of value, is made, which may be a matter of fact or a matter of opinion, it cannot be said that there is any reliance, as the law uses that word, where the party claimed to have been defrauded has been given means of ascertaining the truth and has actually undertaken some investigation. Alberda v. Smith, supra; Hayward v. Widmann, 133 Cal.App. 184, 189, 23 P.2d 762; Tucker v. Beneke, 180 Cal. 588, 593, 182 P. 299; Colton v. Stanford, 82 Cal. 351, 23 P. 16, 16 Am.St.Rep. 137; Carpenter v. Hamilton, 18 Cal.App.2d 69, 71, 62 P.2d 1397; Gleason v. McPherson, supra; Lee v. McClelland, 120 Cal. 147, 52 P. 300; Southern Development Co. v. Silva, supra; Gratz v. Schuler, supra; Farrar v. Churchill, supra; Slaughter's Administrator v. Gerson, 13 Wall. 379, 80 U.S. 379, 20 L.Ed. 627, 628. The rule is thus aptly stated in Farrar v. Churchill, supra [135 U.S. 609, 10 S.Ct. 773, 34 L.Ed. 246]: "The representation must be in respect to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true. * * * If the purchaser investigates for himself, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations." In Gratz v. Schuler, supra [25 Cal.App. 117, 142 P. 900], it was said that in addition to other elements, the plaintiff must show that he was deceived "while acting with reasonable prudence." And in Southern Development Co. v. Silva, supra [125 U.S. 247, 8 S.Ct. 887, 31 L.Ed. 678], the court said: "Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations."

The first contention made by appellants in support of the assignment of insufficiency of the evidence is that the asserted representations, assuming them to have been made, were as a matter of law mere expressions of opinion made and understood as such and were not representations of fact; and accordingly that they are not actionable. This contention must be sustained.

As above pointed out, the complaint charges the making of six representations; but as will be noted, the essence of plaintiff's cause of action is representation (3) —that he was induced to sell his stock for $25 a share by the false representation that it was worth only $25 a share. All of the other representations are incidental to the one just stated, and serve merely to bolster and support it. The first and second—that Hobart Estate Company was in bad financial condition and that the value of its assets had declined so as to endanger the safety of its stock—were in their very nature expressions of opinion; and this was so obvious that the trial court instructed the jury that as a matter of law each of those statements, if made, would be a mere expression of opinion and not a statement of fact. The fifth representation—that upon a dissolution a division of the assets would not net more than $25 a share—like the first two representations, is a statement of opinion and not of fact. It is nothing more than an estimate, or rather a prophecy of what would occur in a hypothetical case of a dissolution of the company. All the elements of that prophecy, the possibility of selling the many and heterogeneous assets of the corporation, the time that might be required to effect such sales, the prices that might be realized, and the expense of such an involved operation and of conducting the corporation until its conclusion, are necessarily matters of conjecture and uncertainty; and fraud cannot be predicated on statements as to future events. 51 A.L.R. 49 et seq., annotation, citing California cases at 50-51. In other words, a charge of fraud cannot be based on a statement that property will yield a good return, or can be sold at a profit at some time in the future. Lee v. McClelland, supra; Gleason v. McPherson, supra; Wegerer v. Jordan, supra; Tahoe Pines Co. v. Newman, 59 Cal.App. 186, 210 P. 445; Williams v. Lowenthal, 124 Cal.App. 179, 12 P.2d 75.

The sixth representation, considered in the light of the testimony given by plaintiff and Aureguy, was no different from the fifth. According to their testimony Greene stated that the "book value" of the stock was $25 a share; that, in response to an inquiry made by them as to the meaning of the term, Greene went on to define it; that as they understood him, it meant the amount that would be left over for distribution to each stockholder after all the assets were sold, the debts paid, and the balance divided among the shareholders. Greene denied having so defined the term; but accepting as true the testimony given by plaintiff and Aureguy, Greene, in what he said about book value, stated the same thing as charged in the fifth representation—that upon a dissolution a division of the assets would net the stockholders not more than $25 a share. Apparently plaintiff concedes appellants' claim that the fifth and sixth representations were mere expressions of opinion, for nowhere in plaintiff's brief does he dispute the claim.

As to the fourth representation—that there was no market for the stock—the evidence affirmatively shows that the representation was true. Briefly stated, the essential undisputed facts are these: Hobart Estate Company was a closely held family corporation, and the only transfers of its stock that took place during the preceding 20 years were inter-family transactions. Back in 1915 plaintiff's father surrendered 600 shares to Mrs. Lester in satisfaction of an indebtedness; that same year Mrs. Baldwin and plaintiff's father surrendered other shares to the corporation itself in payment of an indebtedness due the corporation; and the only other transfer during that period was the sale by plaintiff's father to Mrs. Lester of 6,000 shares at $40 a share, which stock had been theretofore pledged with her as security for loans made to him. There never was any trading of the stock. No evidence was offered to the contrary, nor was any attempt made to prove there was a market for the stock. In the petition filed by Greene as guardian for authority to purchase plaintiff's stock, he stated that he was informed that if the stock should not be purchased by petitioner "there are other persons who are now ready and willing to purchase said shares at said price." But this statement was made in January, 1936, after Greene had made efforts to interest prospective purchasers, and not in the summer of 1935, at the time of the only meeting between Greene and plaintiff, and when Greene had no purchaser; and on cross-examination by plaintiff's counsel Greene explained that the statement in his petition was made on the basis of a discussion with W. W. Crocker in January, 1936, as the result of which Greene felt assured that in any event the Crocker family would buy the stock, if it were not purchased by the Lesters. Under these circumstances it cannot be said that the statement in Greene's petition serves as evidence showing there was a "market" for the stock. If any such evidence was available it is reasonable to assume that plaintiff would have produced it, in support of his case.

The remaining question, under this heading, is whether the third representation—that the actual value of the stock did not exceed $25 a share—was a representation of fact rather than one of opinion. There is little if any dispute as to the law. Generally speaking, a statement of the value of corporate stock or other property is a statement of opinion and not of fact (Wells v. Lloyd, 6 Cal.2d 70, 56 P.2d 517; Gleason v. McPherson, supra; Craig v. Wade, supra; Wegerer v. Jordan, supra; Meeker v. Cross, supra), but the rule is not absolute, and under certain circumstances a statement of the value of property may be one of fact. One of the factors bearing on the result is the existence of a fiduciary relationship between the parties. This factor will be discussed later on. The other factor is whether the alleged representation of value was made as one of fact, or was expressed by the defendant and understood by the plaintiff to be one of opinion merely. The latter is not actionable. Southern Development Co. v. Silva, supra; Lee v. McClelland, supra. Here, according to the testimony of both Aureguy and plaintiff, the statement made by Greene as to the value of the stock was definitely qualified by other statements made by him at the same interview, that there was no data upon which the value of the stock could be determined with anything approaching accuracy, and that he was giving only his opinion. As shown by their testimony, some of the qualifying statements made by Greene were: that "they had no way of determining values except by actual sales"; "that in order to arrive at the value of the stock in this corporation it would be necessary to sell all of the assets"; also that Greene stated in substance that the only figure they were able to furnish in respect to the value of the stock in the absence of a piece by piece appraisal of the physical assets of the corporation was a family sale that had been made by plaintiff's father at $40 a share; that they had no way of determining values except by actual sales. Aureguy testified that at one time he asked Greene the direct question: "What is the stock worth?" and Greene replied: "We have no way of definitely knowing." Aureguy further testified that he asked Greene whether they could "approach the value of the stock from the element of interest" and that Greene replied, "That might be one way of arriving at it"; that thereupon Aureguy requested Greene to furnish him with the amount of the dividends declared that year, and after Aureguy had made certain computations therefrom he, Aureguy, made "the suggestion" that at 5% the stock would be worth between $24 and $25 a share, and that Greene said, "That is precisely the value of the stock, Mr. Aureguy, $25 a share." However, the record shows that immediately preceding this statement Greene had stated unequivocally in answer to Aureguy's direct question that he had no way of definitely knowing what the stock was worth, and that immediately afterwards Greene stated: "When you take into consideration that we are in a depression and that this is a family owned closely held corporation, of which the stock is not generally dealt in, it is worth just what any person will pay for it or someone—or rather, whatever Mr. Hobart can get for it" and "that the only way we can arrive at the value of a corporation of this character would be to sell the assets and divide the money." At no time did Greene profess to have any expert knowledge concerning the value of the stock; nor is it charged that he made any careless or reckless statements concerning it.

Furthermore, the record shows that the assets of the corporation consisted of a large number of parcels of real property. They included large holdings in New York City, various parcels of business property in San Francisco and extensive interests in mining properties in California, some of which had been profitable, and others failures, and some were still undeveloped; also a small power and light property on the Mother Lode, an outgrowth of the Utica mine. They included also large tracts of timber land in Northern California on which lumbering operations were conducted and some 20,000 acres of land fronting on Lake Tahoe, which had been cut over for lumber, and such value as it had lay principally in the adaptability of the lake frontage for resort purposes or for subdivision for homes.

Manifestly, therefore, in view of the character of the company's assets, it was impossible for anyone, except by way of mere expression of opinion, to attempt to fix or determine, with any degree of accuracy, the value of the stock of the corporation at any given time. All of this was known to plaintiff and Aureguy at the time they claim that Greene fixed the value of the stock at not more than $25 a share. In the foregoing state of the evidence, which is undisputed, and which for the most part was produced in behalf of plaintiff, there is no legal or factual ground upon which it may be held that whatever Greene may have said as to the value of the stock was not mere expression of opinion.

Plaintiff contends, however, that even though the statements attributed to Greene were mere expressions of opinion, a fiduciary relationship existed between Greene and plaintiff, and that therefore under the law governing situations arising out of such relationship the statements of opinion became representations of fact. All the circumstances in the case demonstrate to a certainty that no such relationship existed. The undisputed facts show exactly the opposite—that in all of their dealings their relationships were hostile and antagonistic. Briefly stated the facts are these: Plaintiff and Greene met but the one time, and on that occasion they met as strangers and were introduced to each other as such. The purpose of the conference was to discuss the possibility of the purchase of plaintiff's stock and the dismissal of the will contest. They met as adversaries—Greene representing the proponents of the will, and plaintiff as the contestant of the will. Moreover, at this conference plaintiff was being represented by his attorney and his investigator, and plaintiff was acting pursuant to their advice and counsel. In that contest plaintiff had directly charged Greene personally with the grossest sort of fraud—with having poisoned the mind of plaintiff's father against plaintiff, so as to disinherit him. Furthermore, in the sale transaction their positions were directly opposite to each other. Plaintiff was the owner and seller of the stock, and was being represented by his attorney and his investigator; whereas Greene was bargaining for an undisclosed purchaser and was in no manner acting in behalf of plaintiff. To claim that in such circumstances and in such an atmosphere the relationship between plaintiff and Greene was one of "personal confidence and trust" is plainly contrary to the undisputed fact.

The cases cited by plaintiff (Edmonds v. H. W. Wilcox, 178 Cal. 222, 172 P. 1101; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125; Palm v. Smither, 52 Cal.App.2d 500, 126 P.2d 428; and Seeger v. Odell, 18 Cal.2d 409, 115 P.2d 977, 136 A.L.R. 1291) do not purport to deal with the essential requirements of a fiduciary relationship. They merely hold that where such relationship is shown to exist a statement of what would ordinarily be one of opinion may be treated as a statement of fact, a legal proposition that appellants do not dispute.

It is true that plaintiff alleged in his complaint and testified that during this particular interview Greene stated and represented to plaintiff that he "desired to assist and befriend plaintiff and to protect his interest and to take no advantage of him." But this comes far from establishing a fiduciary relationship, for it is well settled that evidence of friendly relations or even intimacy of relationship alone does not constitute a fiduciary relationship. As said in Jackson v. Gorham, 98 Cal. App. 112, 116, 276 P. 391, 393: "Friendly relations or even intimacy of relationship presents an entirely different question from what is understood as a confidential relation in law. One may have confidence in another's integrity and honesty of purpose, and likewise believe that he will live up to any of his contracts, without having any confidential relations with such person that would void any agreements or transactions entered into between them, on the theory of constructive fraud or undue influence. * * * There must be something further than mere confidence in another's honesty and integrity to sustain the presumption of constructive fraud." Upon allegations of fact much stronger than any shown by the evidence in this case the court in Robbins v. Law, 48 Cal. App. 555, 192 P. 118, held that as a matter of law no fiduciary relationship existed.

Plaintiff further contends, however, that the mere fact that he was a stockholder and Greene was a director and the president of Hobart Estate Company established a fiduciary relationship. The following cases hold in conformity with the majority rule prevailing in other jurisdictions that a corporation director and president owes no fiduciary obligation or duty to the stockholders in respect to their individual holdings of stock. Ryder v. Bamberger, 172 Cal. 791, 158 P. 753; Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42. Neither of the two later cases cited by plaintiff (American Trust Company v. California, etc., Ins. Co., 15 Cal.2d 42, 98 P.2d 497, and Leland Stanford Jr. University v. National Supply Co., D.C., 46 F.Supp. 389) overrule the two earlier cases nor repudiate the majority rule adhered to therein. In the American Trust Company case the court declared that the question is still open in this state as to whether the majority rule should be followed; but it went on to point out, as appellants here contend, that there can be no fiduciary relationship where there exists a condition of hostility and if the dealings are at arm's length; and it expressly differentiated the case of Bacon v. Soule, 19 Cal.App. 428, 126 P. 384, upon this very ground. The Leland Stanford Jr. University case was a decision in the District Court of the United States. That decision did not turn on the point for which it is cited by plaintiff, nor is there anything stated therein, much less in the decision of the Circuit Court of Appeals reversing it (9 Cir., 134 F. 2d 689) that suggests that there can be a fiduciary or confidential relationship between known adversaries, such as we have here; nor is there any warrant for the suggestion that it was there claimed that such a relationship could exist under those conditions.

Plaintiff's concept of a fiduciary relationship would seem to be that if one of two parties to a transaction is a stockholder and the other is an officer of a corporation, the relation between them is one of trust and confidence, even though they are in fact adversaries and dealing at arm's length in the particular transaction. This unrealistic concept finds no support in the law or in the nature of human conduct. More specifically, it has been expressly held, as in the very nature of things must be the case, that if in fact the relationship is one of adversaries dealing at arm's length, especially where the parties are essentially hostile, there can be no fiduciary relationship; and that is true no matter what the nominal relationship may be. In so holding the court in Robbins v. Law, supra [48 Cal.App. 555, 192 P. 120], said: "The most liberal definition of confidential relations could not include the relation between known enemies. * * * There is no confidential relation between hostile parties." See also Bacon v. Soule, supra. Moreover, even under the minority rule referred to in the American Trust Company case there could be no fiduciary relationship in a situation where as in this case the relationship between the parties is openly hostile. Bacon v. Soule, supra; Robbins v. Law, supra.

Another essential element in an action for fraud, where a fiduciary relationship does not exist, is that the plaintiff relied upon the alleged false representations. The many cases so holding are uniform, and several of them are hereinabove cited. The substance of the doctrine is this: that one who has made an actual investigation of the matters involved in the representation and has been given full and fair facilities for doing so, and who acts on his own judgment or knowledge, or in pursuance of independent counsel and advice, cannot be heard to complain. Hayward v. Widmann, 133 Cal.App. 184, 23 P.2d 762 and cases cited therein. In applying the foregoing doctrine the court in Carpenter v. Hamilton, supra [18 Cal.App.2d 69, 62 P.2d 1399], said: "Upon the question of knowledge it is held, generally, that where one undertakes to investigate the property involved or the truth of the representations concerning it and proceeds with the investigation without hindrance, it will be considered that he went far enough with it to be satisfied with what he learned. Mr. Pomeroy says, in speaking of one who has undertaken to make an inspection of the property, 'The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled.' 2 Pomeroy's Equity Jurisprudence, (3d. Ed.), § 393. 'One ground of this latter branch of the rule is the practical impossibility in any judicial proceeding of ascertaining exactly how much knowledge the party obtained by his inquiry; and the opportunity which a contrary rule would give to a party of repudiating an agreement or other transaction fairly entered into, with which he had become dissatisfied.' Id. If it fairly appears from the evidence that the buyer undertook to investigate for himself the matters as to which representations had been made, he cannot be allowed to later claim that he acted upon the representations, even though he voluntarily abandoned his investigation before it was completed."

Moreover, in a case of this kind a plaintiff is of course charged with the knowledge of facts discovered or information obtained by his agents or attorneys. 1 Cal. Jur. p. 853, 854. Consequently plaintiff was charged with full knowledge of all information gained by Attorneys Lachmund and Harris and his investigator Aureguy bearing upon the financial condition of the company or the value of its stock. Plaintiff makes no charge of concealment or withholding. Quite to the contrary, Aureguy himself testified that Greene was especially frank in directing attention to the difficulties inherent in arriving at the value of the stock for the purpose of sale; and the facts of record establish without dispute that prior to the interview between Greene and plaintiff at which it is claimed the representations were made, plaintiff's attorneys and his investigator as well as himself made an investigation of the financial condition of the company and the value of its stock, and that as a result of such investigation plaintiff believed that the stock was reasonably worth upwards of $100 a share. In this respect the record shows the following: At the time of the taking of the Stevenson deposition in April, 1935, Lachmund already had in his possession the balance sheet of the company for 1932 and the 1933 and 1934 balance sheets were produced for examination at the hearing and examined by Lachmund. He also went into details in examining Stevenson as to the assets shown on the balance sheets, and brought out the information that the figures entered opposite the various items represented "book value" only, and that these figures were greatly in excess of the current values of the properties. As the result of Lachmund's extensive cross-examination of Stevenson in connection with the statements there produced, Lachmund ascertained among other things that the assets of the company consisted of, what the liabilities were, what the outstanding stock was, and what its book value was; and admittedly the book value as shown by the balance sheets was upwards of $100.

Furthermore, long before plaintiff filed his contest to the will, he himself had acquired considerable knowledge about the affairs of the company, its assets and its stock, for up to the time of his father's death he had an interest in the trust and some years before his father's death he had been shown an annual balance sheet and financial statement of the company by his aunt, Mrs. Baldwin, and had discussed with her matters connected with the estate. He knew also of the sale of 6,000 shares of stock by his father in 1933 for $40 a share, and he also knew of the state appraisement of the stock in his father's estate at $40 a share. According to his testimony, in 1933 and 1934 he believed the stock was worth upwards of $100 a share but that during a conversation with Charles Crocker he was told that his, plaintiff's, stock was worth not more than $20,000 (which is equivalent to $24 a share); that he was "rather amazed" at the statement and did not believe it; and when in 1935 he claimed he was told by Greene that the stock was worth no more than $25 a share he was again "amazed" because from the information he had previously obtained he believed the stock was worth upwards of $100 a share. Furthermore, in his contest to the will, he alleged that his father's estate which had been appraised at less than $200,000 was of the value in excess of $2,000,000, which would fix the value of the stock at between $100 and $150 a share. The record further shows that as soon as Aureguy was employed by plaintiff in the summer of 1934 he began and afterwards pursued an investigation of the financial condition of the company and necessarily of the value of its stock, including a conference with the tax appraiser, in order to arrive at a basis for a settlement of the contest; and finally the record shows that plaintiff and Greene were dealing at arm's length and that plaintiff throughout the negotiations had the independent counsel and advice of competent counsel and an experienced investigator. In these circumstances and under the legal principles above set forth plaintiff cannot be heard to complain that in making the sale he was relying upon the representations made by Greene at this single interview. Colton v. Stanford, supra; Blumenthal v. Greenberg, 130 Cal. 384, 62 P. 599; Carpenter v. Hamilton, supra.

The second major ground upon which the judgments must be reversed is that the action is barred by the three-year statute of limitations. Subd. 4, Sec. 338, Code Civ. Proc.

The defense of the statute of limitations is not a technical one, but is a substantial and meritorious defense that is favored in the law. United States v. Oregon Lumber Co., 260 U.S. 290, 43 S.Ct. 100, 67 L.Ed. 261. In so declaring, the court in Wood v. Carpenter, 101 U.S. 135, 139, 25 L.Ed. 807, said: "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar." This language has frequently been quoted by our Supreme Court with approval. See Shain v. Sresovich, 104 Cal. 402, 38 P. 51; Nichols v. Randall, 136 Cal. 426, 69 P. 26; Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 106 P. 715, 21 Ann.Cas. 1279.

In the present case it is alleged that the fraud was committed in 1935 or at the latest in 1936, and the action was not filed until June, 1941, five years later; consequently, prima facie, the action was barred by the three-year Code provision above cited. The right of a party to bring an action for fraud after the expiration of three years from the time the fraud is committed is an exception to the general statute on the subject, and cannot be asserted unless he brings himself within the terms of the exception. The burden is on him to show that the bar of the statute has not fallen, and as an essential element of his cause of action he must affirmatively both plead and prove that he did not have notice of and did not discover the facts constituting the fraud until within three years before filing suit. Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809, 810. In the case just cited, which is considered a leading case on the subject, it is said: "As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them,—as that they were done in secret or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. These principles are so fully recognized that mere reference to some of the cases in which they have been enforced will be sufficient. Martin v. Smith, Fed.Cas. 9,164, 1 Dill. 85; Wood v. Carpenter, 101 U.S. 135 [25 L.Ed. 807]; Hecht v. Slaney, 72 Cal. 363, 14 P. 88; Moore v. Boyd, 74 Cal. 167, 15 P. 670; Lataillade v. Orena, 91 Cal. 565, 27 P. 924 [25 Am.St.Rep. 219]." One of the supporting cases therein cited is Wood v. Carpenter, supra, and the court there said: "In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.' * * * A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence."

Moreover, it is well settled that absence from the state is no excuse for non-investigation or non-discovery of the facts (Phelps v. Grady, 168 Cal. 73, 141 P. 926; Greenberg v. DuBain Realty Corp., 27 Cal. App.2d 111, 80 P.2d 537); nor does absence from the state toll the statute (Cvecich v. Giardino, 37 Cal.App.2d 394, 99 P.2d 573).

Applying the foregoing tests to the present case, it is plain that for three reasons plaintiff has failed to meet the legal requirements to avoid the statute of limitations: first, because he has neither pleaded nor proved facts sufficient to show that he did not discover the alleged fraud until within three years of filing suit; secondly, the undisputed facts show that plaintiff had knowledge or was on notice of facts relating to the alleged fraud long prior to the three years before the action was brought; and third, there was no showing whatever that the facts he claimed to have discovered in 1941 shortly before he filed suit were any different from those of which he had notice or knowledge at the time of the consummation of the sale in January, 1936.

As to the matter of pleading the discovery of the alleged fraud in 1941, the complaint as filed was obviously legally insufficient in its statement of facts, for during the trial and after the question of its sufficiency had been pointed out by appellants, plaintiff's counsel asked for and over the objection of appellants was granted leave to amend paragraph XII "to conform to the proofs." The substance of the paragraph as amended was that plaintiff went to Europe in 1936 and did not return to New York until the fall of 1940; that in February or March of 1941 he "had a conversation with a mutual friend of plaintiff and said Charles Crocker in the City of New York, in which said mutual friend stated" that after plaintiff left for Europe Crocker had stated that in the settlement of the will contest the estate's attorneys, Greene, Crocker and Crocker's attorney "had gotten together and given plaintiff a 'fearful trimming'"; that as part of the settlement he had sold his stock for $25 a share "when its actual value was at least $120 per share"; that thereupon plaintiff proceeded immediately to San Francisco, arriving in April, 1941, and consulted Aureguy and Attorney Harris, but the latter was about to go on the municipal bench so plaintiff selected his present attorney, who stated he would have an investigation made; that in May, 1941, said attorney "informed him that he had procured information that the Hobart Estate Company was and apparently had been for several years past in excellent financial conditions and owned numerous valuable properties which were unencumbered * * *." The foregoing allegations are similar to those made in Prentiss v. McWhirter, 9 Cir., 63 F.2d 712, 714, and it was there held that they were insufficient, the court saying in part: "It will be observed that the plaintiff does not state what facts were discovered by the 'audit' of the books of the corporation. There is no allegation which purports to show any reason why the same facts could not have been discovered at any time by the plaintiff by the examination of the books of the corporation."

Even assuming, however, that the allegations of paragraph XII of the complaint as amended may be deemed sufficient, there was no proof in the record to which the amendment conformed, and the evidence thereafter offered by plaintiff in this respect not only failed to support the allegations, but failed also to meet the requirements of the legal rules above referred to. At no time did plaintiff or anybody else testify that anyone had ever told plaintiff that Crocker had made any statement of any kind, much less that he had ever said to anyone, as alleged, that he and his attorney and Greene "had gotten together and given plaintiff a 'fearful trimming.'" All that plaintiff testified to was that in January or February, 1941, he "received some information in New York, of some type, or suggestion"; but what the information was or by whom the suggestion was made he did not indicate; the name of the alleged informant was not disclosed, nor were any of the attendant circumstances revealed. He also testified that after he arrived in San Francisco he received "some information" and that this information was "exceedingly at variance" with the statements made to him by Greene; but at no point was he asked by his counsel nor did he testify what facts were discovered when he came to California or what the circumstances were under which those facts were discovered or from whom they were elicited or why those facts could not with reasonable diligence have been discovered earlier. He merely stated that he was then informed as to some of the holdings of the company, the values thereof, and whether they were encumbered. In short, what facts were discovered were never revealed. The alleged discovery therefore has no factual quality, for unless facts are produced, it would be impossible to ascertain whether there was in truth a discovery within the meaning of the rules which a plaintiff is required to observe to bring himself within the statutory exception. Moreover, without a disclosure of the facts alleged to have been newly discovered, it would be impossible to determine whether those facts were within the prior knowledge of the plaintiff, his counsel or his investigator. As said in the case of Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268, 269, in quoting from Wood v. Carpenter, supra: " 'If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.' "

Plaintiff seeks to excuse the absence of evidence respecting discovery upon the ground that he was prevented from introducing it by objections raised by appellants. But the record falls far short of supporting such claim. Prior to the granting of the nonsuit as to Charles Crocker, plaintiff's counsel asked plaintiff this question: "I want you to tell us now, briefly, what is the first information you received that the stock of the Hobart Estate Company was worth more than $25 a share?" Crocker was represented by separate counsel, and he objected to the question on several grounds, among them being that it called for hearsay evidence. After some discussion the court inquired of counsel for appellants if they joined in the objection, and the record shows positively that they did not do so. They did object to the question, but only upon the ground "that the time, place and person or persons present does not appear yet," and although the court expressed the view that the objection was good, it made no ruling thereon. Thereupon counsel for plaintiff abandoned the question and this entire line of examination. Evidently for the purposes of the record the trial court inquired, "You have abandoned the question to which Mr. Roche [counsel for Charles Crocker] objected?" to which plaintiff's counsel replied, "Yes, Your Honor, I think it is a little dangerous. I don't want to fall into error on it." Counsel for appellants then emphasized the inadequacy of the evidence. but plaintiff's counsel stated in effect that he was satisfied with the record as it stood.

Secondly, the more important reason that the action is barred by the statute of limitations is that the undisputed facts show that long prior to the three-year period before plaintiff brought his action he had ample notice or knowledge of the facts which he now claims were discovered only shortly before the action was filed.

In this connection it must be borne in mind that plaintiff's cause of action is based solely upon the claim that in 1936 he was induced to sell his stock by the representation that it was worth not more than $25 a share, and that he discovered for the first time in 1941 that the representation was false. If, therefore, the evidence demonstrates that prior to the three years before he brought his action he had notice or information of circumstances which would put him on inquiry and which if followed would lead to knowledge, or if facts were presumptively within his knowledge, that the stock was worth much more than $25 a share, his action is barred by the statute. Lady Washington C. Co. v. Wood, supra. Furthermore, if the evidence demonstrates that within that period of time the means of discovery of the alleged false statement was within his power and he failed to use diligence to detect it, his action is likewise barred by the statute. Wood v. Carpenter, supra; Vertex Investment Co. v. Schwabacher, 57 Cal.App.2d 406, 134 P.2d 891.

Turning to the record, it discloses the following undisputed facts: (1) In 1933 and 1934 when plaintiff pledged his stock with Charles Crocker the latter told him, so plaintiff testified, that his stock was not worth more than $20,000, which would be approximately $25 a share, and that plaintiff's reaction was, to use his own words: "I was rather amazed at that because I had always thought that the stock was worth somewhere around a hundred a share." (2) Obviously disbelieving Crocker's statement, plaintiff in February, 1934, sent Greene a telegram reading: "Kindly send air mail all documents concerning last financial status of Hobart Estate Company also desire to know roughly market value of stock * * *." In reply Greene stated that the 1933 annual report had not yet been prepared, so he sent plaintiff the report for 1932, saying that the figures were book figures, and that when the 1933 report was completed a copy of it would be forwarded to him; and in reply to plaintiff's inquiry as to the value of the stock Greene said: "I know of no recent sales of the stock and therefore have no method of determining what its market value might be." (3) Some four months later, in the will contest, plaintiff alleged that although his father's estate had been inventoried at $200,000, it was of a value in excess of $2,000,000; and he testified that this allegation was based on the assumption by him that the stock was worth from $100 to $150 a share. (4) Following the filing of the contest Stevenson's deposition was taken and Lachmund was present representing plaintiff; and he conducted an extensive cross-examination as to the financial condition and affairs of the company. He went into the book value of its properties in 1932, as well as the company's annual reports for 1933 and 1934. Many of the company's properties were specifically mentioned, and there was much discussion as to the value of those properties. Furthermore Lachmund had already obtained possession of a copy of the company's balance sheet for 1932, and he cross-examined Stevenson about the figures displayed thereon. (5) Immediately upon the death of plaintiff's father plaintiff employed his professional investigator, Aureguy, on a percentage basis, and Aureguy took the leading part in making the investigation of the financial condition and affairs of the company and the value of its stock in order to arrive at a basis of settlement of the will contest. To that end he conferred with the inheritance tax appraiser and secured from him the information upon which the appraisement of $40 a share was made. It included the sale of 6,000 shares of stock to Mrs. Lester at $40 a share; copies of the balance sheets and profit and loss statements of the company for the years 1931, 1932, 1933 and 1934, on one of which (the 1935 balance sheet) were pencil notations of one of the attorneys for the executors bearing on the value of the company's properties. Aureguy also obtained from the inheritance tax appraiser such information as had been obtained by the appraiser in making his inquiries and investigations of the value of the stock. (6) Plaintiff and Aureguy both knew that the stock had been appraised at $40. All of this took place before the interview with Greene. (7) When Greene is said to have told plaintiff that the stock was worth only $25 a share plaintiff admitted that he was still "rather amazed" and he challenged the figure on the basis of the apraisement of $40 a share.

In the light of the foregoing undisputed facts it is manifest that if as plaintiff claims Greene did represent that the stock was worth not more than $25 a share, plaintiff was on inquiry, if in fact he did not have actual knowledge, as to the material facts concerning the actual value of the stock; and therefore, under the rules laid down by the authorities above cited, his cause of action is barred, because admittedly he made no effort whatever for nearly five and a half years thereafter to verify the belief he entertained in 1936 that the stock was worth much more than $25 a share. To repeat what was said in Wood v. Carpenter, supra, "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. * * * There must be reasonable diligence * * *." See also Phelps v. Grady, supra, wherein the facts are strikingly parallel with those here presented.

Finally, there is no evidence whatever showing that the facts plaintiff and his present attorney claimed to have discovered in 1941 were not the same facts that plaintiff either knew or was charged with having known of in 1936. No claim is made of concealment or withholding of information on the part of Greene; and for all the record shows, plaintiff and his former counsel and his investigator had before them in 1936 the same balance sheets, annual business reports, and all the information and facts which he and his present attorney claimed to have "discovered" in 1941. In other words, there is no claim that in 1941 they received information respecting earnings, dividends, stock transactions, or stock appraisals, which were not fully disclosed to plaintiff and his attorneys and his investigator prior to the consummation of the sale in 1936. In short, if plaintiff or his present attorney acquired knowledge of any facts bearing on the 1936 value of the stock which plaintiff did not have in 1936, the record is barren of what those facts may have been. For the reasons stated, there is no ground upon which plaintiff may escape the application of the statute of limitations.

Plaintiff in support of the position taken by him on the issue of diligence has quoted extensively from the opinions of a number of cases, in most instances without setting out the facts with reference to which the quoted language was used. The facts of a case, however, as the courts have frequently said are often of controlling importance; and stated briefly, the factual situations which differentiate those cases from the present one are these: Each of the following was based on the actual existence of a fiduciary relationship: Knapp v. Knapp, 15 Cal.2d 237, 100 P.2d 759; Laraway v. First National Bank of La Verne, 39 Cal.App.2d 718, 104 P.2d 95. In the following group there was not only a fiduciary relationship but they were cases of concealment: Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383; Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219. In Seeger v. Odell, supra, there was an absence of any suspicious circumstances to put the plaintiff on notice that the representations relied upon were not true; and the language quoted from Phelps v. Grady, supra, was used hypothetically to illustrate a concealed fraud; whereas in the present case there was no claim made of concealment. Nor is there any similarity whatever between the facts of Teague v. Hall, 171 Cal. 668, 154 P. 851, and those of the present case. There no inquiry or investigation of any kind was made by the aggrieved party prior to the consummation of the sale; whereas here the inquiries and investigation extended over a period of several months prior to the sale, and they were conducted not only by plaintiff himself, but by his professional investigator and two attorneys. The remaining case, LeSage v. Title Guarantee & Trust Co., 12 Cal.2d 531, 86 P.2d 115, is not at all in point.

Both appellants challenge the correctness of many instructions, and doubtless several so challenged are subject to the criticisms directed against them. But in view of the conclusions reached on the two determinative issues above mentioned, it will be necessary to notice only two of those challenged, both of which relate to the same subject matter, and the giving of which doubtless constituted prejudicial error. The instructions were as follows: "Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, *the knowledge of the receiving party concerning the real facts,* which shall prevent his relying on and being misled by it, *must be clearly and conclusively established by the evidence.*" "Therefore, if you believe from the evidence that the defendant Greene did in fact make representations calculated to deceive the plaintiff and to induce him to part with his stock for less than its value, then he cannot excuse the deceit by showing that the plaintiff had opportunity to examine or sources of information which would have disclosed the true facts and the falsity of the representations, nor can he excuse himself by saying that the plaintiff had constructive notice of the true facts; but in order to so excuse himself it would have been necessary that the evidence *clearly and conclusively* establish that the plaintiff Hobart had actual knowledge of the real facts, which would prevent his relying on and being misled by any representations of the defendant Greene." (Emphasis added.) In short, the jury was charged that the appellants were required to establish knowledge on the part of plaintiff by clear and *conclusive* evidence. Of course such is not the law, for even conceding that the burden of proving knowledge on the part of the plaintiff was on the appellants, the above instructions imposed upon appellants a degree of proof which is never required in a civil action. "* * * a mere 'preponderance of the evidence' is all that is required to establish a fact necessary to be shown in a civil action * * *." 10 Cal.Jur. p. 790. As defined by Section 1837 of the Code of Civil Procedure, "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. * * *"; and Section 1978 of the same Code provides: "No evidence is by law made conclusive or unanswerable, unless so declared by this code." "Conclusive" proof is never necessary to justify the verdict of a jury in a civil action (Exposita v. United Railroads, 42 Cal.App. 320, 183 P. 576); and "To instruct a jury that they must be conclusively convinced is a manifest error. Hiester v. Laird, 1 Watts & S., Pa., 245." Thompson Lumber Co. v. I. C. C., Com.Ct., 193 F. 682, 684.

From the foregoing it will be seen that the erroneous instructions were even more prejudicial than if the jury had been charged that appellants were required to establish knowledge on the part of plaintiff to a moral certainty and beyond a reasonable doubt, for in such cases a defendant is permitted to introduce contradictory evidence.

Plaintiff seeks to justify the instructions by stating that the language employed therein is used by Mr. Pomeroy in his work on Equity Jurisprudence (2 Pomeroy's Equity Jurisprudence, 4th Ed., sec. 895, 896; see also 3 Pomeroy's Equity Jurisprudence, 5th Ed., sec. 895) where in the course of the discussion of the effect of opportunity to investigate into the true facts by a party claiming to have relied upon a false representation the objectionable words employed in the instructions first above quoted are used. But whatever may be there said cannot change the established law of the state as to the degree of proof required in a civil action. Moreover, in none of the cases cited by the author to that portion of his text is it held that evidence of the plaintiff's knowledge of the facts must be shown "conclusively." Nor is it true, as plaintiff contends, that in the case of Teague v. Hall, supra, "* * * the Supreme Court reversed a judgment for the defendant because of instructions contrary to this rule." That case had nothing to do with the degree of proof required. It involved simply the question whether an opportunity to investigate, in the absence of some duty to investigate, would bar an action for deceit. In the course of the opinion therein, which dealt only with that point, the court quoted a passage from Pomeroy which, as it happens, included the sentence which plaintiff now seeks to appropriate to his advantage; but as stated, the passage quoted was not so employed as to suggest endorsement of the particular sentence upon which plaintiff relies, for the reason that the subject matter of that sentence was foreign to the issue before the court.

It is no answer to say that the instructions were not prejudicially erroneous simply because in another part of the court's charge it gave instructions on the preponderance of evidence and others to the effect that in order to prove fraud the evidence must be "clear and convincing." As will be noted from the Code section above cited, there is a vast difference between "conclusive" evidence and "convincing" evidence, for the reason that the former cannot be contradicted. Furthermore, the two erroneous instructions struck at the very heart of one of the main defenses urged by appellants, and since the obvious effect thereof was to impose upon them a burden of producing a degree of proof contrary to and greater than is required by law, they were clearly prejudicial.

Nor can it be held that the oral instructions given to the jury at the time it sought to return its verdict did not operate to the prejudice of appellants. As shown in the forepart of this opinion, at the time the jury brought in its first verdict it manifested a desire to exonerate Greene of any fraud because it returned no verdict against him. Then, after it had deliberated some three hours more, it returned its second verdicts without assessing Greene for any actual damages. It would seem, therefore, that at this juncture the jury was still minded to resist the assessment of actual damages against Greene. In refusing to accept the second verdicts the court said, among other things: *"If the corporation defendant is liable in any amount, likewise the agent will be liable in the same amount."* (Emphasis added.) The statement thus made by the court might well have been understood by the jury to mean that since actual damages had been assessed against the corporation in a certain amount, it was incumbent upon the jury to assess damages in the same amount against the defendant Greene; and that the jury so understood the statement would seem apparent from the action it took almost immediately afterwards by bringing in a verdict against Greene for actual damages in the same amount that it had assessed against the corporation. In other words, the effect of the statement was to reverse the direction or flow of liability between principal and agent by making the liability of the agent a consequence of the liability of the principal; whereas in law the liability of the principal, if any exists, is dependent upon and flows from the liability of the agent. After the jury had been sent back the second time counsel for appellants stated to the court that the jury should be fully informed that it could still render a verdict in favor of the defendant Greene, adding, "It seems to me in the present state of the record, the jury has been sent out with the impression that they have nothing more to do but to fill out a verdict against both defendants." During the discussion that followed the court stated that it would be glad to give any instructions that might be proposed in that regard, and finally stated: "I find that the more explaining there is, the more confusion there is. I am not inclined to give much more in the way of instruction. I think they are fully informed and have been all along. *They are confused but they have been completely instructed.*" (Emphasis added.) Immediately following that observation the jury re-entered the courtroom, but no further instructions were given, and the verdicts were accepted. In these circumstances it cannot be fairly said that the third and final verdict, whereby actual damages were for the first time, and with obvious reluctance, assessed against the defendant Greene, was not the result of the mistaken insistence of the trial court that "If the corporation defendant is liable in any amount, likewise the agent will be liable in the same amount."

For the reasons stated it is my opinion that the judgments should be reversed with instructions to the trial court to enter judgments in favor of the defendants.

Rehearing denied; KNIGHT, J., dissenting.

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64 Cal.App.2d 151

PEOPLE v. BISHOP.

District Court of Appeal, Second District, Division 1, California.

April 28, 1944.

Gaming ⚷98(5)

Evidence sustained conviction of keeping and occupying premises for the purpose of registering wagers on horse races. Pen. Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Fuller Bishop was convicted of keeping and occupying premises for the purpose of registering wagers on horse races, and he appeals from order denying his motion for a new trial and from the judgment rendered against him.

Judgment and order affirmed.

Max M. Solomon, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

The defendant was accused of the crime denounced by Section 337a, Subdivision 2, of the Penal Code, keeping and occupying premises for the purpose of registering wagers on horse races. A plea of not guilty was interposed and the issue thus presented was tried by the judge of the superior court upon a transcript of testimony taken at the preliminary examination. The defendant was found guilty and sentenced to one year in the county jail; probation was granted for a period of three years, and execution of the judgment suspended, upon condition that the defendant serve the first ninety days of the probationary period in the county jail. Defendant has appealed from the order of the court denying his motion for a new trial and from the judgment rendered against him.

Whether or not the evidence is sufficient to support the conviction is the only question to be determined upon this appeal.

The defendant was arrested as he stood behind a cigar counter at the entrance to a pool room. He admitted that he was in charge there. One entering the pool room would pass by the cigar counter on one side and a small room on the other side. At the rear of the cigar stand and the small room was the pool room occupying the width of the premises, in which there was several pool tables. In the pool room there were persons playing pool, and other persons seated in chairs, perusing racing scratch sheets and racing entries in a daily newspaper.

The small room at the entrance had a door, but the partitions did not extend clear to the ceiling. In this room was a pay telephone. And in this room and over the door there was a chiseled-out or hollowed-out receptacle in which the arresting officers found some betting markers with notations upon them in defendant's handwriting. Wires to the telephone had been severed. Upon connecting them the telephone began to ring and one of the officers who answered it testified that unknown persons sought to register bets with him.

Defendant relies upon People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707. But in that case the betting markers were not in the handwriting of the defendant, and as this Court points out might have been placed where the officers found them by anybody.

In the present case the facts recited sustain the finding of the trial court that the defendant occupied premises with papers and paraphernalia for the registering of bets, which constitutes the offense charged. People v. Kabakoff, 45 Cal.App.2d 170, 113 P.2d 760.

The judgment and order are affirmed.

YORK, P. J., and WHITE, J., concur.

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64 Cal.App.2d 128

TAGUS RANCH CO. v. HUGHES.

Civ. No. 3138.

District Court of Appeal, Fourth District, California.

April 27, 1944.

Rehearing Denied May 23, 1944.

Hearing Denied June 22, 1944.

1. Limitation of actions 🔑24(2)

A cause of action is "founded on an instrument in writing", within statute limiting such actions to four years, where the contract, obligation or liability grows out of written instruments, not remotely or ultimately, but immediately. Code Civ.Proc. § 337, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Founded upon an Instrument in Writing".

2. Limitation of actions 🔑24(2)

In order to come within statute limiting actions founded on instruments in writing to four years, it is sufficient if writing upon which action is based acknowledges the debt and sets forth a state of facts from which obligation of liability to pay necessarily and directly flows, and writing need not contain an express promise to pay. Code Civ.Proc. § 337, subd. 1.

3. Limitation of actions 🔑24(2)

An instrument reading "I, * * * hereby confess and acknowledge that I have stolen and embezzled from you the sum of Nineteen Hundred Sixty Three & 80/100 ($1963.80)", signed by defendant, was an "instrument in writing," so that cause of action thereon was barred only after four years. Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Tagus Ranch Company against J. W. Hughes on a written instrument. From a judgment of dismissal, based upon sustaining of a demurrer to the complaint without leave to amend, the plaintiff appeals.

Reversed.

Russell & Heid, of Tulare, for appellant.

Wm. B. Mitchell, of Visalia, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment of dismissal based upon the sustaining of a demurrer without leave to amend.

The complaint alleged the execution of a written instrument dated November 3, 1938, addressed to the plaintiff and signed by the defendant and acknowledged by him before a notary public. The material part of this instrument reads as follows:

"I, John W. Hughes, being of lawful age, not acting under duress, and being of sound mind, of my own free will, hereby confess and acknowledge that I have stolen and embezzled from you the sum of Nineteen Hundred Sixty Three & 80/100 ($1963.80)."

A second cause of action is based upon a similar instrument containing the same language except for the amount named, which instrument was addressed to R. C. Merritt and which had been assigned to the plaintiff.

This action was commenced more than two years but less than four years after the date of these instruments and the sole question presented on this appeal is whether the action is one upon a contract, obligation or liability founded upon an instrument in writing within the meaning of subdivision 1 of section 337 of the Code of Civil Procedure.

[1] In O'Brien v. King, 174 Cal. 769, 164 P. 631, 632, the court said: "A cause of action is 'founded upon an instrument of writing' when the contract, obligation, or liability grows 'out of written instruments, not remotely or ultimately, but immediate-

ly.'" And again: "We adhere to the declaration that promises 'merely implied by law' from a situation evidenced by a writing—i. e., quasi contracts—are not within the statutory provision under discussion. The promise must be one arising directly from the writing itself, and included in its terms. But in determining whether the obligation is 'supported by an express promise or stipulation in the written instrument,' we must regard, as included in the terms of the writing, all obligations and promises which its words necessarily import." In that case, after referring to certain prior cases, the court further said:

> "The theory of these cases was that the paper, in each instance, acknowledged the existence of facts necessarily and directly importing the obligation which was made the basis of suit, and this was held to be sufficient. See, also, Sannickson v. Brown, 5 Cal. 57; Ashley v. Vischer, supra [24 Cal. 322, 85 Am.Dec. 65].
>
> "None of the cases decided in this state, and cited above, will be found to conflict with this view. They all had to do with writings which did not, in and of themselves, express the obligation sued upon, or a state of facts from which such obligation necessarily and directly flowed. In each instance the obligation could be established only by evidence of facts and occurrences outside of those appearing on the face of the instrument."

In Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009, 1010, the court said:

> "The law is well established in this state by numerous decisions that the acknowledgment or promise referred to in section 360 must be in writing, and that the writing, whether in the form of a promise or not, must contain some reference to an existing debt owing to the creditor, which the debtor is willing to pay. It must, of itself acknowledge the debt."

[2, 3] It is well established that in order to come within this four-year statute the writing in question need not contain an express promise to pay. It is sufficient, under the decisions of this state, if the writing acknowledges the debt and sets forth a state of facts from which the obligation or liability to pay necessarily and directly flows. The writings here in question were very formally executed and they freely acknowledged a state of facts from which an obligation to return the money taken necessarily and directly arises. If these instruments had said "I have borrowed from you" the amount stated, there could be no question that the promise to repay, which the law would imply, would be one which was included within their terms, and one which their words would necessarily import. We are unable to see any difference, in principle, when the language used is "I have stolen and embezzled from you" the amount named. This is a free admission that the amount referred to has been taken by the party signing the instrument and that it belongs to the party to whom the writing is addressed, and the language used imports an obligation to return it to its lawful owner. The present tense is used, which precludes any idea that the money in question might have been theretofore returned. The language used not only acknowledges the debt and sets forth a state of facts from which an obligation to return the money necessarily and directly flows, but it expressly states that the acknowledgment is freely and willingly made. The writings were not limited to a possible use in criminal proceedings but it would appear from the general terms used that they were intended for all purposes. The obligation to repay could be established by the use of these writings and there would be no need for evidence of facts and occurrences outside of those appearing on the face of the instruments. Under these circumstances we think the writings in question are sufficient to bring the action within the provisions of the four-year statute above mentioned.

The respondent relies on Todd v. Board of Education, 122 Cal. 106, 54 P. 527; Butt v. Burkett, 18 Cal.App.2d 612, 64 P.2d 437; Heiser v. McAlpine, 20 Cal.App.2d 467, 67 P.2d 141, and Nelson v. Nelson, 202 Cal. 598, 261 P. 999. The facts in those cases were materially different from those here appearing and we find nothing therein which is in conflict with the views above expressed. There being a present acknowledgment that the amounts named have been stolen and embezzled, the obligation and duty to pay the money which is implied by law must be considered as a party of the written instruments and as an obligation or liability which the language used necessarily imports.

For the reasons given the judgment is reversed.

MARKS and GRIFFIN, JJ., concur.

64 Cal.App.2d 167

PEOPLE v. SING CHAN.

Cr. 1862.

District Court of Appeal, Third District, California.

April 28, 1944.

Hearing Denied May 26, 1944.

1. Criminal law ⚷356

In prosecution for sodomy committed with a soldier, defendant's testimony as to having been assaulted by another soldier before commission of offense was not admissible to show that act was done involuntarily, without criminal intent, because of fear complex involving soldiers. Pen.Code, § 288a.

2. Criminal law ⚷31

A person is not relieved of responsibility for his criminal act because he acted through fear, unless such fear was of immediate and imminent danger.

3. Criminal law ⚷486

In prosecution for sodomy committed with a soldier, defendant's testimony as to having been assaulted by another soldier before commission of offense was not admissible to lay foundation for hypothetical question to physician as to whether defendant had a fear complex involving soldiers, especially where physician was allowed to testify as to his opinion, based on defendant's statement that he had been assaulted by a soldier, that defendant had such a complex. Pen.Code, § 288a.

4. Criminal law ⚷382

In prosecution for sodomy committed with a soldier, testimony that defendant, who claimed that he acted involuntarily because of fear phobia involving soldiers as result of having been assaulted by a soldier, had bumps or lumps on his head after claimed assault, was inadmissible as immaterial and irrelevant. Pen.Code, § 288a.

5. Criminal law ⚷1172(2)

The giving of instruction on circumstantial evidence, even if uncalled for, did not constitute error justifying reversal of conviction for sodomy. Pen.Code, § 288a.

6. Criminal law ⚷737(1)

Whether defendant fled or merely attempted to flee from arresting officers after alleged commission of sodomy in their presence, so as to authorize instruction to jury on question of flight, was for jury under evidence. Pen.Code, § 288a, 1127c.

7. Criminal law ⚷1144(15)

It must be presumed that jury followed law as presented in trial court's instruction.

8. Criminal law ⚷1186(4)

Error, if any, in instructing jury on question of flight after commission of crime charged did not result in miscarriage of justice, as required to warrant reversal of conviction, in view of presumption that flight was not considered in reaching verdict, if not proven. Pen.Code, § 1127c; Const. art. 6, § 4½.

9. Criminal law ⚷872, 892

Where superior court clerk's transcript showed that written verdict of conviction was rendered by jury and indorsed as field on day of trial, reporter's transcript showed that court instructed clerk to read verdict to jury, which he did, and that jury answered in affirmative question whether it was their verdict, and record also showed that clerk recorded verdict pursuant to court's direction and re-read it to jurors, who again stated that it was their verdict, statutory requirements as to recording, reading and confirmation of verdict were fully complied with, though not shown by clerk's transcript. Pen.Code, §§ 689, 1164.

10. Criminal law ⚷1144(16)

The presumption that official duty has been regularly performed requires conclusion that statutory requirements as to recording, reading and confirmation of jury's verdict of conviction were complied with, even in absence of showing thereof in record on appeal. Pen.Code, §§ 689, 1164; Code Civ.Proc. § 1963, subd. 15.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Sing Chan was convicted of Sodomy, and he appeals.

Affirmed.

Walter F. Lynch, of San Francisco, and Grover W. Bedeau, of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed by the District Attorney of Sacramento County defendant was charged with a violation of section

288a of the Penal Code, and after trial by a jury was convicted. Defendant's counsel then moved the court to set aside the verdict on the ground that the jury were discharged from the case before the verdict was recorded in full upon the minutes by the clerk, and read to the jury. Defendant also made motions to arrest the judgment and for a new trial. These motions were denied, and defendant has appealed, contending before this court that the trial court erred in refusing to admit certain evidence offered by defendant, that it committed prejudicial error in giving two instructions on circumstantial evidence, that it erred in instructing the jury on flight, and that defendant's motion to vacate the verdict should have been granted.

The evidence for the prosecution presented in the case was the testimony of two state police officers assigned to patrol Capitol Park. Officer De Martini testified that on the date charged, while he and Officer Teske were patrolling that park, he saw the defendant lying on the grass with his head over the lower portion of a soldier's body, and with the soldier's penis in his mouth; that as he and Officer Teske approached they flashed their flashlights upon defendant and the soldier from a distance of about 15 feet; that the soldier was lying on his back with his hands above his shoulders close to his head, and defendant was lying flat on his stomach, his legs outstretched and his hands close to the soldier's body; that as he approached he stated, "You are under arrest," whereupon defendant got up and attempted to run away, but was tripped by De Martini and fell to the grass where he struggled with the officers and bit Teske on the hand, but was finally subdued and handcuffed. The soldier was also taken into custody, and was turned over to the Military Police. The hour was about 10:35 p.m. Officer Teske testified to the same effect.

Defendant testified that on the night of the alleged offense he went into the park and sat on a bench to rest, then lay down on the grass and closed his eyes; that the soldier came along and made a suggestive gesture to him; that defendant said "no, no," and started to go, whereupon the soldier held him down, pushed him along for 60 or 80 paces, then lay down and held defendant with his right leg; that defendant could not get up; that there was a light flashed on them, whereupon the police officers came up; that they wore military clothes and he at first thought they were soldiers "coming to the help of him"; that they struck and beat him, knocking him unconscious; that he did not commit the act charged.

He was then asked if he was assaulted in San Francisco in the month of December, 1942, by a soldier during the night time, but objection to the question was sustained.

Defendant then called two witnesses who resided in San Francisco, and offered to prove by them that during the preceding month of December they saw an injury on defendant's head—the asserted purpose being to corroborate defendant's testimony that he was assaulted by a soldier in San Francisco and knocked unconscious. Objection to this testimony was also sustained on the ground that it was immaterial.

Defendant then called Dr. Otto G. Freyermuth, a specialist in mental and nervous diseases, who stated that on October 3rd and October 13th prior to the trial which began on October 14, 1943, he made an examination of defendant, particularly along psychiatric lines; that he formed an opinion from the history of the case which he had obtained from the patient, that at one time he had had a definite fear complex, but that this fear complex was not present at the time of the examination. This he qualified by stating that there is "a fear in his makeup directed towards soldiers." The reason given for this opinion was the history given by defendant that in San Francisco he was assaulted by a soldier in December, 1942, from which he suffered a definite injury, and that thereafter when he came in contact with soldiers it would leave an apprehension, especially in the night time; that his conclusions were based upon an assumption that the statements made to him by the patient were true; that he based his opinion on what defendant told him and if the information was incorrect the opinion would be incorrect. Defendant then rested.

In rebuttal Officer De Martini testified that he saw no evidence of a struggle when he flashed his light upon the soldier and defendant; that he did not see the soldier's hands on defendant, that they were above his shoulders; that soldiers frequent the park in the evenings, especially in the summer months.

[1, 2] As to the alleged error of the trial court in refusing to allow defendant to prove that he was assaulted in San

Francisco in December, 1942, during the night time, defendant asserts that this testimony would have supported and would have been the basis for the opinion of Dr. Freyermuth, and that the refusal of the court to admit testimony of such alleged assault debarred defendant from establishing his defense to the charge, namely, that it was done involuntarily and without criminal intent, due to a fear phobia involving soldiers; that evidence of such fear complex was relevant to prove that what defendant did was done involuntarily and without criminal intent; that this would explain why defendant did not cry out for help, why he did not more vigorously resist the soldier's advances, and why he attempted to escape or resist arrest; and that this error was intensified by the court's refusal to allow the two witnesses to testify that they observed a bump on defendant's head during December, 1942.

The question asked by counsel for defendant, to which objection was sustained, was: "Were you assaulted some time during the month of December, 1942 in San Francisco, California, on Kearny Street, near the Hall of Justice, by a soldier during the night time?" Objection was made on the grounds of incompetency, irrelevancy and immateriality, and the objection was sustained. We find no error in this ruling. Appellant argues that it was pertinent to show a "fear complex" on the part of defendant. But from the testimony that defendant was so assaulted, it would not follow that such assault would produce a fear complex, nor would a "fear complex" on the part of defendant serve to explain why he committed the acts charged. A person is not relieved of the responsibility for a criminal act because he acted through fear unless the fear was of immediate and imminent danger (People v. Martin, 13 Cal.App. 96, 105, 108 P. 1034), and there was no showing here of any such danger to defendant. According to the testimony of defendant he had gone into the park and had lain down and closed his eyes. This was not conduct evidencing fear. He also said when asked if he went to the park to look for a soldier: "Yes, sometimes I been looking for soldiers." Also, he said when asked if he was afraid of soldiers: "I am not afraid of soldiers, except I been attacked by soldiers before and I am afraid of them that way." There is no evidence that he cried out when, as he contends, he was seized by the soldier. Furthermore, Dr. Freyermuth, when called to testify in behalf of defendant, was allowed to testify that in his opinion defendant at one time had a definite fear complex, but he said that it was not present at the time of his examination which was on October 3rd and 13th, just prior to the trial and less than two months after the alleged offense.

[3] In his closing brief appellant says regarding the alleged error in refusing to admit this testimony that one purpose of same was to lay the foundation for a hypothetical question to be asked Dr. Freyermuth, and that such a hypothetical question must have, as its foundation, sworn testimony. But this would not render material matter otherwise immaterial, nor justify the admission of immaterial evidence. No hypothetical question was propounded to Dr. Freyermuth, but as he was allowed to testify that there was a fear or phobia in defendant's make-up, directed toward soldiers, particularly in the night time, and that he based his opinion upon a statement made to him by defendant that he had been assaulted by a soldier in San Francisco, we fail to see that defendant's testimony to this effect, if allowed, would have added anything material to his defense.

[4] As to the contention that the testimony offered by defendant that in December, 1942, he had bumps or lumps on his head should have been admitted, such testimony was immaterial, irrelevant and incompetent. Had it been admitted it would have proven no more than that defendant had bumps on his head. It would not have tended to prove that said bumps were caused by an assault by a soldier or that defendant was afraid of soldiers, nor could it have thrown any light on whether defendant did or did not commit the offense charged.

[5] Appellant's next contention is that the trial court erred in giving to the jury an instruction on circumstantial evidence, it being contended that there were no circumstances in the case worthy of the name. It is not argued that the instruction as given was erroneous in itself. However, assuming, but not deciding, that the giving of the instruction on circumstantial evidence was uncalled for in this case, nevertheless we are unable to see that the giving of same constituted error justifying reversal. People v. Soules, 41 Cal.App.2d 298, 313, 106 P.2d 639; People v. Sberno, 22 Cal.App.2d 392, 395, 71 P.2d 274;

People v. Jackson, 63 Cal.App.2d 586, 147 P.2d 94.

[6-8] As for appellant's argument that the giving of an instruction on flight after the commission of crime was erroneous because the evidence does not show flight, but only an attempt to flee, and that section 1127c of the Penal Code has no application when there is merely an attempt to flee, we are of the opinion that whether defendant fled or not was a matter for the jury to determine. The evidence shows that when the officers said to the parties that they were under arrest defendant attempted to run away, that Officer De Martini tripped him, that defendant struggled and crawled on the grass in an effort to get away; that he "kept crawling."

While it has been said that where there is no evidence showing flight by a defendant, such instruction should not be given (People v. Goodwin, 202 Cal. 527, 540, 261 P. 1009), in numerous cases the giving of same has been held proper or else nonprejudicial. People v. Hall, 220 Cal. 166, 173, 30 P.2d 23, 996; People v. Madison, 3 Cal.2d 668, 675, 46 P.2d 159; People v. Wiley, 33 Cal.App.2d 424, 428, 91 P.2d 907; People v. Lee Nam Chin, 166 Cal. 570, 573, 137 P. 917; People v. Soldavini, 45 Cal.App.2d 460, 462, 114 P.2d 415; People v. Lem Deo, 132 Cal. 199, 204, 64 P. 265. We have found no case in which a distinction has been made between a flight accomplished and one which was attempted and thwarted, or between a flight of several miles and a crawling of only a few feet. We think there was enough in the evidence in this case to constitute a foundation for the giving of the instruction of which complaint is made. Also, as was said in People v. Sanchez, 35 Cal.App.2d 231, 237, 95 P.2d 169, the instruction as given left all questions of fact solely for the jury, and did not assume the guilt of defendant, and that it must be presumed that the jury followed the law as presented, and, if flight was not proven, that it was not considered in reaching a verdict. On an examination of the entire case we cannot say that the alleged error has resulted in a miscarriage of justice. Const. art. VI, sec. 4½.

[9, 10] The remaining complaint of appellant is that the clerk's transcript fails to show that the verdict of the jury was recorded in full, or at all, upon the minutes of the court and then read to the jury, as recorded, and inquiry made of them whether it was their verdict as recorded (citing People v. Laird, 69 Cal.App. 511, 515, 231 P. 596). Appellant cites sections 689 and 1164 of the Penal Code requiring such recordation, etc. The clerk's transcript here shows that a written verdict was rendered by the jury, and is endorsed filed October 15, 1943, the day of the trial; the reporter's transcript shows that upon the bringing in of the verdict the court, after inspecting it, instructed the clerk to read it to the jury, which he did, and that when asked if this was their verdict they replied that it was. The record also shows:

"The Court: The Clerk will record the verdict. (Thereupon the Clerk recorded the verdict and re-read the same to the Jury as follows: 'The People of the State of California vs. Sing Chan. Verdict. We, the Jury in the above-entitled cause find the defendant Sing Chan guilty of the crim of violation of section 288a of the Penal Code of the State of California, as charged in the Information. Irving J. Schwartz, Foreman.'

"Gentlemen of the Jury, is this your verdict?

"The Jury: Yes."

We know of no requirement that these things must be shown by the clerk's transcript, and the foregoing record shows that the requirements of the Penal Code sections cited by appellant were fully complied with. But even in the absence of such a showing in the record, the presumption that official duty has been regularly performed (C.C.P. sec. 1963, subd. 15) would lead to the conclusion that the requirements of the law as to the recording of the verdict, etc., were complied with. Appellant's motion on this ground to have the verdict set aside and vacated was properly denied.

As we find no error in the record justifying reversal, the judgment and the orders appealed from are affirmed.

PEEK and THOMPSON, JJ., concur.

64 Cal.App.2d 52

CUTHBERT BURREL CO. v. SHIRLEY et al.

Civ. No. 3114.

District Court of Appeal, Fourth District, California.

April 24, 1944.

1. Appeal and error ⚷934(2)

Where findings of fact and conclusions of law were waived, every intendment is in favor of the correctness of the judgment, and District Court of Appeal must presume that all facts were found necessary to support the judgment.

2. Appeal and error ⚷907(3)

Where appeal was taken on clerk's transcript alone, and findings of fact and conclusions of law were waived, the District Court of Appeal must presume that sufficient evidence was introduced to support the judgment.

3. Appeal and error ⚷907(3)

On defendant's appeal taken on clerk's transcript alone, from adverse judgment in action to quiet title as against defendant's option to purchase, District Court of Appeal must presume that evidence was introduced showing that defendant had defaulted under the terms of the option and had forfeited all right to the property, that the property could be located from the description contained in complaint and option, and that the property was owned by plaintiff.

4. Judgment ⚷18(2), 226

In action to quiet title as against defendant's option to purchase, where the complaint, the judgment and the option described the property involved in identical language, defendant could not claim that the description contained in the complaint and judgment were too vague to form basis of valid judgment.

◆

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by the Cuthbert Burrel Company against E. H. Shirley and another to quiet title. From a judgment for plaintiff, the defendant named appeals.

Affirmed.

Walter Gould Lincoln, of Los Angeles, for appellant.

Sidney J. W. Sharp and M. Wingrove, both of Hanford, for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiff's title to about 12,000 acres of land in Fresno County.

The sole question presented by appellant, on which he bases his argument for a reversal of the judgment, is that the descriptions of the property contained in the complaint and judgment are too vague and uncertain to describe any property so that the complaint fails to state a cause of action and the judgment fails to describe any property that can be identified.

Were this the ordinary case of an action to quiet title we would be compelled to sustain the argument under the rule laid down in Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 P. 158. However, we believe that there are facts presented here that make the application of that rule unnecessary and inequitable.

The appeal is taken on the clerk's transcript alone. Appellant has caused to be incorporated in the record the exhibits introduced in evidence in the court below.

From those exhibits we learn that for many years plaintiff has been the owner of large tracts of land in the San Joaquin Valley; that on July 4, 1932, plaintiff leased the land in controversy here to Wm. Edward Wright for the term of one year; that on the same day plaintiff gave Wright an option to purchase the same and other property for the sum of $425,000, to be paid on or before January 3, 1933; that the property in controversy here was described in both instruments and in the same manner that it was described in the complaint and judgment; that on July 11, 1932, Wright gave appellant an option to purchase the same property for $1,200,000, $600,000 of which was to be paid in cash on or before January 1, 1933, and the balance by improvement bonds finally accruing July 11, 1937; that on July 11, 1940, Wright and his wife quitclaimed the property to plaintiff. The description in all of these documents correspond exactly with those used in the complaint and judgment.

[1] Findings of fact and conclusions of law were waived so every intendment is in favor of the correctness of the judgment and we must presume that all facts

were found necessary to support it. Gray v. Gray, 185 Cal. 598, 197 P. 945; High v. Bond, 107 Cal.App. 153, 290 P. 145.

[2, 3] The notice of appeal was filed April 16, 1943, and the record on appeal was filed June 17, 1943, so rules four to twelve, and rule 52 of the Rules on Appeal, do not apply to this case. Rule 53, Rules on Appeal. Therefore we must presume that sufficient evidence was introduced in the trial court to support the judgment. Whitney v. Redfern, 41 Cal.App.2d 409, 106 P.2d 919. To this end we must presume that evidence was introduced showing that appellant had defaulted under the terms of his option and had forfeited all rights in the property; that experts were called who were able to locate the property in controversy from the descriptions contained in the complaint and the options; that this property was owned by plaintiff. E. E. McCalla Co. v. Sleeper, 105 Cal.App. 562, 288 P. 146. Thus, if we may not consider the exhibits we have referred to, these presumptions come to the aid of the judgment and support it.

No demurrer to the complaint was filed and the question of the insufficiency of the description is presented for the first time on appeal. The error could have been corrected by amendment had the defect been called to the attention of the trial judge.

[4] The complaint, the judgment, and the two options to purchase described the property involved here in identical language. It is rather clear that the purpose of the action was to quiet title against any interest under the option held by appellant, the description of which was identical with that in the complaint and judgment. If appellant was satisfied with the description of the property contained in his option, and could locate that property from that description, he certainly was not misled when the identical description was used in the complaint and judgment.

If this description was so vague and uncertain, as claimed by appellant, as to describe no property, then appellant could not specifically enforce his option of purchase. Joyce v. Tomasini, 168 Cal. 234, 142 P. 67; Eaton v. Wilkins, 163 Cal. 742, 127 P. 71; Laugharn v. Bryant, 5 Cal.App.2d 721, 43 P.2d 312.

In Crane v. Roach, 29 Cal.App. 584, 156 P. 375, 376, it was said:

"* * * and that, when a contract of sale of real estate is for any reason incapable of specific performance, it cannot form the basis of a valid claim to an interest therein, and that, when such claim is asserted, the owner of the real estate is entitled to a decree quieting his title thereto. (Jolliffe v. Steele, 9 Cal.App. 212, 98 P. 544; Valentine v. Streeton, 9 Cal.App. 640, 99 P. 1107." See, also, Archer v. Miller, 73 Cal.App. 678, 239 P. 92; Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175.

As plaintiff sought to quiet its title against a purported interest, under an option, by use of the identical description contained in the option creating that interest, the judgment should not be reversed where appellant had no existing interest in the property involved and suffered no damage or prejudice from the judgment.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

WINSLOW et al. v. HAROLD G. FERGUSON CORPORATION et al.

TREMAINE v. ALLEN et al.*

Civ. 14305.

District Court of Appeal, Second District, Division 2, California.

April 26, 1944.

Hearing Granted June 22, 1944.

Appeal and error ⇨1135

In action by holders of certificates of beneficial interest in a trust to terminate the trust and to secure a judicial administration and liquidation of trust assets, an order denying a motion made under Soldiers' and Sailors' Civil Relief Act to vacate an order which had been made during movant's absence in military service and which subordinated movant's fee as attorney to claims of creditors of the trust fund which movant asserted was preserved through his efforts was affirmed. Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A.Appendix, § 520.

MOORE, P. J. dissenting.

* Subsequent opinion 153 P.2d 714.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Glenn Winslow and another on behalf of themselves and on behalf of all other holders of certificates of beneficial interest in a trust against Harold G. Ferguson Corporation and others to terminate the trust and secure judicial administration and liquidation of trust assets wherein R. E. Allen was appointed receiver and Ella Stromgren, as executrix of the estate of L. G. Prentiss-Baker, deceased, was substituted plaintiff in intervention. The Fidelity & Deposit Company of Maryland filed a claim and Raymond Tremaine filed a motion to vacate an order subordinating his fee as attorney to claims of creditors of the trust fund. From an order denying the motion, Raymond Tremaine appeals.

Affirmed.

Tuttle & Tuttle, of Los Angeles, for appellant.

Meserve, Mumper & Hughes, of Los Angeles, for respondent R. E. Allen, receiver.

W. J. WOOD, Justice.

Appellant, who is now an officer in the army, was practicing law in the city of Los Angeles before the commencement of the war. He has appealed from a minute order made on June 8, 1943, denying his motion made under section 200 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix § 520, to vacate an order which was made during his absence in military service. He complains of the order because it subordinates his fees as attorney to the claims of creditors of a trust fund which he asserts was preserved through his efforts.

The action was commenced on January 30, 1931, by the owners of two "certificates of beneficial interest" in the Ferguson Trust No. 50. By the declaration of trust, which was executed in 1927, Metropolitan Trust Company was named as trustee and Harold G. Ferguson was appointed executive agent with power to bind all of the beneficiaries under the trust in all matters relating to its administration. It is alleged in the complaint that the Ferguson Corporation was the syndicate manager with "uncontrolled discretion" to invest, reinvest, loan, secure or lease all of the property of said trust; that according to the terms of the trust the beneficiaries bound themselves to pay all taxes, insurance, expenses, liens, charges and expenses necessary for the maintenance of the trust property and the expenses of the trust. It is further alleged in the complaint that the Ferguson Corporation became insolvent and for this and other reasons it became impossible to carry out the purposes of the trust, that it was impossible to appoint a succeeding trustee and that the appointment of a receiver was necessary. Plaintiffs sought by their complaint to terminate the trust and secure judicial administration and liquidation of the trust assets. At the request of plaintiffs R. E. Allen was appointed receiver pendente lite. The litigation was brought to a close in 1940 and an interlocutory judgment entered dissolving the trust and making the receivership permanent for the purpose of completing the liquidation of the trust assets. Appellant was one of the attorneys for plaintiffs and succeeds to the interests of his associate attorneys in the matter of claims for legal services rendered. On April 25, 1934, the court made an order "that the fee of Raymond Tremaine, attorney for said plaintiffs, shall be not less than $500 and shall be not more than 2½% of all moneys or of the value of other property ordered distributed by this court to the beneficiaries of that certain trust heretofore described as P.T. 50. * * *" On August 11, 1941, the court made a further order fixing appellant's fees at the total sum of $5,000 and directing the receiver to "pay from sums available to him as receiver, the balance of $4,500 to Raymond Tremaine, for such services when said receiver shall have sufficient sums available to make the entire payment, or part thereof, or whenever this court shall determine there are sufficient funds available to pay these attorney fees."

A current account was filed by the receiver in December, 1942, in which he reported on the claims and petitioned for instructions as to their priority. On December 18, 1942, the court made an order by which the receiver was directed to pay appellant's fees for services rendered after the payment of the claims of creditors. This order in effect makes the fees for plaintiffs' attorney payable from funds which would belong to the beneficiaries of the trust. On February 17, 1943, appellant filed a notice of appeal from the order of December 18, 1942, and on March 22, 1943, he filed a notice of motion in the superior court to vacate that part of the order of December 18, 1942, by which his fees were subordinated to the claims of creditors, on the ground that he was in military service and had not been given notice before the order was made. This motion was denied without prejudice, for lack of jurisdiction because of the appeal. Thereafter appellant filed with the clerk of the superior court a written abandonment of the appeal and on May 28, 1943, appellant again filed a notice of motion to vacate the portion of the order of December 18, 1942, which affected his interest, basing his motion on the fact that he was in military service and was entitled to relief under the Soldiers' and Sailors' Civil Relief Act of 1940. The present appeal is from the order denying this motion.

Assuming that the order of December 18, 1942, did not become final by virtue of the fact that appellant filed an appeal therefrom and later abandoned it, a point which is argued in the briefs, nevertheless appellant is not now in position to demand that the order from which the appeal is prosecuted be reversed, for the reason that it does not appear that he was prejudiced by the order of December 18, 1942. Section 200, sub. (4) of the Soldiers' and Sailors' Civil Relief Act of 1940 provides: "If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service * * * and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may * * * be opened * * * and such defendant * * * let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof."

More than 2,000 persons became purchasers of certificates of beneficial interest in Trust No. 50 and the plaintiffs are the beneficial owners of a very small fractional part of the trust property. They and the other owners in like position purchased the certificates with the view of making an advantageous business investment in a concern dealing in real estate. The just debts of the concern should be paid before any part of the investments made by the certificate holders is returned to them. Likewise the debts of the trust should be paid before certificate owners are reimbursed for expenses incurred by them in protecting their interests as investors. If only ten individuals had become the owners of the certificates of beneficial interest and all ten had joined as parties plaintiff in the action to terminate the trust they would not be in position to ask that the creditors of the trust be required to forego their prior claims on the theory that the plaintiffs in taking action to terminate the trust were preserving the trust property for the creditors as well as for the owners. In the present action it is not alleged that the complaint was filed on behalf of creditors but it is specifically alleged that "the plaintiffs bring this action on behalf of themselves and on behalf of all other holders of certificates of beneficial interest as represented by a series of certificates issued by said trustee under said declaration of trust who may hereafter become parties to this suit."

The general rule is well established that in case of the existence of a common fund to which a number of persons are entitled, where one files a representative action for the benefit of himself and others in like situation to obtain, preserve, or protect the fund, the party commencing the action may be awarded costs, including counsel fees, out of the fund. In re Pacific Coast Building-Loan Ass'n, 15 Cal.2d 155, 157, 99 P.2d 261; Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157. Counsel have cited many decisions both in this and other jurisdictions in which the rule is applied that contribution to reimburse for expenses incurred in preserving the common fund can be compelled from others having a common interest in the fund. But no case has been cited to us, and we have found none, where the precise point under discussion has been submitted for judicial review. In Muskegon Boiler Works, v. Tennessee Valley I. & R. Co., D.C., 274 F. 836, 837, the court follows a statement of the general rule with this observation: "Such fees, however, are to be based only on the fund applicable to claims of creditors of the same class as the plaintiff, and the fund on which others have liens superior to such claims cannot be subjected to such payments." It should be noted, however, that the facts in the Muskegon case and also the facts in Buell v. Kanawha Lumber Corp., D.C., 201 F. 762, cited in the Muskegon case, are different from the facts of the case now under review.

The plaintiffs and other certificate holders do not have a common interest with the creditors in the property of trust No. 50. Since the creditors have the right to subject the trust property to the payment of their claims, it follows that plaintiffs may not subordinate any part of the claims of the creditors to their own right to a distributable interest in the property of the trust or to the payment of their expenses, including the fees of their counsel, incurred in procuring disposition of the trust property to them.

Appellant cannot demand his fees as a part of the expense of administration. Indeed, the record discloses that fees have been allowed and been made payable from the trust fund in favor of counsel engaged by the receiver. Since the trial court properly held that appellant's fees should be subordinated to the claims of the creditors it is apparent that appellant has not been prejudiced by the order from which the appeal is taken.

The order is affirmed.

McCOMB, Justice.

I concur in the judgment, on the sole ground that the alleged errors urged by appellant may not be reviewed on this appeal. See Neighbours v. Neighbours, 62 Cal.App.2d 840, 145 P.2d 688; Smith v. Superior Court, 21 Cal.App.2d 160, 164, 69 P. 2d 176.

MOORE, Presiding Justice.

I dissent from the opinion of Justice Wood in so far as it subordinates the right of appellant to his fee to the claims of creditors.

On April 25, 1934, following a hearing on counsel's application for attorney's fees the court ordered that the fee should be not less than $500 and should be no more than 2½ percent of assets to be distributed to the beneficiaries of trust P. T. 50 of the Metropolitan Trust Company, "the exact amount and time of payment of said fee to be determined later."

Seven years passed during which an intervener came into the case represented by her counsel. During that time extensive services were performed by both counsel for plaintiff and counsel for intervener in recovering and protecting the assets of the involved trust. On August 11, 1941, following a joint application of plaintiff and plaintiff in intervention, the court made its order that the total attorneys' fees for the several counsel appearing "be and they are hereby fixed at $5,000, the reasonable value thereof of which $500 has been heretofore paid to Raymond Tremaine." The order then directed that the receiver pay from "sums available to him as receiver the balance of $4,500 * * * when said receiver shall have sufficient sums available to make the entire payment or part thereof. * * *"

The respondent contends that the first order was final and decisive as to the amount of fees to be paid and the order of its payment with reference to the payment of the creditors of the trust. He argues that, inasmuch as the first order restricted the payment of counsel fees out of the fund available for the beneficiaries after the payment of the claims of creditors, appellant may not be paid out of the gross fund saved to the trust and also that he is limited to 2½ percent of the net fund available for division among the beneficiaries.

With this contention I disagree. The original order was interlocutory only in its effect. It provided for plaintiff's expenses while acknowledging that other extensive labors should be performed in order to effect the ultimate purpose of the litigation. During the seven years, numerous and valuable services were performed by counsel for interveners as well as counsel for plaintiff. In August, 1941, following the hearing on the joint application of all counsel for an order fixing their fees a definitive order was made for counsel fees and costs of plaintiffs and the intervener. It contained no limitations. It prescribed a sum to be paid based upon its implied finding that services had been rendered to the trust. This order is both final and conclusive. Tyrrell v. Baldwin, 67 Cal. 1, 5, 6 P. 867; Semple v. Wright, 32 Cal. 659, 668. The amount of the fee finally determined is some indication of the extent and value of the service which the court considered had been rendered to the trust. In view of such finding it would seem unjust to turn counsel away without fair compensation. Such is necessarily the effect of subordinating counsel fees of appellant to the payment of the numerous creditors of the trust. There is nothing sacramental about a creditor that should exempt him from contributing to the compensation of those who make it possible for him to collect his claim. In extending credit to a corporation or a trust the creditor knows that frequently mismanagement and sometimes dishonesty results in a dissipation of the assets. The attorney who attempts to protect or recover the assets of a trust represents the creditors as well as its beneficiaries. Hence, if his service is necessary to recover a fund, he is entitled to an equitable lien upon the share due the creditors as well as upon the excess which might be distributable to the beneficiaries. If he recovers the fund from which the creditors are to be paid, in equity they are obligated for the payment of the services of that instrumentality which has avoided the total loss of their claims. Tanner v. Superior Court, 43 Cal.App.2d 732, 111 P.2d 713.

The order of August 11 awarding counsel fees and costs to be paid out of the trust fund was based solely upon a long prevailing rule in equity which allows attorneys' fees and costs for the preservation of a fund for all who are interested in it. Under that rule such counsel fees are customarily made senior to other claims against the fund. The court could have made the award to Tremaine on no other theory. Scott v. Superior Court, 208 Cal. 303, 281 P. 55. That the order of August 11 was based upon this long-established rule readily appears from the nature of the action itself as revealed by all of the pleadings of the plaintiff and of the intervener. The predominance of that rule was recognized by the original order of 1934 in requiring the immediate payment of $500 counsel fees to which no objection appears to have been made by the receiver, but who, on the contrary, made the payment. Practically all of the claims given precedence over that of Tremaine were those of general creditors only. The solitary exception appears to be that of the government for income tax which is supported by a statutory lien. Since the claims of the general creditors accrued long prior to the institution of this litigation in equity, they should have been subordinated to the payment of counsel fees.

Creditors are daily seeking judicial intervention to collect claims from solvent debtors. In such endeavors they voluntarily pay for legal services. There is no good reason why the creditor of a failing trust should be exempt from the payment for the service of a lawyer by whose diligence he has been protected from total loss. Where a lawyer has rendered such valuable service as to make available a fund for a class, even though he appeared for only one claimant, it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184. The attorney's right to compensation under such circumstances arises from the benefit conferred upon those who would have suffered loss but for his timely intervention and not by reason of an agreement to pay his fees. Buford v. Tobacco Growers' Co-op. Ass'n, 4 Cir., 42 F.2d 791.

It is wholly out of line with the traditional concept of equity practice to pay the expenses of a receiver and the fees of his counsel prior to the participation of any creditor or beneficiary and at the same time to deny the payment of fees to the lawyer who has invoked the powers of the chancellor to appoint that same receiver. The expenses of the plaintiff in causing the appointment of the receiver and in sustaining the incumbency of that official is as much an expense of administration as the attorney's fees and should have priority to the same extent. Muskegon Boiler Works v. Tennessee Valley I. & R. Co., D.C., 274 F. 836; McLane v. Placerville & Sacramento Valley R. Co., 66 Cal. 606, 622, 6 P. 784. In Re Estate of Marre, 18 Cal.2d 191, 192, 114 P.2d 591, the court held that plaintiffs who protect and preserve a fund for the benefit of themselves and others are entitled to the payment of their counsel fees out of such fund. This principle is derived from the equitable concept that where one of a group has borne the cost of litigation resulting in the benefit to the entire group the latter should contribute to such expenses. Nolte v. Hudson Nav. Co., 2 Cir., 47 F.2d 166.

Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action but an equitable lien is created in favor of the attorney who actually performs the service. Muskegon Boiler Works v. Tennessee Valley I. & R. Co., supra.

Appellant and his associates having rendered a valuable service over a period of ten years and having thereby saved a fund which avoided total loss to the creditors should now be paid from the fund recovered prior to the payment of creditors. To do otherwise is to discharge without compensation a faithful and efficient servant who has recovered a fund without which the receiver would sit with empty hands and the creditors would write off their claims as "uncollectible."

The order appealed from was made on June 8, 1943, in response to appellant's petition to have the judgment of December 14, 1942, amended by striking therefrom that portion which subordinates the allowance of counsel fees and costs to all other creditors. The petition was based upon a federal statute, to wit: The Soldiers' and Sailors' Civil Relief Act, Chapter 888, § 100, 50 U.S.C.A.Appendix § 510, which authorizes any court to open a judgment that may have been rendered in any proceeding if it appears that the soldier was prejudiced, by reason of his military service, in making his defense thereto, provided it appear that such soldier has a meritorious defense to the action or some part thereof. The order of December 14 was a judgment in contemplation of the federal statute. In re Cool's Estate, 18 A.2d 714, 19 N.J.Misc. 236. Before it was entered no affidavit was filed as required by subdivision 1 of Section 200 of the statute, nor was an attorney appointed to represent the absent soldier who had received no notice of the hearing on the receiver's application. For the reasons stated herein the court should have modified its order of December 14 as requested by Tremaine.

The judgment should be reversed.

64 Cal.App.2d 144

WOOD v. MOORE et al.

SHARP et al. v. AMMONS.

Civ. Nos. 14248, 14249.

District Court of Appeal, Second District, Division 1, California.

April 28, 1944.

1. Automobiles 🔑244(3, 36)

Evidence that defendant's driver during hours of darkness drove automobile from private property upon a public highway in front of tractor-trailer approaching some 50 to 75 feet away, stopped automobile upon half of highway being used by tractor-trailer, and failed to yield right of way, established negligence of defendant proximately contributing to collision with tractor-trailer and consequent damage to property adjoining highway. Vehicle Code, § 553, St.1941, p. 2723.

2. Trial 🔑194(16)

Instruction declaring that Vehicle Code section relating to stopping on highway was in effect at time of accident "and applicable here" simply advised jury that section was in effect and was applicable to facts presented by litigation in event jury found there was a violation of such section, and use of quoted phrase was not objectionable as invading province of jury. Vehicle Code, § 543, St.1941, p. 2723.

3. Trial 🔑243

Where collision involved tractor-trailer and occurred within a 25-mile speed zone, and evidence as to speed was conflicting, instruction that speed of tractor-trailer in excess of prima facie limit did not constitute negligence as a matter of law unless it was in excess of 40 miles per hour in which event it would constitute negligence as a matter of law was not objectionable as contradictory. Vehicle Code, § 511, St.1941, p. 2716; § 513, St. 1935, p. 177; § 515, St.1939, p. 2109.

4. Appeal and error 🔑1033(5)

Where there was overwhelming proof of defendants' negligence in operating automobile, and issue of speed was raised only with respect to plaintiff's tractor-trailer, defendants could not complain that court's instructions on Vehicle Code sections pertaining to speed created an irreconcilable conflict thereby placing on plaintiff a greater burden than was necessary. Vehicle Code, §§ 510, 511, St.1935, pp. 176, 177; § 513, St.1941, p. 2716.

5. Trial 🔑295(1)

Where particular inaccuracy or omission, or phraseology objected to, appears to have been cured by entire charge, and jury was fairly instructed as to the law, claim of error cannot be predicated upon defect in particular instruction.

6. Appeal and error 🔑1064(1)

Judgment will not be reversed for erroneous instructions unless evidence indicates that, without error, verdict probably would have been different.

7. Damages 🔑188(1)

Plaintiff's testimony that certain toilet fixtures were not usable after tractor-trailer crashed into plaintiff's building following a collision with defendant's automobile authorized implied finding of jury that such fixtures were destroyed and warranted inclusion of value thereof in verdict, notwithstanding testimony of contractor who bid on repairs that fixtures were in good shape and did not require replacement.

8. Evidence ⚷601(4)

Evidence of cost, uncontradicted by other evidence, is sufficient to support a finding of value.

9. Damages ⚷188(2)

Where only evidence of value of plaintiff's neon sign which was destroyed as result of an automobile collision was the cost thereof, jury was authorized to include cost in verdict for plaintiff.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Laura Lee Wood against Ed Moore and others to recover for damage to plaintiff's sandwich stand, cafe building and equipment therein as the result of a collision between a tractor and semitrailer belonging to defendants Nora J. Sharp and Harry Sharp, and a Ford automobile owned by the defendant Laura Ammons and operated by the defendant William O. Hyman, consolidated for trial with an action by Nora Sharp and Harry Sharp against Laura Ammons for damage to the tractor and semitrailer and for loss of use of such equipment arising out of the same collision. From judgments for plaintiffs in each action, Laura Ammons appeals, and William O. Hyman appeals from the judgment in the first action.

Affirmed.

Stephen Tighe, C. W. Bowers, and Paul Hitch, all of Los Angeles, for appellants.

Stanley A. Phipps and Claire T. Van Etten, both of Los Angeles, for respondent Wood.

Angus C. McBain, of Los Angeles, for respondents Sharp.

YORK, Presiding Justice.

The above-entitled actions, which were consolidated for trial, arose out of a collision between the tractor truck and semitrailer, owned by plaintiffs Sharp which were being driven by their employee, Ed Moore, and the Ford automobile, owned by defendant Ammons which was being operated by her agent, defendant Hyman.

In the first action, Civil No. 14248, the jury returned a verdict for plaintiff Wood and against defendants Ammons and Hyman for $2,271.01, representing damage done to a sandwich stand, a cafe building and to certain equipment contained therein. The other action, Civil No. 14249, resulted in a verdict for plaintiffs Sharp against defendant Ammons for $3050.86, as compensation for damages inflicted upon their tractor and semitrailer and for loss of use of such equipment. Defendant Ammons prosecutes a separate appeal from each of the judgments entered in said actions, defendant Hyman joining in the appeal from the judgment in the first action. Since the two appeals present for determination practically identical questions, this court will endeavor to dispose of both in one opinion.

The collision occurred about six o'clock on the morning of March 8, 1942 on Highway 101 where it passes through the town of Saugus, when the driver of appellant Ammons' Ford car in an attempt to make a left-hand turn swung out into the highway from a vacant lot, across the path of respondents' truck which was traveling south transporting a cargo of condensed milk weighing 68,000 pounds.

At the point in question the highway described a long, gradual or "slow" curve to the right to one approaching Saugus from the north. Wood's garage was located on the west side of the highway, immediately to the south of which was the vacant lot from which appellant Hyman started his left-hand turn. Adjoining said lot to the south was a sandwich stand built against the north wall of a brick building housing the Saugus Cafe. The east side of the highway through Saugus is bounded by a railway right of way and tracks, and although there is no intersection at this point, the old Lancaster Road joins the highway a short distance to the north.

Before daybreak on the morning when the accident occurred, appellant Laura Ammons was returning from Wyoming to her home at Ventura, accompanied by her two small children and two young men, one of whom, appellant William O. Hyman, was driving her Ford automobile. They had entered Highway 101 from the old Lancaster Road and had made a right-hand turn in order to proceed north on the highway; however, because he was uncertain of his directions, the driver turned the Ford around and drove south on the highway to Saugus where he stopped in front of Wood's garage and talked to the witness Leslie Manning who directed him which way to go. About thirty minutes later, the witness Manning heard the motor of respondents' truck approaching from the north, and when it was within 50 or 60 feet of the center line of the vacant lot, said Manning observed appellant's automobile which had been facing south on the highway, suddenly turn into the vacant lot between the garage and the sandwich stand and make a left-hand turn by swinging out into the highway in a northerly direction toward the Lancaster Road. Said automobile slowed down after entering the highway and came to a complete stop. The approaching truck was too close to avoid the automobile and the left front wheels of the tractor collided with the left rear end of the machine, after which the tractor struck and sheared off a telephone pole near the corner of the sandwich stand; struck the corner of the sandwich stand and rolled to a stop directly in front of the Saugus Cafe in a position facing south partially off the west side of the highway.

[1] The evidence adduced at the trial herein conclusively established acts of negligence on the part of appellants which directly and proximately contributed to the collision and the consequent damage to respondents' property, i.e., driving the Ford during hours of darkness from private property upon and across a public highway in front of the approaching tractor and trailer when the latter were within a distance of seventy-five to fifty feet; stopping said Ford on the west half of the highway upon which said tractor and trailer were approaching; failure to yield the right of way to the approaching tractor as required by section 553 of the Vehicle Code, St.1941, p. 2723.

The driver of the tractor testified that the front end of the Ford was out in the center line of the highway at the time of the impact while appellant Ammons testified that when she first saw the truck and trailer, her car was "pulling onto the highway. I think, I believe our front wheels were about two feet on the highway", and the truck and trailer were seventy or seventy-five feet to her left.

There was substantial evidence to show that for some time before it reached the scene of the accident, respondents' truck was traveling at 25 miles per hour. The driver Moore testified that under the conditions existing at the time, the tractor and trailer could not have gone over 26 miles per hour. The highway patrolman who investigated the accident estimated the speed of the truck at 30 to 35 miles per hour solely from the skid and tire marks which he observed after the accident. Appellant Ammons, testifying that she did not see the tractor and trailer until her automobile was entering the highway when the truck was seventy-five feet distant, estimated the truck's speed at 45 miles per hour.

The trucking equipment left skid and tire marks approximately seventy-five feet in length. However, when it is considered that the equipment had an overall length of forty-seven feet, that the tractor was equipped with three axles and ten tires, and the trailer with three axles and twelve tires, such equipment would need to move only a few feet to create more than forty-seven feet of skid marks.

As usual in cases of this type, many issues were decided upon conflicting evidence. However, a careful review of the entire record discloses substantial evidence in support of the verdicts of the jury and the resulting judgments.

Appellants' main point in both appeals is that the court erred in its instructions to the jury:

[2] Instruction 43: "Section 543 of the Vehicle Code in effect at the time of this accident and applicable here, reads as follows: 'No person shall start a vehicle stopped, standing or parked on a highway nor shall any person back a vehicle on a highway unless and until such movement can be made with reasonable safety.'" Appellants urge that the use of the words "and applicable here" instructed the jury in effect that the Ammons car was stopped on the highway, while this was one of the issues of fact to be determined by the jury. As we read this instruction it simply advised the jury that section 543 of the Vehicle Code, St.1941, p. 2723, which was in effect at the time of the accident, was applicable to the facts presented by the instant litigation in the event the jury found there was a violation of said section of the Vehicle Code.

[3] Appellants complain because the court instructed the jury as to the prima facie speed laws on the one hand (sections 511 and 513, Vehicle Code, St.1941, p. 2716, St.1935, p. 177, instruction 39 and 50) and on the speed law applying to trucks and trailers having a gross weight of 25,000 pounds or more on the other hand (section 515 Vehicle Code, St.1939, p. 2109, instruction 5), urging that by giving these instructions which were contradictory it became impossible for the jury to follow the court's instructions and return a proper

verdict. The speed of the trucking equipment was one of the major issues at the trial of these cases and counsel for respondent Wood in case No. 14248 took great pains to establish that the district in which the accident occurred was built up to comply with the twenty-five mile zone defined by the Vehicle Code and to establish the existence of twenty-five mile signposts. As heretofore shown, the evidence as to the speed of the trucking equipment was conflicting, therefore, in order to properly instruct the jury upon this issue it was necessary to advise it that the speed of the tractor and trailer in excess of the prima facie limits did not constitute negligence as a matter of law, unless it was in excess of forty miles per hour in which event it would constitute negligence as a matter of law.

[4] It is next contended that the court's instructions 38, 39, and 50 on section 510, 511 and 513 of the Vehicle Code, St.1935, pp. 176, 177, St.1941, p. 2716, created an irreconcilable conflict in the instructions. While the courts have held that the giving of conflicting instructions under certain circumstances constitutes prejudicial error (Westberg v. Willde, 14 Cal.2d 360, 370, 94 P.2d 590) in the instant litigation the issue of speed was raised only with respect to respondents' truck and trailer and was never even suggested in so far as the operation of appellants' automobile was concerned. Consequently, if the instructions given imposed a greater burden upon respondents than was necessary, appellants have no cause for complaint in view of the overwhelming proof of their negligence in operating the Ford automobile.

[5] In the cases under consideration the trial judge gave voluminous instructions which were proposed by all the parties to the litigation. In such circumstances, as suggested by the following statement in the case of Inai v. Ede, 59 Cal.App.2d 549, 555, 139 P.2d 76, 79, "* * * it is an ever present possibility that some particular instruction will fail to contain either a complete or accurate statement of the law. It is but one of the many difficulties where several parties are involved in the same trial. It therefore becomes increasingly necessary to examine the entire charge in the light of fair and reasonable construction, without straining at any particular portion of the language. Then if in the light of such scrutiny it may be reasonably said that the particular inaccuracy or omission or phraseology appears to have been cured by the entire charge and that the jury was fairly and impartially instructed as to the law, it is sufficient to defeat any claim of error predicated upon defects in particular instructions."

[6] An examination of the record including all of the instructions given to the jury by the trial judge herein leads to the conclusion that is so aptly stated in the case of Shuey v. Asbury, 5 Cal.2d 712, 713, 55 P.2d 1160, 1161, to-wit: "It is now settled law that a judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice. The usual consequence is that there will be no cause for reversal unless the evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury."

[7-9] With respect to the first of the above-entitled actions, No. 14248, appellants urge that the evidence is insufficient to justify the verdict returned therein for $2,271.01 because it represents the exact bid made by the contractor Pollock for reconstructing and repairing respondent Wood's damaged buildings, plus the latter's own valuation on equipment therein contained including toilet fixtures in the men's rest room and the cost of a Neon sign; and that since the said contractor testified that said fixtures were in good shape and did not require replacement, that neither the cost of the sign nor the sum of $50 included in the judgment for the fixtures represents a loss actually sustained by respondent Wood. At the trial herein respondent Wood testified that "part of the toilet fixtures are back in—on a little platform back of the fence in the rear of where the sandwich stand was * * * just sitting there, just old toilet fixtures sitting there, not usable." This is sufficient foundation for the implied finding of the jury that the said fixtures valued at $50 were destroyed, despite the statement of the contractor Pollock heretofore recited. With respect to the Neon sign, it is well-settled that evidence of cost, uncontradicted by other evidence, is sufficient to support a finding of value. Sanders v. Austin, 180 Cal. 664, 666, 182 P. 449; Baci-

galupi v. Phoenix Bldg. & Const. Co., 14 Cal.App. 632, 637, 112 P. 892.

For the reasons stated the judgments appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.

64 Cal.App.2d 162

MARYLAND CASUALTY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7047.

District Court of Appeal, Third District, California.

April 28, 1944.

Rehearing Denied May 25, 1944.

1. Workmen's compensation 🔑1745, 1776

The Industrial Accident Commission has no jurisdiction to make a finding and award in absence of competent evidence to support them.

2. Evidence 🔑574

When cause of an ailment is solely within scientific knowledge of medical expert witnesses, and not within common knowledge of nonexpert witnesses, medical expert testimony is ordinarily controlling over layman's mere opinion.

3. Appeal and error 🔑994(3)

The weight to be given to expert medical testimony is within sound discretion of fact finding tribunal, and the law makes no distinction in this regard between expert and nonexpert witnesses.

4. Workmen's compensation 🔑2033

Expert evidence sustained findings that employee's new and further disability was attributable to back injury for which compensation had already been awarded. St. 1937, pp. 292, 296, §§ 5303, 5410.

Proceeding under the Workmen's Compensation Law by Harry Baldwin, claimant, opposed by A. Brizard, employer, and the Maryland Casualty Company, insurer. On petition by the insurer to annul an award granting compensation.

Affirmed.

Leonard & Hanna, of San Francisco, for petitioner.

E. A. Corten, of San Francisco, for respondent.

THOMPSON, Justice.

This is a petition by Maryland Casualty Company, the insurer of A. Brizard, a corporation, to annul the award of the Industrial Accident Commission, rendered on rehearing, in favor of Harry Baldwin for permanent injury to his back sustained in the course of his employment.

This petitioner contends the record contains no evidence that the workman's present disability resulted from the injury to his back, and that all of the medical experts agreed his present ailment is a manifestation of latent arthritis which was not caused by said injury.

Harry Baldwin was employed by A. Brizard, a corporation, as a sheet metal worker. The Maryland Casualty Company was the insurer. July 12, 1939, Baldwin, who was then forty-nine years of age, while engaged beneath the ground floor of a dwelling house at Loleta, in installing a furnace, twisted his back, resulting in sharp pain and an injury to the lower portion of his spine. He remained at home in Arcata for about a week on account of the injury, reporting his condition to Doctor D. N. McInturff. The Doctor examined him on July 13th, finding that he had "pain over the lumbosacral area, spasm particularly of the muscles of the left part of the back that extend down to the hip." Baldwin returned to his work in about one week, doing "what I could", but suffered from severe pain "between the hip and small of my back." He visited the office of Doctor McInturff several times within a few weeks following the accident. The Doctor assumed he might be afflicted with sciatica and took X-ray pictures of his spine and concluded "that his disability was from the original injury." He "was getting progressively worse." At the time of the original hearing in April, 1940, the Doctor testified that Baldwin had not then "completely recovered." When asked if the injury was permanent or temporary, he replied, "It is impossible to state. People in this age group don't get better because of their age and the tendons become more fixed and tend to mobilize the spine. He should improve but I can't say whether he ever will be completely all right." He said the sciatica resulted from the injury to the back. Regarding that conclusion this colloquy occurred:

"Q. * * * Your conclusion is from the whole thing, Doctor, that this sciatica was a result of the original injury which he gave you a history of when he first came to see you in July? A. Yes."

The testimony of Baldwin adequately supports the theory that his disability originated from the injury to his back which was sustained in the course of his employment. He testified to continuing pains and soreness in the locality of the injury sustained to his back.

An examination of the workman by Doctor Callander, five months after the accident occurred, disclosed that he then suffered "pain down left side" and a "sore spot at the inferior gluteal fold, left buttock." The Doctor did report that "the spine seems fairly normal throughout" and that X-ray pictures disclose "no evidence of recent bone injury." He then concluded "There should be no permanent disability."

Upon that showing, based on conflicting evidence, the Commission adopted findings in May, 1940, holding that the injury caused "total temporary disability" from October 31, 1939, to January 1, 1940, and awarded him compensation accordingly.

Mr. Baldwin returned to his work in January, 1940, but became a member of a partnership, and performed only light work. He continued to suffer from severe pain in his back and down the left leg. In April, 1943, he filed an application pursuant to Section 5410 of the Labor Code, St.1937, p. 296, for "new and further disability" caused by the prior injury to his back. At that hearing the evidence of the former proceeding was received, and Mr. Baldwin fully and elaborately testified to the entire history of his injury to the back and continued disability on that account. The former reports of the physicians were also before the Commission on the last mentioned hearing. Pursuant to Section 5303 of the Labor Code, the Commission considered the entire evidence of both hearings. The testimony of Baldwin adequately supports the conclusion that his present disability is the result of his injury to the back, or at least that his ailment was exacerbated on that account.

Upon the foregoing evidence the Commission amended its former findings determining that Harry Baldwin sustained an injury to his back on July 12, 1939, in the course of his employment by A. Brizard, which caused "permanent disability" to the extent of 30½ per cent thereof, entitling him to an award of $25 per week for 122 weeks, amounting to $3,050 against Maryland Casualty Company, the insurer of said employer, with credit for all sums previously paid on account of said injury. On petition of said insurer, a rehearing was granted on October 14, 1943. Upon further hearing, after due notice, the Commission readopted its last mentioned findings on November 2, 1943, adding a further award for payment of future necessary medical treatment "to cure and/or relieve applicant from the effects of aforesaid injury."

This petition for a writ of review was then filed.

The Maryland Casualty Company contends that the record contains no evidence supporting the findings of the Commission that the workman's permanent disability resulted from the injury to his back, which was sustained by him while installing a furnace beneath the ground floor of a dwelling house on July 12, 1939, and that the expert medical testimony is uncontradicted that his ailment is "entirely ascribable to non-industrial, chronic, infectious pathology." It is also asserted that when the cause of a chronic ailment is not within the common knowledge of non-expert witnesses that cause requires the evidence of scientific medical experts to support a valid finding to that effect.

[1, 2] It is true, as contended by the petitioner, that the Industrial Accident Commission has no jurisdiction to make a finding and award in the absence of competent evidence to support them. Hartford Acc. & Indemnity Co. v. Industrial Acc. Comm., 140 Cal.App. 482, 35 P.2d 366. The generally approved rule is that when the cause of an ailment is solely within the scientific knowledge of medical expert witnesses, and not within the common knowledge of nonexpert witnesses, medical expert testimony is ordinarily controlling over a layman's mere opinion in that regard. Pacific Employers Ins. Co. v. Industrial Acc. Comm., 47 Cal.App.2d 494, 118 P.2d 334; William Simpson Construction Co. v. Industrial Acc. Comm., 74 Cal.App. 239, 240 P. 58; 20 Am.Jur. 719, secs. 858, 859; 1

Campbell's Workmen's Compensation, p. 939, sec. 1082. In the text last cited it is said:

"When the question is one within the knowledge of experts only, their testimony is conclusive. This is best illustrated by the question as the cause of designated pathology, and what is or is not either proper or usual practice in the treatment of disease. The rule does not apply to facts which may be ascertained by the use of the senses of the nonexpert, nor to those facts which inspection by nonexperts would disclose."

[3] The weight to be given to expert medical testimony is within the sound discretion of the fact finding tribunal. The law makes no distinction in that regard between the testimony of expert and nonexpert witnesses. State Comp.Ins.Fund v. Industrial Acc. Comm., 195 Cal. 174, 184, 231 P. 996; Arais v. Kalensnikoff, 10 Cal. 2d 428, 432, 74 P.2d 1043, 115 A.L.R. 163; Neel v. Mannings, Inc., 19 Cal.2d 647, 654, 122 P.2d 576.

[4] In the present case we are of the opinion there is sufficient medical expert evidence to support the findings and award of the Commission that the disability of Baldwin, which continued to the time of the last hearing four years after the injury to his back was sustained, was attributable to that cause. There is a conflict in the evidence of Doctor McInturff and that of Doctor Callander. While the latter physician did say "I feel that there is no permanent disability due to trauma" and in his later report of March, 1943, he said: "I think that now any effects of his trauma has worn off. * * * I think that he has no disability at the present time." On the contrary, Doctor McInturff testified that the pain and disability from which he was then suffering, and which the evidence shows continued to the time of the final hearing, was caused "from the original injury" and that "he was getting progressively worse." He finally concluded that Baldwin was afflicted with sciatica, which was caused by the original injury. Assuming, as the Commission had a right to, that Baldwin was suffering from sciatica, neuritis or traumatic neurasthenia, caused by inflammation of the sciatic nerve or other nerve fibers, the determination of which required scientific medical diagnosis which would be conclusive under the circumstances of this case, still there is some medical testimony in this case to support the conclusion that the chronic ailment was caused by the injury to his back. We must concede this proceeding presents a close case dependent on technical scientific knowledge. It might have been more satisfactory if the examinations of Doctor McInturff had covered the period of time to the date of the last hearing. But since he did testify that the ailment was growing "progressively worse" and that it originated from the injury to his back, we may not hold there is no expert testimony to support the findings and award of the Commission with respect to the cause of his disability.

The award is affirmed.

ADAMS, P. J., and PEEK, J., concur.

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63 Cal.App.2d 768

PEOPLE v. TOTTEN.

Cr. 1860.

District Court of Appeal, Third District, California.

April 15, 1944.

1. Criminal law 🔑1144(13)

Reviewing court on appeal from conviction must consider the evidence in light most favorable to the prosecution.

2. Homicide 🔑254

Evidence sustained conviction for murder of the second degree.

3. Criminal law 🔑1158(1), 1160

Reviewing court on appeal from judgment of conviction will not interfere with verdict of jury or order of trial court denying a new trial where defendant's testimony created only a conflict in the evidence.

4. Homicide 🔑231

Evidence in prosecution for murder justified conclusion of jury that killing was not "without malice", as against defendant's contention that if he was guilty in any sense it would at most be manslaughter. Pen.Code, § 192.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

William Totten was convicted of murder of the second degree, and he appeals.

Affirmed.

Geo. E. Foote and Al. Matthews, both of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed by the District Attorney of Nevada County, defendant was charged with the murder of one Harvey McVean on July 15, 1943. He entered pleas of not guilty and not guilty by reason of insanity. A jury found him guilty of murder of the second degree, and also found that he was sane at the time of the commission of the offense. A motion for a new trial was denied. Defendant now appeals from the judgment of imprisonment for the term provided by law, and from the order denying a new trial, contending that the evidence is insufficient to support the verdict of murder of the second degree, and that if defendant was guilty of any offense it was, at most, manslaughter.

[1] These contentions are without merit. Considering the evidence in the light most favorable to the prosecution, as we must do on this appeal, it is ample to sustain the verdict. Defendant was the nephew of a Mrs. Mary E. Field, a woman past eighty years of age, who lived alone in her own home in Hill's Flat near Nevada City. About a year prior to the homicide, defendant came to reside in Hill's Flat, and with his wife, Ethel, occupied a house back of his aunt's property. The decedent, Harvey McVean, lived with his wife, Mary, on property also adjoining that of Mrs. Field. The evidence shows that there was a very real friendship between the McVeans and Mrs. Field, that Mr. McVean had been very good to Mrs. Field, had helped to take care of her deceased husband during his last illness, and at one time after her husband's death had boarded with her to help her out. On the evening of July 15, 1943, just before seven o'clock, McVean, who just two days before had returned to Hill's Flat after an absence of several months, left his house, stating to his wife that he was going to see Mrs. Field whom he had not yet seen since his return. Mrs. Field testified that McVean came to the side door of her home and knocked, that she went to the door and exclaimed, "My Lord, Harvey McVean," and that at her invitation he entered; that at this point defendant Totten came into the house through the back door, "wild and shouting, 'Harvey McVean, you get out of here, you get out of here, Harvey McVean, you get out of here and stay out of here' " ; that McVean said, "Mrs. Field, he has got the gun on us," and that when she turned around Totten "had the gun pointed to shoot"; that with her hand she gave him a push and he went down; that when he got up he said "I will shoot Harvey McVean and I will shoot you. I will kill the both of you"; that McVean then said he would go home and would see her later, whereupon he stepped out of the house and started back to his home; that he said nothing whatever to Totten; that the latter went out the back door, that she followed him and locked the door and then ran to a neighbor's to call for help, and that after one call she heard a shot. She also said that she had once heard defendant say that McVean had better stay away from there and "not be monkeying around."

There were no actual witnesses to the shooting. Mrs. McVean testified that she heard the gunshot, ran toward Mrs. Field's house and saw her husband coming down the path; that he was "sort of falling" and when she reached him was lying in the grass; that she saw that he had been shot, and that he died without speaking. She further testified that her husband was not carrying a gun or other weapon when he left home to go to Mrs. Field's and that he had none when he died.

Dr. Jones, who was called to attend decedent, testified that he had been shot at close range—within a foot or thereabouts—with a shot-gun, the charge entering the left side just over the heart. This witness, who was the county health officer, also testified that defendant Totten had called upon him several times within a few weeks prior to the date of the homicide, and complained that Mrs. Field was living in miserable conditions and that he thought she ought to be declared incompetent and removed from the property.

Carl T. Larsen, a deputy sheriff, testified that Totten came to the sheriff's office the evening of July 15, 1943, with a gun in his hand, and stated that he was in trouble and that he had shot McVean; that Totten gave him the gun and a shotgun shell and that an empty shell was found near the body of McVean. Larsen also said that Totten told him that McVean was trying to get his aunt's property and that he tried to stop him from doing so; also that he said something about McVean's trying to take the gun away from him.

William D. Woods, an undersheriff, testified that he had seen Totten about noon of July 15th, at the sheriff's office, at which time Totten wanted him to go down to Hill's Flat and make McVean stay away from his aunt; that he said McVean was trying to get her property away from her; and that he also said, "Well, I don't want to have to shoot him." Mrs. McVean, who was called for the defense, stated that Totten had been at their home the morning of the 15th, at which time he had asked McVean how Mrs. Field's property was arranged; that Mr. McVean had answered that it was none of their business and he would rather not talk about it, and that Totten had said, "I just can't do anything with that old bat."

Totten himself testified that after he had been at the McVean home the morning of the 15th he had gone to the sheriff's office and asked the sheriff to ask McVean to stop bothering him; also that he had gone to the district attorney and told him his story. His account of the events leading up to the shooting differs in some respects from that of Mrs. Field, but the jury apparently believed her testimony. Defendant admitted the shooting, but stated that McVean was advancing upon him and attempting to take the gun away from him. He said, "When the man reached around to grab the gun this way and take it away from me was when the climax came." He contended that he was afraid of McVean, but made no contention that decedent was armed with any sort of weapon. There was also evidence that on the morning of the 15th Totten had gone to Mrs. Field's house but had been denied admittance, and that he was angry about this matter, and blamed McVean for it.

In rebuttal the prosecution introduced in evidence a statement made by defendant to the district attorney the day after the homicide. Therein defendant stated that McVean had passed him on his way to Mrs. Field's house the evening of the shooting, and that he had followed him into the house; that he went in to put him out; that he "wasn't going to have him in there, pumping her against me so I couldn't get in to feed her"; that when he shot McVean was "trying to push me back and I wouldn't go back." When asked why he had taken the gun with him when he went into the house he said, "I expected trouble with him."

While at the trial defendant stated that he was carrying the gun for the purpose of shooting cats that had been killing his chickens, and that before the shooting McVean threatened to do him bodily harm, the jury evidently did not accept this testimony as true.

[2, 3] There is no evidence that McVean had ever been other than a good friend to Mrs. Field, or that he had ever attempted to influence her against defendant, or as to the disposition of her property. Defendant's testimony created only a conflict in the evidence. Its verity was for the jury, and in such case an appellate court will not interfere with its verdict or the order of the trial court denying a new trial. See People v. Frank, 60 Cal.App.2d 802, 141 P.2d 780, and cases there cited.

[4] We find no merit in appellant's contention that if he is guilty of any offense it would at most be manslaughter. The latter defense is defined as the unlawful killing of a human being, without malice, and is of two kinds: voluntary—upon a sudden quarrel or heat of passion; and involuntary—in the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. Pen.Code, sec. 192. The jury in this case were fully justified in their conclusion that the killing of McVean was not "without malice," and they might well have concluded that it was wilful, deliberate and premeditated.

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.

64 Cal.App.2d 132

In re CRAIG'S ESTATE.

AGNEW et al. v. McCARTHY et al.

Civ. 12669.

District Court of Appeal, First District,
Division 2, California.
April 28, 1944.

Rehearing Denied May 27, 1944.
Hearing Denied June 26, 1944.

1. Wills ⟹497(2)

Though word "children" is ordinarily presumed to be used by testator in its primary or strict sense, other provisions of will or extrinsic evidence may show that such word should be interpreted in its enlarged sense to include "grandchildren".

See Words and Phrases, Permanent Edition, for all other definitions of "Children" and "Grandchildren".

2. Wills ⟹488

Where will made bequests to "children or child living at the time of my death" of named uncle and evidence showed that there were no sons or daughters of such uncle living, either at time of testator's death or of execution of will, there was a "latent ambiguity" respecting whether word "children" should be enlarged beyond its primary meaning to include grandchildren, calling for resort to other provisions of will or to extrinsic evidence, or both. Probate Code, §§ 92, 105.

See Words and Phrases, Permanent Edition, for all other definitions of "Latent Ambiguity".

3. Wills ⟹497(2)

Where will, after making bequests to testator's first cousins and children of deceased first cousins, made bequests to children of named deceased uncle of testator living at testator's death, and there were no sons or daughters of deceased uncle living on testator's death or on execution of will, the word "children" should be construed to include grandchildren without resort to extrinsic evidence in view of subsequent provision of will. Probate Code, §§ 92, 103, 105.

4. Wills ⟹467

Where will, after giving one-half of testator's estate to his first cousins or to children of deceased first cousins, concluded with recital that it was testator's desire that each of children of deceased first cousins living at testator's death should share equally with each of first cousins then living, and if any children of first cousins predeceased testator leaving lawful issue then living such issue should take by right of representation, such concluding clause would be sufficient, standing alone, to dispose of one-half of testator's estate mentioned in opening paragraph.

5. Wills ⟹472

Clause in will making bequests to children of testator's named uncle living at testator's death was required to be interpreted in relation to subsequent clause expressing testator's desire that each of children of testator's deceased first cousins living at testator's death should share equally with each of first cousins then living and that issue of any of children of such first cousins who predeceased testator should take by right of representation the share their deceased parent would have received if living, so as to form one consistent whole, if possible. Probate Code, §§ 92, 103, 105.

6. Wills ⟹452

Where two interpretations of word "children" in will are possible, courts are disposed to adopt that one which will not disinherit testator's heirs or close blood relatives. Probate Code, § 102.

7. Wills ⟹488

Where latent ambiguity exists in a will, testimony of attorney who drew will as to testator's specific instructions for drawing the will is admissible.

8. Appeal and error ⟹1050(1)

Where testimony of attorney who drew will as to specific instructions by testator was admissible because of latent ambiguity therein, admission of testimony of testator's surviving widow, which was at best merely cumulative in nature, was not prejudicial error.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of William Martin Craig, deceased. From an order granting partial distribution to Winifred J. McCarthy and others, Maud Agnew and others appeal.

Affirmed.

John B. Ehlen, of San Francisco, for appellant Maud Agnew et al.

Pillsbury, Madison & Sutro, M. D. L. Fuller, Francis R. Kirkham, and Louis E. Goodyear, all of San Francisco, for appellant James Agnew et al.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for appellant Florence McKenna.

Warren H. Atherton and J. C. Dozier, both of Stockton, and Meyer & Franklin, of Champaign, Ill., for respondents.

SPENCE, Justice.

This is an appeal by seventeen appellants from an order granting partial distribution to the seven respondents.

Appellants are ten first cousins and seven second cousins of the deceased while respondents are seven second cousins of the deceased. The seventeen appellants were likewise granted partial distribution of the estate by other orders which are not involved on this appeal. The question presented here is whether respondents were persons entitled to take under the provisions of paragraph three of the will of the deceased.

Preliminarily it may be stated that deceased left surviving him his wife but no other relatives closer than first and second cousins. The residence of the deceased was in San Francisco but the residences of the first and second cousins were scattered throughout the world. It appears probable that deceased had not been in close touch with his first or second cousins as he made provision for some who had died long prior to the execution of the will and also made provision for the children of some who had died without leaving children, long prior to the execution of the will.

Appellants and respondents represent four branches of the families of the parents of the deceased, being children or grandchildren of deceased's aunt and uncle on his father's side and the children or grandchildren of the deceased's aunt and uncle on his mother's side. The evidence does not definitely show that the four branches which were mentioned in the will and which are represented by appellants and respondents were the only branches of the families of the parents of deceased, but there is nothing to show that they were not. It is a fair assumption that the testator made provision for all branches of which he had knowledge and there is no suggestion that there were other branches. Under the interpretation placed upon paragraph three of the will by the trial court, persons in all four branches have been held to be entitled to take under the provisions thereof. Under the interpretation for which appellants contend, no person in one of the four branches, that is, the branch represented by the descendants of David Craig who was the uncle of the deceased on his father's side, would be entitled to take.

In paragraph four of the will, the deceased stated, "All of my property is separate property, being the property and avails thereof acquired by me through inheritance from my deceased father," and in one of the concluding clauses of paragraph three of the will, deceased stated, "* * * I am not advised as to whether all of the above mentioned parties are now alive, or as to their whereabouts * * *." Paragraphs two and three made disposition of the entire estate of the deceased.

By paragraph two of the will, deceased left one-half of his estate in trust for his wife, who is not a party to the present controversy. Paragraph three then followed, the pertinent portions of which are:

"Third: The other one-half of my said estate I give device and bequeath to the following persons in equal proportions, to-wit:

"(a) The children or child living at the time of my death of my first cousin, Mrs. May Johnston, (now deceased) formerly of Courtland, Donaghadee, County of Down, North Ireland;

"(b) My first cousin, Maud Agnew now residing in Courtland, Donaghadee, County of Down, North Ireland;

"(c) My first cousin, John Agnew, now residing in Seabreezr, Warren Road, Donaghadee, County of Down, North Ireland;

"(d) My first cousin, James Agnew, now residing in Vancouver, British Columbia;

"(e) The children or child living at the time of my death of my first cousin Mary G. Higginson, (now deceased), formerly residing at 86 Hatton Drive, Woodstock Road, Belfast, Ireland;

"(f) My first cousin, Mrs. Florence MacKenna, now residing at Amarmore, Alfred Road, Brookvale, Manly, Sydney, New South Wales;

"(g) My first cousin, George William Higginson, now residing at 115 Congress Street, Brooklyn, New York;

"(h) My first cousin, Maurice Cecil Higginson, now residing at 375 Woodstock Road, Belfast, Ireland;

"(i) My first cousin, Mrs. Beatrice Mabel Higginson Naylor, now residing at 68 Glendower Street Belfast, Ireland;

"(j) My first cousin, Sarah Sophia Higginson, now residing at 86 Hatton Drive, Woodstock Road, Belfast, Ireland;

"(k) The children or child living at the time of my death of my first cousin, Ann Morton Hunter, (now decease) formerly of the City of Carrick-fegus, County of Antrim, Ireland;

"(l) My first cousin, Jane Morton Barry, now residing at Glentulla, Jordans Town, Belfast, Ireland;

"(m) My first cousin, Mrs. Ida Higginson Latimer, whose address is G. O. Box 29, Kenville, Manitoba, Canada;

"(n) The children or child living at the time of my death of David Craig (now deceased) my father's brother, formerly of Joliet, Illinois, in equal shares, the names and addresses of said children being unknown to me;

"(o) The children or child living at the time of my death of my first cousin, Campbell Morton, who dies in South Africa; and

"(p) The children or child of my deceased first cousin, Dr. Nathaniel Morton, who died in Earlshilton, England.

"It is my desire that each of the children of my deceased first cousins living at the time of my death shall share equally with each of my first cousins then living, and if any of the children of my said first cousins have predeceased me leaving lawful issue then living, such issue shall take by right of representation the share in said estate which said decedent would have received if living."

The last quoted clause of paragraph three, commencing with the words "It is my desire", has been termed in different ways by the parties to this appeal and, for the sake of convenience in this discussion, said clause will be termed the "concluding clause." The first quoted clause of paragraph three, reading "the other one-half of my said estate, I give devise and bequeath to the following persons in equal proportions, to-wit:" will be termed the "opening clause." The clause lettered (n) in paragraph three is the other principal clause for discussion.

The clause lettered (n) uses the words "The children or child living at the time of my death of David Craig (now deceased) my father's brother * * *". Taking the word "children" in its primary sense, there were no "children" of David Craig living at the time of the death of the deceased or at the time of the execution of the will. The will was executed in 1939 and both John Craig and Herbert Craig, who were first cousins of the deceased and were the only "children" of David Craig, deceased, had died in 1933. Five of the respondents are the children of said John Craig, deceased, and the remaining two respondents are the children of said Herbert Craig, deceased. It is therefore conceded by all that if the word "children", as used in clause (n), is to be interpreted in its primary or strict sense, then there were no persons answering the description of "children * * * living at the time of my death of David Craig * * *." And it is further conceded that under such interpretation of clause (n), respondents would not be entitled to take by virtue of the provisions of section 92 of the Probate Code as said clause (n) referred only to those persons answering the description of "children", as so interpreted, "living at the time of my death." Estate of Rounds, 180 Cal. 386, 181 P. 638.

Respondents contend, however, that when the will is read as a whole and clause (n) is interpreted in the light of the other provisions of the will and particularly of the concluding clause of paragraph three, or in the light of the extrinsic evidence introduced, or in the light of both such other provisions of the will and such extrinsic evidence, the only reasonable conclusion to be drawn is that the deceased intended the word "children", as found in clause (n), to be used in its enlarged sense so as to include grandchildren. In our opinion respondents' contention must be sustained and under this view, it is clear that the trial court correctly held that respondents, as grandchildren of David Craig living at the death of the testator, were entitled to take under said paragraph three of the will.

[1] There are many authorities holding that while the word "children" is ordinarily presumed to be used by a testator in its primary or strict sense, other provisions of the will or extrinsic evidence may show that the word "children" should be interpreted in its enlarged sense so as

to include grandchildren. In re Schedel, 73 Cal. 594, 15 P. 297; Rhoton v. Blevin, 99 Cal. 645, 34 P. 513; Estate of Heberle, 155 Cal. 723, 102 P. 935; see also numerous authorities collected in 104 A.L.R. 282. There are two cases in this jurisdiction in which the claim that the word "children" should be interpreted in its enlarged sense was denied but each of said cases is distinguishable and each recognizes that said word may be interpreted under certain circumstances as including grandchildren. In Estate of Willson, 171 Cal. 449, 153 P. 927, 929, the bequest was to "the children of my said brothers and sisters." Six of said "children" survived the testator as did also a number of grandchildren whose parents had died after the execution of the will. The court there said at page 456 of 171 Cal., at page 930 of 153 P., "The word 'children,' in a will, has been held to include grandchildren in only two classes of cases. The first class is where there is an ambiguity in the will itself which leaves the meaning of the testator in respect to the word 'children' uncertain. * * * The other class consists of cases where there is a latent ambiguity * * *. Where the will purports to make a gift to 'children' and it appears that none were living at the execution of the will, or afterward, extrinsic evidence may be given tending to prove that a gift to grandchildren was intended. * * * As there were a number of children of the brothers and sisters living, both at the time of the execution of the will and at the time of the death of the testatrix, this case does not come within the second class. * * * There is nothing in the context of this will which throws doubt upon the meaning of the word children, as used in the residuary clauses, nothing to suggest that it was not used in the ordinary sense to describe the immediate offspring of the brothers and sisters named." In Estate of Vizelich, 129 Cal.App. 347, 18 P.2d 773, 774, property was left "to my surviving children, that is to say, my sons and daughters herein named." The court said on page 352 of 129 Cal.App., on page 775 of 18 P.2d, "The word 'children' in its primary significance means descendants in the first degree, and can receive no other construction, in the absence of satisfactory evidence that the testator intended it to include grandchildren. * * * No such intention is apparent in the testator's will. * * * It is evident that Mrs. Vizelich, the testatrix herein, desired the share of any of her children or grandchildren who might die without issue, to go to her surviving children, and, as a precaution against uncertainty in that classification, she added, 'that is to say, to my sons and daughters herein named.'"

[2, 3] We therefore turn to the circumstances presented in the present case to determine whether the word "children", as used by the testator in clause (n) of paragraph three, should be interpreted in its primary or strict sense so as to exclude grandchildren or in its enlarged sense so as to include grandchildren. When the evidence showed that there were no sons or daughters of David Craig, deceased, living either at the time of the death of the testator or at the time of the execution of the will, a latent ambiguity arose with respect to said clause (n) which called for interpretation by resort to the other provisions of the will or by resort to extrinsic evidence, or by resort to both. Probate Code, section 105, and authorities cited above. In our opinion a reading of the will as a whole without resort to extrinsic evidence calls for the interpretation of the word "children" in the enlarged sense as determined by the trial court.

Respondents lay particular stress on the concluding clause of paragraph three reading "It is my desire that each of the children of my deceased first cousins living at the time of my death shall share equally with each of my first cousins then living, and if any of the children of my said first cousins have predeceased me leaving lawful issue then living, such issue shall take by right of representation the share in said estate which said decedent would have received if living." Respondents were children, living at the time of the testator's death, of two of the testator's deceased first cousins. In passing, we may state that it does not appear that any of the children of the testator's deceased first cousins had predeceased the testator leaving issue who might take by right of representation under the last portion of said concluding clause.

[4, 5] The concluding clause is termed by respondents as the "key" or "master" clause expressing the desires and intentions of the testator and we believe that it may properly be so termed. It is significant to note that it would be sufficient, standing alone and in the absence of any of the let-

tered clauses of paragraph three, to dispose of the one-half of the estate of the testator mentioned in the opening clause of paragraph three. Estate of Tooley, 170 Cal. 164, 149 P. 574, Ann.Cas.1917B, 516; Estate of Briggs, 186 Cal. 351, 199 P. 322. Estate of Lawrence, 17 Cal.2d 1, 108 P. 2d 893. Clause (n) must be interpreted in relation to this concluding clause so as "to form one consistent whole", if such is possible, and if the concluding clause should be found to be "absolutely irreconcilable" with clause (n), the concluding clause should prevail. Probate Code, sec. 103. We believe, however, that these clauses are not absolutely irreconcilable but on the contrary may be interpreted as entirely consistent with each other if the word "children", as used in clause (n), is interpreted in its enlarged sense so as to include grandchildren.

The entire plan of the testator seems perfectly evident from reading the will as a whole. He declared in his will that his entire estate had come to him by inheritance from his deceased father. He manifested throughout his will his desire that said estate should be shared at his death by the descendants of the several branches of the families of his parents. There were four such branches represented by the descendants of his two uncles and two aunts and, as above indicated, it does not appear that there were any other branches. The testator stated in his will his uncertainty as to whether all his first cousins and second cousins, who were mentioned therein, were alive and if alive, as to where they might be located. He apparently did not know whether some of his first cousins had ever married and if so, whether they had had children and if so, the number and names of said children. It is entirely probable that he did not know who were the living children or grandchildren of his deceased uncle, David Craig. He was, of course, uncertain as to which of his first and second cousins might predecease him.

With the limited knowledge which the testator had concerning the existence and the names and addresses of the descendants of his deceased uncles and aunts, it seems clear that the testator did all that his knowledge permitted to designate such descendants as beneficiaries by name or by description and to make reference to addresses which might aid in locating such descendants; and it further seems clear that he believed it necessary and proper to give definite expression to his general plan by adding the concluding clause of paragraph three. That plan as therein expressed, which no doubt appeared just and proper to him, was to have each living first cousin and each living child of a deceased first cousin share equally and, in the event that any child of a deceased first cousin predeceased the testator leaving lawful issue, to have such issue share but only by right of representation. There is nothing in the will to show that the testator intended to discriminate between the four branches of the families of his parents. Every indication is to the contrary.

[6] In referring to a will bearing some similarity to the one before us, the court referred to the strong family spirit exemplified saying that the will was "patriarchal in design" and holding that the word "children" should be interpreted in its expanded sense. Davis Trust Co. v. Elkins, 114 W. Va. 742, 175 S.E. 611. The expended sense was also adopted where there was no person living coming within the description of a "child", in the primary and restricted sense of the word, but there were grandchildren living, the court pointing out that there as here "the beneficiaries were cousins, and lived at a distance, and were much scattered; and it did not appear that the testator was acquainted with the situation of their families, and the number or names of their children." Dunn v. Cory, 56 N.J.Eq. 507, 39 A. 368, 369. And in another case, where the wording of the will was similar to the one before us in that it read "to such children as should be living at the time of her death", it was held that the word "children" should be interpreted so as to include grandchildren. Prowitt v. Rodman, 37 N.Y. 42. While it is difficult, if not impossible, to find cases on all fours to aid in the interpretation of a particular will, the foregoing authorities indicate the trend of the decisions and to these may be added the following: Pfender v. Depew, 136 App.Div. 636, 121 N.Y. S. 285; Matter of Paton, 111 N.Y. 480, 18 N.E. 625; Matter of Brown, 93 N.Y. 295; In re Miller, In re Marshall's Will, 18 App.Div. 211, 45 N.Y.S. 956; In re Faust's Estate, 83 Misc. 250, 145 N.Y.S. 842; In re Scholl's Estate, 100 Wis. 650, 76 N.W. 616; Spencer v. Title Guarantee Loan & Trust Co., 222 Ala. 221, 132 So. 32; Douglas v. James, 66 Vt. 21, 28 A. 319, 44 Am.St.Rep. 817; Bowker v. Bowker, 148 Mass. 198, 19 N.E. 213. As was said in Pfender v. Depew, 136 App.Div. 636, 121 N.Y.S. 285, at page 287, "Where two

interpretations of the word 'children' are possible, the courts have been much disposed to adopt that one which will not serve to disinherit the heirs of the testator."

Appellants argue for an interpretation which would disinherit the seven respondents whose relationship as second cousins of the testator was the same as that of seven of the appellants. To adopt this interpretation would result in disinheriting the only heirs shown by the record to bear the name of Craig, which was the family name of the testator and of the deceased father of the testator from whom the estate had been inherited. Such interpretation seems entirely out of harmony with the general plan of the testator as expressed in his will and entirely out of harmony with the trend of the authorities above cited.

We are not impressed with appellants' argument that the concluding clause must be interpreted as a clause inserted by the testator solely for the purpose of fixing the proportions which the legatees, under appellants' interpretation of the legatees included in the lettered clauses, were to take and for no other purpose. Such proportions, under appellants' interpretation of the legatees included in the lettered clauses, had been previously fixed by the words "to the following persons in equal proportions" found in the opening clause. Even if it be conceded that appellants' argument is based upon a possible interpretation of the concluding clause, the interpretation placed upon said clause by respondents is at least equally reasonable and the latter should be preferred as it renders clause (n) operative (Probate Code, section 102) and prevents the disinheriting of the heirs who were descendants of David Craig.

Appellants further argue that under respondent's interpretation "any other first cousins of the testator or children of deceased first cousins would be entitled to inherit along with the expressly mentioned first cousins and children of first cousins expressly referred to as deceased." While this is a possible interpretation of the concluding clause, it does not appear that there were, at the time of the death of the testator or at the time of the execution of the will, other branches of the families of the parents of the deceased or that, in addition to appellants and respondents, there were other living first cousins or other living children of deceased first cousins within the four branches of said families mentioned in the will. We are therefore not called upon to determine whether the concluding clause, which standing alone would be sufficient as a dispositive clause should be interpreted as such when read with the lettered clauses. We are merely called upon to hold that the lettered clauses must be read in the light of the concluding clause and that said concluding clause was properly interpreted by the trial court as expressing the general plan and intention of the testator with respect to the several branches of the families which were mentioned in the lettered clauses and as indicating that the word "children" was used in its enlarged sense in the clause lettered (n).

[7, 8] Appellants further contend that the trial court committed prejudicial error in admitting certain extrinsic evidence. The evidence to which particular reference is made is certain evidence given by Mr. Randolph V. Whiting, the attorney who drew the will, and by the testator's surviving wife.

We have heretofore indicated our belief that it was unnecessary for the trial court to have resorted to anything other than the remaining provisions of the will to clarify the latent ambiguity which arose with respect to clause (n) when it appeared that there were no sons or daughters of David Craig living at either the time of the death of the testator or at the time of the execution of the will. However, if it may be said, after a reading of the entire will, that the intent of the testator still remained in doubt, the testimony of Mr. Whiting, covering the specific instructions given to him by the testator for the purpose of drawing the will, left no doubt concerning such intent. It is well settled that when a latent ambiguity exists in a will, testimony concerning such specific instructions is admissible. Estate of Dominici, 151 Cal. 181, 90 P. 448; Estate of Little, 170 Cal. 52, 148 P. 194; Estate of Greenwald, 19 Cal.App.2d 291, 65 P.2d 70. The testimony of the testator's surviving wife was at best merely cumulative in nature. Under these circumstances we find no prejudicial error in the admission of any of said testimony.

The order appealed from is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

On Rehearing.

PER CURIAM.

In the petition for rehearing, appellants call our attention to the fact that toward the end of the opinion heretofore filed respondents were referred to as "heirs" of the testator. While appellants concede that "appellants and respondents were the testator's closest blood relatives," it appears that neither appellants nor respondents were heirs of the testator as the testator left a surviving wife. Probate Code, § 224. We are satisfied, however, that the conclusions reached in the opinion heretofore filed were correct regardless of whether respondents were or were not heirs of the testator.

The petition for a rehearing is denied.

64 Cal.App.2d 153

MARY LEN MINE et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. No. 7036.

District Court of Appeal, Third District, California.

April 28, 1944.

Rehearing Denied May 24, 1944.

Hearing Denied June 26, 1944.

1. Workmen's compensation ⇨1434

Evidence that working partners of mining partnership were to participate in the profits, if any, that accrued, and that meanwhile they were to receive wages irrespective of profits, sustained finding that working partner was an "employee" within the Labor Code and entitled to the benefits thereof. St.1937, p. 268, § 3359.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

2. Workmen's compensation ⇨1937

The District Court of Appeal is unable to set aside an award of the Industrial Accident Commission because of the admission of incompetent evidence, where there is competent evidence to support the award.

3. Workmen's compensation ⇨1054

Where a working partner in mine received wages irrespective of profits and was therefore an "employee" within the Labor Code, and partnership was covered by compensation insurance policy expressly excluding coverage of any member of the partnership, an ambiguity existed which should be construed against the State Compensation Insurance Fund issuing the policy. St.1937, p. 268, § 3359; Civ.Code, § 1654.

4. Contracts ⇨167

All applicable laws in existence when an agreement is made necessarily enter into and form a part of it as fully as if they were expressly referred to and incorporated therein.

5. Insurance ⇨146(3)

Any ambiguity or uncertainty in an insurance contract is to be construed most strongly against the insurer. Civ.Code, § 1654.

6. Workmen's compensation ⇨1054

A partner working for wages irrespective of profit is an individual entirely distinct from a "partner" as ordinarily used, and was not included in clause of insurance policy excluding any member of copartnership from coverage thereof. St. 1937, p. 268, § 3359.

See Words and Phrases, Permanent Edition, for all other definitions of "Partner".

◆

Petition by Mary Len Mine and Victor J. DeCampos, Al B. Broyer, Marvin R. Fleming, and Thomas C. Seitzinger, individually and as copartners doing business as Mary Len Mine, to review an award made by the Industrial Accident Commission of the State of California, to Alta Mae Payne and William Payne, Ronald Payne, Gene Payne, and Donald Payne, minors, by their guardian ad litem and trustee, Alta Mae Payne, on account of the death of William Ralph Payne, deceased, and dismissing the State Compensation Insurance Fund.

Award modified, and cause remanded, with instructions.

George C. Faulkner, of San Francisco, for petitioners.

E. A. Corten, Dan Murphy, Jr. and Edmund J. Thomas, Jr., all of San Francisco, for respondents.

PEEK, Justice.

This is a petition by the Mary Len Mine, a co-partnership, and four of the individual members thereof, to review an award made by respondent Industrial Accident Commission to the widow and four minor children of William Ralph Payne, deceased.

The Commission, by its decision after rehearing, found (Finding No. 1) that the decedent, "while employed as a miner * * * by Mary Len Mine, a copartnership, and by Victor J. DeCampos, Al B. Broyer, Marvin R. Fleming and Thomas C. Seitzinger, doing business as Mary Len Mine", received fatal injuries, and that his wife and his minor children were entitled to a death benefit in the sum of $5,985, payable in weekly designated payments based on wages of $150 per month. The Commission further found (Finding No. 5) that the decedent "was a working member of the defendant partnership herein and received wages irrespective of profit from said partnership herein. He is therefore an employee within the meaning of the Workmen's Compensation, Insurance and Safety Laws of the

State of California." It further found (Finding No. 4) that the defendant employers were covered by a compensation insurance policy issued by the State Compensation Insurance Fund, which "policy specifically excluded coverage with respect to deceased employee, who at the time of the injury was a working partner and a member of the co-partnership generally insured by said State Compensation Insurance Fund. Said carrier is therefore entitled to be dismissed herefrom."

The award was made in accordance with said findings in favor of the widow and minor children and against the co-partnership and petitioners named herein.

It is now contended by petitioners that by the award the Commission acted without and in excess of its power by refusing to join other parties defendant; that the Commission erred in the admission of hearsay evidence and in its refusal to admit testimony regarding the interpretation of the insurance contract, by the disaffirmance or nonaffirmance of such contract by the respondent State Fund; that the award is unreasonable and the result of bias and prejudice of the referee, and deprives petitioners of due process of law and their property under the Fourteenth Amendment to the Constitution of the United States, and that the award is not supported by the findings of fact.

The record discloses that during the fall of 1940 the petitioners herein leased certain mining property known as the Mary Len Mine near the town of Penryn in Placer county. Articles of co-partnership were adopted and signed by the four individual petitioners and the deceased. Said articles provided that each of the petitioners named would contribute the sum of $1,000 or its equivalent under conditions therein set forth. The articles further provided that decedent, having already made certain contributions to the maintenance and operation of the mine, would contribute an additional sum of $360 for his one-fifth interest, "which said sum he shall contribute by the performance of services on behalf of the said co-partnership and by permitting one-half of his *wages* to accumulate against the payment of his partnership interest. All of the co-partners who are actually working and performing services in the Mary Len Mine shall do so upon the basis of receiving one-half of their respective *wages* until such time as the Mary Len Mine is operated upon a profitable basis." The partnership agreement further mentioned that others of the partners "are to receive *wages* for personal services rendered and performed upon behalf of said co-partnership." (Italics ours.)

Subsequent to the adoption of the original agreement two additional partners were included by separate agreements granting each a five per cent interest for which each agreed to pay the sum of $500 by the performance of "personal services for said partnership * * * and shall permit one half (½) of said *wages* so earned to accumulate against the $500 to be paid for the partnership interest." (Italics ours.)

During the month of December 1940, application was made to the respondent State Compensation Fund for a policy of compensation. The application designated the organization as a co-partnership composed of the four petitioners named herein, and in general described the work to be covered as quartz mining near the town of Penryn, but did not name decedent as a partner. Thereafter, by a supplemental report, more specific information was given relative to the operations and location of the mine. In accordance with the application the State Fund issued its policy of insurance wherein it agreed to cover the work contemplated at the designated location. Said policy, on the back thereof, specifically provided that it did not cover "the following risks, persons, operations, work or employments; * * * if the insured be a firm, association or copartnership, any member of such firm, association or copartnership."

It is apparent that the first question for consideration must be a determination of the working-member status of the decedent, while the second must be a determination of the construction of the exemption set forth in the policy, and if it be concluded that (1) the wording of the exclusion clause presents an ambiguity or uncertainty which must be resolved most strongly against the carrier, or (2) if the interpretation to be placed upon the insurance contract, in the light of the statutory law, leads to the conclusion that the policy did cover the activities of decedent while working as an employee member of the partnership for wages irrespective of profits from said partnership, then in either event the further questions raised by petitioners herein become immaterial.

The evidence before the Commission discloses that the original articles of partnership referred to the "wages" to be received by the decedent although much of the evidence in regard to this question is in sharp conflict. However, Mr. Broyer, one of the partners, in response to a question regarding the limitation of time, if any, as to cash withdrawals, stated that "they were to continue drawing these amounts until a profit was obtained from the mine, *if any;*" and in reply to a question regarding the balance over and above the amount the decedent withdrew, stated, "yes, that was all to be credited to a fund and considered on distribution of profits *if any.*" (Italics ours.) In its payroll reports to the State Fund the decedent was included as an employee and not as a partner. The widow of the decedent also testified to the fact which was objected to by the petitioners as hearsay that Payne received "wages" every two weeks.

[1, 2] As it is reasonably apparent from the record that the working partners were to participate in the profits, *if any,* that accrued, but meanwhile they were to receive *wages irrespective of profits,* there is support for the finding of the Commission that the decedent was an employee under section 3359 of the Labor Code, St.1937, p. 268, and thereby entitled to the benefits of the act. Such being the case this court "is unable to set aside an award because of the admission of incompetent evidence, provided there is enough competent evidence * * * to uphold the same." Maryland Casualty Co. v. Industrial Acc. Comm., 178 Cal. 491, 493, 173 P. 993. Therefore the question relating to the status of the decedent is reduced to a consideration of the one remaining element—was Payne at the time of his death a partner within the meaning of the exclusion clause, thereby precluding his dependents from obtaining compensation from the State Fund?

Prior to the adoption of the Workmen's Compensation Act, Stats.1917, p. 831, the courts of this state had followed the rule originally laid down in the English cases and uniformly held that members of partnerships were not eligible to compensation. Cooper v. Industrial Acc. Comm., 177 Cal. 685, 689, 171 P. 684. However, since the adoption of the amendatory acts of 1917, the rule has been reversed so that now we have specific statutory authority that a partner working for "wages irrespective of profit", comes within the provision of the act. Sec. 3359, Labor Code. The practical effect of such section is to make possible a situation wherein an individual may be both partner-employer and partner-employee.

The Supreme Court, in the case of Johnson v. Industrial Acc. Comm., 198 Cal. 234, 244 P. 321, 322, wherein the constitutionality of section 8(b) of the Workmen's Compensation Act (now section 3359, Labor Code) was directly in issue, quoted with approval from the case of Gallie v. Detroit Auto Accessory Co., 224 Mich. 703, 195 N.W. 667, where the court stated: "It is somewhat anomalous to say that a partner may, as a member of the firm, be an employer and as such come within the compensation law, and then if he works for the firm for wages be also an employee within the meaning of the act; but the compensation law so provides, and it is evidently based on the holdings that a partner may, by special agreement, be entitled to wages for services rendered the firm * * *."

In the same case the Supreme Court further quoted with approval from the case of Ohio Drilling Co. v. State Industrial Comm., 86 Okl. 139, 207 P. 314, 25 A.L.R. 367, wherein the Oklahoma court said that "the construction * * * that [a] member of a partnership who works for the partnership * * * is not an employee * * * is an exceedingly narrow construction of the act." See also 81 A.L.R. 654, 658.

If, then, as we have determined, there was evidence to warrant Finding No. 5 of the Commission we next must turn to Finding No. 4 which, read in relation to Finding No. 5, is to the effect that although Payne was engaged in a dual capacity, that is, a working member for "wages irrespective of profits" and therefore entitled to compensation, nevertheless he also was a partner, and by virtue of this latter fact, he came within the terms of the insurance contract excluding partners from benefits, and the insurance carrier thereby was absolved from all liability for such compensation. By such findings an obvious question immediately arises, that is, if Payne could be a partner and an employee both at one and the same time, does such situation present an uncertainty when viewed in connection with the exclusion provision in the insurance contract and the quoted sections of the Codes? It is the studied opinion of this court that such is the case.

[3] Inasmuch as the State Fund by its contract agreed to compensate a partner working for wages irrespective of profits, in accordance with the provisions of the Workmen's Compensation Laws and particularly section 3359 of the Labor Code, and by the same contract specifically excluded in general terms partners as such, it properly can be contended that an ambiguity or uncertainty is thereby presented. In the case of Maryland Casualty Co. v. Industrial Acc. Comm., 178 Cal. 491, 173 P. 993, it was held that because of an uncertainty in the construction of a particular clause in the contract of compensation there in issue the court should be guided by the rule expressed in section 1654 of the Civil Code, and therefore as the insurer caused the uncertainty to exist it should be construed most strongly against it. In a later case wherein the construction of an insurance policy was again directly in issue (Greenberg v. Continental Cas. Co., 24 Cal.App.2d 506, 75 P.2d 644, 646), the court, quoting with approval from the case of Aschenbrenner v. United States F. & C. Co., 292 U.S. 80, 54 S.Ct. 590, 78 L.Ed. 1137, stated: "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder * * *. So if its language is *reasonably open to two constructions,* that more favorable to the insured will be adopted * * *."

[4,5] It is well settled in this state that "all applicable laws in existence when an agreement is made necessarily enter into it and form a part of it as fully as if they were expressly referred to and incorporated in its terms * * *." 6 Cal.Jur. 310. "Hence, the courts must read as a part of a contract the laws of the state existing at the time it was made." 6 Cal.Jur. 312. It is also established by section 1654 of the Civil Code that uncertainty in the language of a contract "should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party." Thus any ambiguity or uncertainty in an insurance contract is to be construed most strongly against the insurer. The carrier framed the contract and "is supposed to make it as potent as possible in his own favor." 6 Cal.Jur. 308. The policy in question specifically states that the said Fund will pay to any one entitled under the Workmen's Compensation Laws "as therein provided" any sums due for compensation for injuries or in the event of death, to their dependents. The State Fund itself has added further authenticity to such construction by a letter of December 31, 1940, addressed to petitioners, which was mailed with the policy, wherein it was stated: "The Fund has assumed your liability for industrial injuries in accordance with the *provisions of the Workmen's Compensation Law* and the terms of your policy * * *."

[6] Turning then to the second phase of the question—the interpretation of the statutes—we find in section 3202 of the Labor Code, St.1937, p. 265, that the direct expression of the legislature of its intent and purpose in adopting our present Compensation Laws was that such laws "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Under such statement of legislative intent to guide the courts in their interpretation of the act it cannot be denied that one who comes within the provisions of section 3359 of the Labor Code, that is, a partner working for wages irrespective of profits, is an individual entirely separate and distinct from a partner in the usual concept of the term. In the exemption clause of the contract of compensation it is to be noted that unless specifically included a member of a copartnership is not covered. However, as section 3359 of the Labor Code specifically does include as an employee a member working for wages irrespective of profits, it logically would seem to follow that the clause set forth in the contract only refers to partners as such and not to the Code exception of a partner *working for wages irrespective of profit.* Further support for such conclusion is found in the case of National Auto Insurance Co. v. Industrial Acc. Comm., 19 Cal.2d 540, 122 P.2d 1, 2, where, in construing a contract of compensation wherein nephews or nieces were expressly mentioned but nephews or nieces by marriage were not, the court held that "inasmuch as the policy expressly excluded certain designated relatives by marriage, and inasmuch as nephews or nieces by marriage were not so expressly excluded, it must be concluded that there was no intention to exclude them."

Section 11651 of the Insurance Code, St.1935, p. 658, provides that every contract of insurance shall contain a clause to the effect that the insurer shall be directly and primarily liable to any claimant for payment of any compensation for which the employer is liable, subject, however, to the specific terms of the policy. Sections 1646 and 1656 of the Civil Code provide that all applicable laws in existence at the time when the agreement was made must enter into and form a part of the agreement as fully as if they were incorporated therein. Under the circumstances herein presented the partnership and the individual members thereof could not defeat the claim of the dependents of the decedent upon the ground that he was not a partner working for wages irrespective of profits. Likewise, the carrier could not escape liability unless the exclusion clause of the contract was sufficiently broad and explicit to accomplish such purpose. In view of the decided cases and the Code sections cited this court, therefore, must read into the contract in question the provisions of section 3359 of the Labor Code that a working member of a partnership receiving wages irrespective of profits, is an employee under the act, and, as in the National Auto Insurance Company case the policy excluded only partners as such, it must be concluded that there was no intention to exclude a partner working for wages irrespective of profits.

Section 3359 of the Labor Code establishes a partnership capacity entirely separate and apart from the office of a partner in its usual sense, and thereby the legislature has specifically created dual capacities. The exclusion clause of the contract only excepts a partner in the commonly excepted sense. No mention is made of a partner working for wages. Referring back to the first question we raised—if such exclusion clause creates an uncertainty or ambiguity—the determination of this court must be in accordance with the well-established rules previously mentioned, and therefore such clause must be construed to exempt only partners as such. And secondly, by reading into the contract, as this court must, the provisions of section 3359 of the Labor Code, and likewise heeding the admonition of the legislature as to the purposes for which compensation legislation was enacted, we are compelled to hold that although the Commission properly found that Payne was an employee within the provisions of the Code, yet, nevertheless, it improperly found that he was excluded by the provision in question in the policy and absolved the State Fund from all liability.

The award is therefore modified as herein indicated and the cause is remanded with instructions to the Commission to find in accordance with the opinion expressed, and to enter judgment accordingly for the dependents of the decedent Payne.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CURTIS, EDMONDS, and TRAYNOR, JJ., dissenting.

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64 Cal.App.2d 175

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. HIRSCH MERCANTILE CO.

Civ. 3318.

District Court of Appeal, Fourth District, California.

April 28, 1944.

1. Landlord and tenant ⇨95
Mortgages ⇨151(1)

A lease executed prior to a mortgage or trust deed is superior to the mortgage, and title acquired on foreclosure of mortgage will be subject to the lease.

2. Pleading ⇨345(1)

Where there was no denial of any of material facts in either complaint or answer, motion for judgment on the pleadings was an appropriate remedy for determination of rights, and conflicting conclusions of parties as to their rights and obligations based upon those facts raised no issue requiring a trial.

3. Landlord and tenant ⇨95

Where trust deed was originally prior to lease, a sale under the trust deed would terminate all rights in real property which were created after recording of the trust deed.

4. Mortgages ⇨378

Where agreement subordinating rights under trust deed to those under lease provided for period that agreement was to continue in force and that in consideration of that period of subordination lessee would pay beneficiary under deed of trust stated amount during each year of last five years of period, a sale and execution under trustee's deed did not terminate the subordination agreement. Civ.Code, § 2924.

5. Mortgages ⟹159

Subordination of rights under trust deed to those under lease subsequently executed pursuant to agreement fixing a definite period of subordination and providing for payment of stated amount to beneficiary under trust deed during each year of last five years of period in consideration of period of subordination was a conditional subordination and beneficiary under trust deed, as purchaser at trustee's sale while subordination agreement was in effect, took title subject only to limited subordination granted by agreement. Civ. Code § 2924.

6. Mortgages ⟹372(1)

Title of a purchaser at trustee's sale relates back to date of the trust deed.

7. Mortgages ⟹372(4)

Where agreement subordinating rights under trust deed to those under lease provided that, in consideration of period of subordination, lessee would pay beneficiary under trust deed a stated amount during each of last five years of period, and expressly provided exact method for terminating agreement including provision that subordination could be terminated by trustee's sale only in event that lessee was in default, beneficiary under trust deed as purchaser at trustee's sale during period of subordination and at time lessee was not in default was entitled to payment of rentals under lease and to minimum payment of amount specified in subordination agreement. Civ.Code, § 2924.

8. Appeal and error ⟹1135

Where judgment of trial court on the pleadings correctly declares the rights of parties in accordance with documents upon which such rights rest, it cannot be disturbed on appeal.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by the Bank of America National Trust & Savings Association against the Hirsch Mercantile Company for declaratory relief seeking a judgment defining and declaring the rights and duties of the parties under a promissory note, trust deed, lease, subordination agreement, and trustee's deed affecting the title and right to possession of a certain parcel of real property and the right to receive payments under the subordination agreement. Judgment for plaintiff, and defendant appeals.

Affirmed.

Dearing & Jertberg, of Fresno, and Lawrence L. Larrabee, of Los Angeles, for appellant.

W. H. Stammer and Galen McKnight, both of Fresno, for respondent.

GRIFFIN, Justice.

This is an action for declaratory relief in which respondent seeks a judgment defining and declaring the rights and duties of the appellant and respondent under a promissory note, trust deed, lease, subordination agreement, and trustee's deed affecting the title and right to possession of a certain parcel of real property in Fresno and the right to receive payments under the subordination agreement. Appellant filed its answer setting up additional documents affecting the rights of the parties, an assignment of rents made to respondent, a modification of the lease, a letter addressed by respondent to appellant, and appellant's reply thereto. It likewise prayed for a judgment declaring and determining the rights and interests of each of the parties under the documents above described. Since the answer of appellant admitted all of the material facts of the complaint but set up additional facts which must be here deemed to be true, and since mere legal conclusions and claims of the parties are not a part of the factual picture, we will outline the facts as they appear through the admitted facts in the complaint and the facts alleged in the answer.

On May 1, 1932, Ka Ra Investment Company, hereinafter referred to as Ka Ra, was the owner of certain real property in Fresno, with a store building situated thereon. On that day Ka Ra executed to respondent its promissory note for $187,750, and to secure that note it executed a trust deed to the real property to Corporation of America, as trustee, and to respondent, as beneficiary, which trust deed was recorded June 7, 1932. In addition to the usual provisions it also provided that upon default of the trustor the beneficiary could record a notice of default in accordance with section 2924 of the Civil Code, and that the trustee could sell the property in the manner required by law. On May 20, 1934, the entire amount evidenced by the promissory note and secured by the trust deed became due, and thereafter Ka Ra was in default. On June 27, 1935, Ka Ra executed and delivered to appellant a lease of the real property for the period from September 1, 1935, to August 31, 1955. It provided that the lessee should pay as rental a percentage of the gross receipts derived from the lessee's business, and provided no fixed or minimum rental. On July 23, 1935, Ka Ra executed an assignment of all rentals to become due under the lease to respondent. On July 26, 1935, appellant and respondent entered into the following subordination agreement the interpretation of which is the main source of contention in this case. It provides generally as follows:

"Subordination Agreement

"Whereas, Hirsch Mercantile Company * * * as Lessee, is about to execute a certain lease in which the Ka Ra Investment Company is designated as Lessor, dated the 27th day of June, 1935, and covering the 'property here involved,' a copy of which lease is hereunto annexed and made a part hereof; and

"Whereas, Bank of America National Trust and Savings Association is the owner and holder of a note secured by a deed of trust constituting a first lien on the aforementioned premises; and

"Whereas, Hirsch Mercantile Company desires the said Bank of America National Trust and Savings Association to subordinate its deed of trust to the aforesaid lease; and

"Whereas, Bank of America National Trust and Savings Association is willing to subordinate its said lien in the manner and subject to the terms and conditions hereinafter set forth;

"Now, therefore, in consideration of the execution by Hirsch Mercantile Company, as Lessee, of the aforesaid lease, and in consideration of the faithful performance by said Hirsch Mercantile Company of all the terms and conditions of said lease therein provided to be kept and performed by the said Hirsch Mercantile Company, including the prompt payment of all rent in said lease provided to be paid by said Hirsch Mercantile Company, Bank of America National Trust and Savings Association hereby subordinates the aforesaid deed of trust to the aforesaid lease, subject, however, to the following terms and conditions, to wit:

"First: This subordination shall only be effective for a period of ten (10) years, and shall terminate in the manner herein provided, but in any event at the end of ten (10) years from the date hereof.

"Second: During the first five (5) year period of this subordination agreement, it shall only be terminated by failure on the part of Hirsch Mercantile Company to keep and perform all the terms and conditions of the aforementioned lease between the Ka Ra Investment Company and Hirsch Mercantile Company, including the prompt payment of all rent due or to become due under the terms of said lease. Hirsch Mercantile Company shall have the right and the privilege to terminate this subordination agreement at the end of the first five (5) year period hereinabove referred to provided that it shall give written notice of such election to terminate at least thirty (30) days prior to the expiration of said first five (5) year period and if it so elects to terminate this agreement and serves such written notice of such election as hereinabove provided for, it shall have six (6) months from and after the termination of said first five (5) year period in which to vacate said premises, provided, however, that the rental during said six-month period shall be computed in accordance with the terms of said lease. In event no such election of termination is served upon Bank of America National Trust and Savings Association, Hirsch Mercantile Company agrees that it shall pay or cause to be paid to said Bank of America National Trust and Savings Association a sum of not less than Thirty-One Thousand Two Hundred Fifty Dollars ($31,250.00), during each and every year of said last five (5) years of said ten-year period, in twelve (12) equal installments annually, payable monthly, although the rental under the terms of said lease be less than Thirty-One Thousand Two Hundred Fifty Dollars ($31,250.00) per annum each or any year or years of said second five-year period.

"It is agreed between the parties hereto that the present existing deed of trust may be renewed from time to time as agreeable to Trustor and Beneficiary therein named at any time prior to the outlaw date of note secured by said Deed of Trust to be renewed, by a new deed of trust comparable in terms with the present or then subsisting deed of trust and such deed of trust thus renewed shall be superior and prior in right and estate to the lease hereinabove referred to but subject, however, to all the terms and conditions of this agreement.

"Third: In the event that any of the above mentioned conditions of default occur, Bank of America National Trust and Savings Association may, at its option declare this subordination agreement terminated, and within a period of ninety (90) days from said declaration the said Bank of America National Trust and Savings Association may proceed to foreclose its deed of trust in the same manner and to the same extent as if this subordination agreement had never been executed, and in such event all rights of Hirsch Mercantile Company by virtue of this subordination agreement shall cease and terminate.

"Fourth: It is agreed that rent under the aforesaid lease may commence on October 1, 1935, or as soon thereafter as the premises are fit for occupancy.

"Fifth: It is agreed that at any time during the existence of this subordination agreement the owner of the property described in the aforesaid lease may make payment in full of the obligation secured by the aforesaid deed of trust, whether the same be due or not, and without the payment of any premium. Upon such payment in full, all responsibility of the parties hereto with regard to this subordination agreement shall cease and terminate."

The lease became effective on August 22, 1935, and was recorded on the same day. The assignment of rents by Ka Ra to respondent was recorded on August 30, 1935. On October 1, 1935, appellant entered into possession of the real property under the lease, and the rental under the lease commenced on that date. Appellant has been ever since, and now is, in possession of the property under the provisions of the lease. On September 22, 1937, with the consent of respondent, appellant and Ka Ra entered into a modification of the lease which increased the rent for the period from October 1, 1937, to July 25, 1940, and fixed a minimum rent for that period of $29,000 per year. It also fixed the portions of the building which appellant was required to use in its business. Appellant has performed all of the terms and conditions of the lease as modified. It gave no notice of termination of the subrogation agreement or of the lease within five years of the date of the execution of the subordination agreement. It commenced the payment to respondent of the $31,250 per year provided for in the subordination agreement on July 27, 1940, and has continued to pay that sum ever since under protest. Ka Ra continued in default under the promissory note and trust deed. On June 15, 1941, there was due on the promissory note and trust deed the full principal, together with interest, taxes and advances, amounting in all to $236,246.50. On June 14, 1941, respondent mailed a letter to appellant reciting the fact that respondent, on June 16, 1941, intended to record a notice of default under the provisions of the trust deed and sell the real property unless all sums secured thereby were paid. Appellant did not answer that letter until after the real property was sold and conveyed by the trustee to respondent. On June 16, 1941, respondent recorded a notice of default and election to sell the real property to satisfy the obligations of Ka Ra under the promissory note and trust deed. The Corporation of America, as trustee, sold the property and respondent bought it at the trustee's sale for $150,000. The trustee's deed was recorded on October 18, 1941. On November 14, 1941, appellant wrote a reply to respondent's letter of June 14, 1941, enclosing with it a check for the monthly installment of the $31,250 annual payment required by the subordination agreement. The letter acknowledged receipt of the notice of default and the intended sale under the trust deed, and informed the respondent that the appellant "believes that its obligation to make payment under the terms of the subordination agreement terminated upon purchase by you of the property at the foreclosure sale. The undersigned, however, transmits herewith its check * * * in the amount of $2,604.17. * * * In making payment in the amount above stated, or any future payments in amounts equal to the amount specified in the subordination agreement, the undersigned pays under protest the amounts included in the above sum * * * in excess of the amounts required to be paid under the terms of said lease as modified * * *." Since that time appellant has paid the amount required under the subordination agreement, but accompanied each check with a letter similar to the one above mentioned.

The foregoing are the undisputed facts upon which the rights and obligations of of the parties were determined by the trial court and upon which the judgment of the trial court must rest. Upon these facts the parties in their pleadings made the following contentions:

Respondent contended that by the provisions of the subordination agreement the rights of the parties under the promissory note and trust deed were subordinated to appellant's lease for a period of ten years only, upon the condition that appellant should perfom the provisions of the lease and pay to respondent the minimum sum of $31,250 per year during the last five years of that period; that the subordination of the rights under the trust deed to the lease will cease and terminate on July 26, 1945, at the end of the ten-year period specified in the subordination agreement; that respondent is entitled to the payment by appellant of the rentals under the lease as modified, but in any event to the minimum amount of $31,250 per year specified in the subordination agreement; and that on July 26, 1945, respondent will be entitled to the immediate possession of the real property.

[1] Appellant claims that the subordination agreement was in full force and effect up to the time of the sale of the real property to the respondent by the trustee; that it operates to completely subordinate the title acquired by respondent at the trustee's sale to the lease for the full term specified in the lease and that it has no further force or effect; that by purchasing the property at the trustee's sale respondent acquired the title to the real property subject to the lease as modified, for the full term of the lease, expiring on September 30, 1955; that appellant's obligation to make further payments in the sum of $31,250 each year under the provisions of the subordination agreement terminated upon the purchase of the real property by respondent at the trustee's sale; and that thereafter appellant is only required to pay the rentals specified in the lease. In support of these contentions appellant cites the rule in Vol. 25 Cal. Jur. p. 94, sec, 78 that "When a transfer of the property through a sale under a deed of trust occurs, the deed ceases to exist and there is then no encumbrance on the property by virtue thereof", and in this connection cites the general rule that a lease executed prior to a mortgage or trust deed is superior to the mortgage, and the title acquired on foreclosure of the mortgage will be subject to the lease. Enos v. Cook, 65 Cal. 175, 3 P. 632; Security-First National Bank of Los Angeles v. Marxen, 28 Cal.App.2d 446, 82 P.2d 727; San Mateo County Bank v. Dupret, 124 Cal.App. 395, 12 P.2d 669. It is therefore argued that under the above cited cases, the deed of trust herein ceased to exist after the foreclosure sale, and that the priority of the subordination agreement must therefore be determined as of the time of the sale, and the rights of the parties are measured as of that time.

[2] In view of the fact that there was no denial of any of the material facts in either the complaint or the answer, the motion for judgment on the pleadings was an appropriate remedy for the determination of the rights of the parties, and the conflicting conclusions of the parties as to their rights and obligations based upon those facts raised no issue requiring a trial. Northern Light Min. Co. v. Blue Goose Mining Co., 25 Cal.App. 282, 143 P. 540; Davies v. Ramsdell, 40 Cal.App. 424, 181 P. 94; McNew Mulcahy, 24 Cal.App.2d 656, 76 P.2d 143; Griffin v. County of Colusa, 44 Cal.App.2d 915, 113 P.2d 270. Respondent moved for a judgment on the pleadings. The motion was regularly heard and argued by both parties and it was conceded that the trial court was required to accept as true all allegations of fact in the complaint admitted by the answer and all allegations of fact in the answer. Appellant did not at that time dispute the propriety of the motion or the trial court's right to enter judgment upon it but contended that the judgment should be in accordance with the claims of appellant. The trial court granted the motion for judgment on the pleadings and entered a judgment which was in fact a judgment in favor of respondent, which in effect followed the contentions and legal theory of the rights of the parties as advanced by respondent.

[3, 4] The trust deed was a first lien and incumbrance on the real property. Respondent never waived its primary and superior rights except by the express terms of the subordination agreement. That agreement recited that respondent was willing to subordinate its rights under its trust deed only in the manner and subject to the terms of that agreement. The agreement specifically provided that the subordination of the trust deed to the lease

should only be continued for a period of ten years and should terminate in any event at the end of ten years. It then provided four additional methods for termination of the agreement by act of the parties within the ten-year period. It is clear that the parties themselves carefully and expressly provided for the exact method for terminating the subordination agreement. It expressly provided that the subordination could be terminated by a trustee's sale, but only in the event that appellant was in default. No other method of termination in the event of trustee's sale was provided. Therefore, in the absence of any termination within the ten-year period by act of the parties, the agreement and the subordination it afforded was to continue for a period of ten years and then was to expire by its own terms. In the light of the facts pleaded, it is unquestioned that respondent's trust deed was originally prior and superior to appellant's lease. Under such circumstances a sale under the trust deed would terminate and cut off all rights in the real property which were created after the recording of the trust deed. Metropolis Savings Bank v. Barnet, 165 Cal. 449, 132 P. 833. Appellant's only right to possession of the real property after the execution of the trustee's deed to respondent, must rest alone upon the subordination agreement and the rights therein specifically granted to appellant, which alone can give that lease effect as against the rights of the purchaser at the trustee's sale. Appellant's right to possession, therefore, has ceased except for the protection afforded that possession by the subordination agreement. The subordination afforded by the agreement was granted only in the manner and subject to the terms and conditions of the agreement, and the first term of that agreement is that the *subordination shall only* be effective for ten years and shall terminate *in any event at the end of ten years.* In consideration of that period of subordination, appellant agreed to pay respondent $31,250 during each year of the last five years of the period. It therefore seems plain that under the terms of the agreement, the subordination of the rights under the trust deed to those under the lease was to continue for ten years and no longer. The sale and execution of the trustee's deed did not affect or terminate the subordination agreement. It still remained as an existing agreement affecting the right to the possession of the real property and the obligations of the parties.

In Tanner v. Title Insurance & Trust Co., 20 Cal.2d 814, 129 P.2d 383, the Supreme Court applied and enforced the provisions of a subordination agreement after a sale and conveyance by the trustee, and determined the rights of a purchaser at the trustee's sale under a lease subordinate to the trust deed in accordance with the terms of the subordination agreement. That such a limited and conditional subordination is valid and operates to subordinate in accordance with its conditions was directly decided in Cummings v. Jackson, N.J. 1897, 55 N.J.Eq. 805, 38 A. 763.

[5, 6] The agreement itself lends no support to appellant's view that it ceased to be a document under which payments were to be made after the trustee's sale. Its express terms required the payment to be made "each and every year of said last five years of said ten-year period". These payments are directly made a condition of the subordination, and without the payment required, appellant would not be entitled to any subordination. The subordination agreement was just as much a document affecting the title and right to possession of the real property as was the lease. Without it the lease had no validity as against the trust deed or the purchaser at the trustee's sale. The subordination agreement remained an operative and effective instrument regulating the rights of the parties, and subordination being clearly a limited and conditional subordination, the respondent, as purchaser at the trustee's sale, took the title subject only to the limited and conditional subordination granted by the agreement. The title of a purchaser at a trustee's sale relates back to the date of the trust deed. Carpenter v. Smallpage, 220 Cal. 129, 29 P.2d 841; Penryn Fruit Co. v. Sherman-Worrell Co., 142 Cal. 643, 76 P. 484, 100 Am.St.Rep. 150; Central Construction Co. v. Hartman, 7 Cal.App.2d 703, 47 P.2d 484. Appellant could have no right at all to possession under its lease unless the subordination agreement was still effective and an integral part of the chain of title. The cases cited by appellant are not opposed to this construction.

[7, 8] The trial court correctly determined that respondent was entitled to the payment of the rentals under the lease and to the minimum payment of $31,250 per

year specified in the subordination agreement. That agreement granted a subordination only subject to certain terms and conditions, one of which was that in the event no election of termination was served upon respondent, the appellant agreed that it would pay $31,250 during each and every year of the last five years of the ten-year period in twelve equal installments. This was a definite consideration for the limited subordination granted, and the payments specified in the subordination agreement were required to be made without exception and were to be paid whether or not the rental under the lease was less than that amount. This is a reasonable interpretation of the agreement and the judgment of the trial court correctly declares the rights of the parties in strict accordance with the provisions of the documents upon which those rights rest. It therefore cannot be disturbed on appeal. Johnston v. Landucci, 21 Cal.2d 63, 130 P.2d 405, 148 A.L.R. 1355; Estate of Northcutt, 16 Cal.2d 683, 107 P.2d 607.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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64 Cal.App.2d 117

In re KEIZUR'S ESTATE.

NORMAN v. STEWART et al.

Civ. No. 14154.

District Court of Appeal, Second District, Division 3, California.

April 27, 1944.

1. Wills 🔑120

Testator's affirmative reply when asked whether document was his will and whether he wanted persons present to witness his signature could be construed as a request that such persons act as witnesses and as a declaration that the document was his will.

2. Wills 🔑289

Proof that testator and witnesses signed will raised a presumption of due execution.

3. Wills 🔑166(1)

Evidence sustained finding that undue influence was not used to induce execution of will naming testator's attorney and friends as beneficiaries.

4. Wills 🔑163(4)

Where testator's attorney was a beneficiary of will, beneficiaries had burden in will contest of producing evidence that no undue influence was used.

5. Wills 🔑386

On appeal in will contest, trial court's finding upon sufficient evidence that facts were contrary to the presumption of undue influence by beneficiary standing in a confidential relation to testator was conclusive.

6. Wills 🔑322

In will contest, court properly permitted examination of subscribing witness as to circumstances of execution, and properly refused to strike out answers.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Roy Ellis Keizur, also known as Roy Keizur, and Roy Keyser, deceased, for probate of will, wherein Lola Norman filed contest, opposed by Archie D. Stewart and others. From a judgment admitting the will to probate, the contestant appeals.

Affirmed.

Roland T. Williams, of Los Angeles, for appellant.

E. P. Mulholland, of Long Beach, and Archie D. Stewart, of Long Beach, in pro. per., for respondents.

SHINN, Acting Presiding Justice.

The appeal which is before us is from a judgment admitting to probate the will of Roy Ellis Keizur after a trial before the court of a contest before probate filed by Lola Norman, a sister of decedent, charging the exertion of undue influence by one of the beneficiaries in the procurement of the will, and denying its due execution by the testator and the subscribing witnesses. The principal contention of appellant is that the findings in favor of the executor and the beneficiaries upon these issues were not justified by the evidence.

Decedent was unmarried at the time of his death and left as his only heirs two brothers and two sisters. The sole beneficiaries of his will were three friends of decedent, Lowell Guest, his mother, Lida Guest, and Archie D. Stewart, who was then and for some time past had been acting as decedent's attorney. The estate consisted of real and personal property of the appraised value of $4,855.80. Testator was about 50 years of age and had acquired the estate in question shortly before his death, through the will of one Margaret Bartino. Respondent Stewart had acted as his attorney as executor of the Bartino estate and was acting in that capacity at the time he prepared decedent's will, which was executed in Stewart's office in the presence of two witnesses called in by Stewart, one, Dr. Gilbert, a dentist, whose office was in the same building, and the other, Mr. Burge, a public accountant who shared a reception room with Stewart and an adjoining private office.

[1, 2] Dr. Gilbert, as a witness upon the trial, had little recollection of the circumstances of the execution of the will. After he had stated that he, Mr. Stewart, and Mr. Burge were present with the testator when the will was signed, he testified: "To the best of my knowledge Mr. Stewart said, 'These gentlemen will act as witnesses,' and I don't recall if there was anything else said unless Mr. Keizur in that conversation remarked, 'All right,' or shook his head, or something." Mr. Burge testified that in the presence of the named parties, "Mr. Stewart, as I recall, turned to Mr. Keizur and said something about, 'Is this your last will and testament?' And 'Do you want these gentlemen to witness your signature?' I don't know whether those were the exact words, but something to that effect. And he replied, 'Yes,' and he signed the document and Dr. Gilbert signed and then I signed, as witnesses." The trial court was fully justified in construing the answer of the testator to the questions asked as a request that those who signed the will as witnesses do so, and as a declaration that the document was his will. In re Estate of Offill, 1929, 96 Cal.App. 640, 274 P. 623. Proof of the signing of the will by the testator and the witnesses raised a presumption of due execution. In re Estate of Braue, 1941, 45 Cal.App.2d 502, 114 P.2d 386.

[3] In her attack upon the finding on the issue of undue influence, appellant's contention is that a confidential relationship existed between the testator and his attorney, Stewart, that the latter profited unduly by the will and participated in procuring its execution, that the burden was thereby cast upon respondents to show that the will was not induced by Stewart's influence, and that they failed to meet the presumption that it was so procured. We are of the opinion that the finding that no undue influence was used is supported by the evidence.

The undisputed evidence was that Mr. Stewart became acquainted with the testator early in August, 1941, and was employed at that time to act as testator's attorney in the administration of the estate of Margaret Bartino; that the testator called at his office about twice a week until September 24, 1941, the date of the will. The relations between the two were friendly and cordial but of a business and not social nature. Testator first spoke about his own will soon after the Bartino will was admitted to probate September 5, 1941. He told Mr. Stewart that Mr. and Mrs. Guest were friends, that they had helped him when he was ill and that he desired to remember them in his will. Mr. Stewart's wife had given birth to a baby girl and in giving instructions for the will the testator said that he would like to set up a little education fund for the benefit of the child, and when Mr. Stewart protested, testator insisted that he could do as he pleased with his money. The will was drawn in conformity with instructions given by the testator to his attorney. The attorney rendered small services aside from those in the administration of the Bartino estate and for these he was paid. The will was explained to the testator paragraph by paragraph and after its execution was delivered to a bank, where it remained until testator's death June 29, 1942, and it appears that the testator knew that the will was on deposit with the bank. There were no business, professional, nor even social relations between Mr. Stewart and Mr. and Mrs. Guest, and Mr. Stewart did not discuss with Mr. or Mrs. Guest the matter of the will until after testator's death. There was no evidence that Mr. Stewart ever advised testator to make a will or that he made any suggestion as to what the testator should do with his estate. The circumstances under which the will was executed were disclosed by the evidence and nothing appeared therein to indicate that testator did not fully understand what he was doing or that the will was not his voluntary act. An important fact tending to disprove the allegation that the testator acted under the domination of

Mr. Stewart is that the latter took only one-third of the estate, while the other two-thirds went to those who were friends of the testator but mere acquaintances of Mr. Stewart. The testator would appear to have been the author of this plan of the will.

[4, 5] The foregoing facts were established by uncontradicted evidence. There was testimony on behalf of contestant that the testator had expressed dissatisfaction with the will to friends with whom he discussed it, and stated that he intended to change it; that he stated he had believed Lowell Guest to be his friend and had found out that he was not, and that in numerous conversations about his will he did not mention the fact that Stewart was one of the beneficiaries. We may assume for the purposes of this opinion that the case was one which called for the application of the established rule that where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud. In re Estate of Baird, 1917, 176 Cal. 381, 384, 168 P. 561. Under this rule it was incumbent upon respondents to produce evidence that no undue influence was used in procuring the will. The presumption upon which contestant relied was not supported by the testimony of any witness nor the circumstances in evidence. Nothing more was shown than that Stewart had an opportunity to influence the making of the will. Against this was the testimony of Stewart that he made no suggestions and gave no advice with reference to the terms of the will. The trial court accepted his testimony and, believing it, was obliged to conclude that the testator acted voluntarily. The decision was one of fact based upon conflicting evidence. Contestant's case at most was a prima facie one, and the finding of the trial court, upon sufficient evidence, that the facts were contrary to the presumption is conclusive upon appeal. In re Estate of Wickes, 1903, 139 Cal. 195, 72 P. 902. A question of law would be presented if appellant contended that there was no substantial evidence to support the finding, but that contention is not made except as a mere assertion. No mention is made of the testimony of Mr. Stewart upon the vital issue of the actual use of undue influence, and yet the argument appears to be that the court should not have believed the testimony of respondents' witnesses, and is addressed to a question of fact, not of law.

[6] We think the court did not err in overruling objections to questions propounded to one of the subscribing witnesses as to the circumstances under which the will was executed and in denying motions to strike out certain of the answers upon the ground that they were not responsive to the questions and upon other grounds.

The judgment is affirmed.

PARKER WOOD, J., and BISHOP, Justice pro tem., concur.

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64 Cal.App.2d 40

MATCOVICH v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Civ. 6998.

District Court of Appeal, Third District, California.

April 21, 1944.

Rehearing Denied May 19, 1944.

Hearing Denied June 19, 1944.

1. Injunction 🔑75
Mandamus 🔑73(1)

The owner of a dance hall could not, by mandamus or injunction, prevent employment commission from passing on taxi dancers' applications for unemployment compensation, notwithstanding that superior court had held, in action for unemployment compensation contributions, that taxi dancers were not owner's employees. Gen. Laws Supp.1939, Act 8780d, § 67.

2. Judgment 🔑707

A superior court judgment holding, in action for unemployment compensation contributions, that taxi dancers were not employees of dance hall owner, was not res judicata of applications for unemployment compensation by taxi dancers who were not parties to action for contributions.

3. Master and servant 🔑78

The courts may not interfere with uncompleted administrative proceedings before the employment commission. Gen. Laws Supp.1939, Act 8780d, § 67.

4. Master and servant 🔑78

That superior court had held, in action for unemployment compensation contributions, that taxi dancers were not employees of dance hall owner, did not deprive employment commission of jurisdiction of taxi dancers' applications for unemployment compensation. Gen.Laws Supp.1939, Act 8780d, § 67.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Petition by N. N. S. Matcovich, doing business as the Rio Bar & Cafe, against the California Employment Commission, formerly the Unemployment Reserves Commission, and others for a writ of mandate or a writ of injunction. From an adverse judgment, petitioner appeals.

Affirmed.

R. H. Schwab, of Sacramento, for appellant.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and Forrest M. Hill and Doris H. Maier, both of Sacramento, for respondents.

ADAMS, Presiding Justice.

Appellant filed in the Superior Court of Sacramento County a pleading denominated a "Petition for Writ of Mandate or Writ of Injunction," and, in the prayer thereto, asked that "an Alternative Writ of Mandamus" issue out of that court directed to the California Employment Commission and its named members commanding them to dismiss the certain applications for relief alleged to have been filed with said respondents, or for a writ of injunction restraining and enjoining said respondents from passing upon said applications.

The petition alleges that petitioner is and has been for more than four years in the business of operating a taxi dance hall in Sacramento; that during said time he granted "licenses" to women who desired the privilege of dancing with patrons of said dance hall, for which said privilege said women paid him a sum agreed upon as "rental"; that this "license" recited that it was the intent thereof that licensees should not become employees of the licensor and that they should not become subject to his control; that no other agreement, oral or written, was ever entered into between petitioner and said dancers in so far as the privilege of dancing in said premises is concerned; that at no time has the relationship of employer and employee ever existed between said women taxi dancers and petitioner; that the Superior Court of Sacramento County, in the case of California Employment Commission v. N. N. S. Matcovich, etc., held that the said women dancers in petitioner's dance hall were not employees; that there has been no change in the relationship between said taxi dancers and petitioner since said decision was rendered, and that he has not employed taxi dancers; that prior to the filing of this petition three named women, Rose May Reynolds, Kleta Kinney Guzman and Eva H. Pendergast filed applications with respondent commission for relief under the California Unemployment Insurance Act; that at the time said applications were filed respondent knew that said named persons were not employees of petitioner, and knew that said individuals entered into the contract above mentioned "and that by reason thereof, respondents knew that they had no jurisdiction to hear any of said applications"; that said Rose May Reynolds, Kleta Kinney Guzman and Eva H. Pendergast heretofore entered into contracts with petitioner and pursuant to the privilege thereby granted, danced with patrons of petitioner in his dance hall; that "notwithstanding the objection of your petitioner that it has heretofore been established that the relationship of employer and employee did not exist, said respondents continue the hearing, entertaining and passing upon said applications, and will continue to pass upon said applications to a final determination. That said respondents are without jurisdiction to hear or entertain said applications, in that it has been established that the relationship of employer and employee did not and does not exist between your petitioner and said taxi dancers. That as a result thereof, your petitioner incurred a large expense, loss of time and inconvenience, all to his irreparable loss and damage." Also, that because of the facts above alleged, respondents are charged with a specific legal duty in that they should dismiss the said applications alleged to have been filed before them; that there were some forty taxi dancers who had entered into agreements similar to the one set forth who danced in petitioner's dance hall, and that any or all of them could file applications for relief notwithstanding that the court had held that the employer and employee relation did not exist, unless respondent is enjoined from accepting such applications; that if such applications are filed it becomes necessary for petitioner to contest them, and petitioner has no other means or method of preventing the filing of similar applications; that said respondents have refused to dismiss said applications; that petitioner has no plain, speedy or adequate remedy at law, and unless respondents are compelled to dismiss said applications or enjoined from hearing or passing upon them, petitioner will be put to great expense, etc.

To said petition respondents demurred both generally and specially, alleging that the court had no jurisdiction over the subject matter of the action, and that petitioner had a plain, speedy and adequate remedy in the ordinary course of law. Respondents' demurrer was sustained without leave to amend, and petitioner has appealed.

In his brief before this court appellant contends, as his petition alleges, that the California Employment Commission has no *jurisdiction* to hear the applications for relief made to it by the three named applicants; that this lack of jurisdiction is due to the fact that in an action in the superior court between petitioner and said Commission that court held that the relationship of employer and employee did not exist between him and women taxi dancers licensed to dance in his dance hall, and that said decision is conclusive and operates as a bar which deprives the Commission of jurisdiction to "accept and hear applications for relief"—that the former decision by the superior court is res judicata by reason of the provisions of section 1908 of the Code of Civil Procedure, though the named women applicants were not a party to that action. After citing Todhunter v. Smith, 219 Cal. 690, 694, 28 P.2d 916, 918, to the effect that "the final determination of a court of competent jurisdiction necessarily affirming the existence of any fact is conclusive evidence of the existence of that fact when it is again in issue in subsequent litigation *between the same parties in the same or any other court*" (italics ours), appellant says in his brief that the issue in *this case* was an issue between the same parties as were involved in the prior litigation; that the trial court there found that the relationship of employer and employee did not exist between him and the women who danced in his place of business, that the trial court in this case is bound by that finding and that it is binding upon respondents. He then states: "Hence before it [the Commission] could accept applications for relief, it became necessary to establish that that relationship had been changed. So far as the petition herein is concerned, the demurrer admits that there has been no change. If this can be established by a trial of that issue, then the respondent would have no jurisdiction to hear said applications. Said applicants' rights if any they have are protected in this proceeding. This proceeding will determine whether or not they are employees. If they are employees they are entitled to relief, otherwise not. Petitioner should not be compelled to contest each application filed where it has been definitely established by Superior Court that he carries on his business with independent contractors and not with employees."

Again, in his closing brief, he states: "The real question here involved, is whether the former judgment is res adjudicata until such time as it is shown that the conditions existing subsequent to said judgment were changed. It takes evidence to show that." He also urges that it was the duty of the lower court to overrule the demurrer and require respondents to answer; that respondents could then attempt to show that the relationship of the parties had changed since that judgment, and that therefore petitioner was subject to the act.

Respondents challenge petitioner's plea of res judicata on the ground that the former action was not between the same parties as the proceedings pending before the Commission—that the former action was one instituted in the Superior Court by the Commission to recover contributions from petitioner under the California Unemployment Insurance Act, while the present proceedings are before the Commission upon applications made by certain named women claiming to be employees of petitioner who were not parties to the former action. Respondents also assert that the petition filed in the present proceeding fails to state a cause of action, in that it appears that petitioner did not exhaust his administrative remedies before applying to the courts.

The trial court held that the question whether or not the present applicants before the Commission worked under the same conditions as those considered in the prior action was one for initial determination by the Commission, as provided by the Act (Stats.1935, ch. 352, P. 1226, Deering's Gen.Laws of California, 1939 Suppl., Act 8780d, p. 1697); also that the applicants were not bound by the prior decision since they were not parties to that action, and that for the Commission to dismiss their applications without a hearing would leave them remediless.

[1, 2] We concur in those conclusions. It is obvious from the statements in petitioner's brief, as set forth above, that he seeks to transfer from the Commission to the court the matter of determining initially whether the conditions under which the named women applicants worked justify giving them relief, and to transmute the proceeding before the Commission to which the women applicants are parties, into one before the court to which they are not parties; to make the Commission, which sits as a quasi-judicial body to determine such questions, a party defendant in an action before the court to defend a determination which they have not yet made—that the applicants are employees entitled to relief—and, at the same time, preclude the possibility of a contention by the Commission that said women applicants are entitled to relief by pleading res judicata in anticipation thereof. This petitioner may not do by any such proceeding.

[3] A determination of whether the women applicants are entitled to relief is one to be made initially by the Commission. Section 67 of the California Unemployment Insurance Act provides that, when claims are made for benefits under the act, "an initial determination on the claim shall be made and shall include a determination with respect to whether or not benefits are payable," etc. Such determination has not yet been made by the Commission on the application pending before it. The courts cannot anticipate what its determination may be, or that it will be in violation of such rule as may have been laid down by the court in the prior action relied upon by petitioner, and enjoin the Commission from making any determination, especially since it is not alleged by petitioner that it intends to or will make a determination in violation thereof. Petitioner is attempting to have the courts do here just what the Supreme Court said, in Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715, they could not do—interfere with uncompleted administrative proceedings before the Commission. It was said in that case, 17 Cal.2d at pages 291, 292, 109 P.2d at page 949, 132 A.L.R. 715:

"The Unemployment Insurance Act, summarized above, contains a complete administrative procedure, with provision for one original determination and two appeals, fulfilling every requisite of due process of law. Until that administrative procedure has been invoked and completed, there is nothing that the District Court of Appeal or any other court may review; it cannot interfere in the intermediate stages of tthe proceeding. The employers have no standing to ask for judicial relief because they have not yet exhausted the remedies given them by the statute. They still have their appeal to the commission, which appeal has not yet been decided adversely to them, and prior to the prosecution of this appeal they have no right to demand an extraordinary writ from a court.

"This is the doctrine of 'exhaustion of administrative remedies.' In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act."

[4] We are unable to see upon what appellant bases his contention that the Commission is without *jurisdiction* to receive or consider the applications presented to it, or why it should be restrained from receiving or hearing such applications, and compelled by writ of mandate to dismiss them without a hearing. In receiving such applications, and in acting upon them, the Commission is but exercising the authority given it by the statute. The fact that a court has held that under a state of facts presented to it certain persons were not employees of petitioner would not deprive the Commission of *jurisdiction* to hold hearings upon future applications and determine whether applicants who may be taxi dancers in petitioner's place of business come within the rule laid down by the former decision. Such decision may have determined what decision the Commission should make, that is, its adjudication upon such issues as were actually litigated and determined in that action may be binding upon respondents, but it could not have the effect of depriving it of the jurisdiction expressly conferred by the Act to make a determination. It is not even averred by petitioner that respondents will hold, or that they threaten to hold, that the applicants before them are employees of petitioner, but merely that the Commission continues to hear and pass upon the applications.

It is possible that in the proceedings before the Commission facts not shown in the prior action before the Superior Court may be shown which justify a different conclusion such as was arrived at in Matcovich v. Anglim, 9 Cir., 134 F.2d 834, certiorari denied 320 U.S. 744, 64 S.Ct. 46, 88 L.Ed. 441. But whatever the outcome of proceedings before the Commission, if petitioner finds himself aggrieved by its final decision he may then seek redress in the courts by proper proceedings for that purpose (Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935); but until that body has acted finally the courts are without jurisdiction to interfere. Abelleira v. District Court of Appeal, supra; Gantner & Mattern Co. v. California Employment Commission, 17 Cal.2d 314, 109 P.2d 932; Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

* * *

64 Cal.App.2d 188

BIGELOW et al. v. SAN JUAN GOLD CO. et al.

Civ. 7017.

District Court of Appeal, Third District, California.

April 29, 1944.

As Modified on Denial of Rehearing May 26, 1944.

1. Mines and minerals 🔑25

Forfeiture of a mining claim, as distinguished from abandonment thereof, depends entirely upon proof of violation of federal or state statutes with relation to performance of annual assessment work or upon a violation of the district mining rules in that regard, the sole question being whether terms of statutes or district rules have been complied with. St.1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

2. Mines and minerals 🔑25

The owner of unpatented mining claim may forfeit his title for failure to conform to law requiring annual assessment work, if some one else has entered with intention to relocate the claim. St.1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

3. Mines and minerals 🔑23(1)

An association of persons may jointly locate a mining claim containing not more than 160 acres and may fulfill statutory requirements as to assessment work by annually performing work on the tract for the benefit of all claims of the value of $100 only. St.1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

4. Mines and minerals 🔑23(1)

Where several contiguous claims are separately located, though subsequently consolidated for mining operations, while annual assessment work may be done on one claim for the benefit of all of them, the work must aggregate in value the sum of $100 for each consolidated claim. St. 1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

5. Mines and minerals 🔑23(1)

Purchaser of 12 contiguous but separately located unpatented placer mining claims which purchaser consolidated for mining operations did not sufficiently comply with statutory requirements as to annual assessment work by performing only $100 worth of work annually on entire tract, though claims were located before May 10, 1872. St.1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

6. Mines and minerals 🔑23(1)

The rule that annual assessment work must aggregate in value the sum of $100 for each consolidated but separately located claim applies to both lode and placer mining claims. St.1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

7. Mines and minerals 🔑23(1)

Federal and state statutes requiring performance of annual assessment work on unpatented placer mining claims apply to claims located before May 10, 1872, as well as to those subsequently located. St. 1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

8. Mines and minerals 🔑25

Persons claiming title to unpatented placer mining claims relocated after alleged forfeiture of previously located claims by failure to conform to statutory requirements concerning annual assessment work had the burden of affirmatively proving such forfeiture by clear and satisfactory evidence, since the law does not favor forfeitures. St.1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

9. Mines and minerals 🔑25

Failure of purchaser of 12 contiguous

but separately located unpatented placer mining claims which purchaser consolidated for mining operations to perform annually more than $100 worth of assessment work on entire tract resulted in forfeiture of title to the claims which thereupon became open to relocation. St.1939, p. 1083, § 2314; 30 U.S.C.A. § 28.

10. Appeal and error ⟹882(3)

Where case was tried on sole theory that $100 worth of annual work was adequate for the entire group of 12 unpatented placer mining claims, appellate court was not authorized to remand the case for trial on theory that $100 worth of work was performed on a particular claim.

◆

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by G. A. Bigelow and others against San Juan Gold Company and others to quiet title to a tract consisting of six contiguous placer mining claims, wherein named defendant filed a cross-complaint. From that portion of judgment quieting title in named defendant to certain placer mining claims included within the larger tract claimed by plaintiffs, plaintiffs appeal.

That portion of judgment appealed from reversed, with directions to render judgment in favor of plaintiffs.

Wm. F. Rose, of San Francisco, H. Ward Sheldon, of Nevada City, for appellants.

Thomas R. White and Francis B. Perry, both of San Francisco, and Lynne Kelly, of Grass Valley, for respondents.

THOMPSON, Justice.

The plaintiffs have appealed from that portion of a judgment which quiets title in the defendant, San Juan Gold Company, a corporation, to several contiguous unpatented placer mining claims situated in Nevada County. After the claims were separately located prior to 1872, they were purchased by the defendant in 1906, and consolidated for the purpose of mining operations. They are designated as "Union Lot 59A" and contain 192.32 acres of land. Assuming that these claims had been forfeited by defendant's failure to perform assessment work in certain specified years, of the value of $100 on each lot contained in that tract, the plaintiffs located a larger tract in 1930, consisting of six continguous placer mining claims, called the "Trood Claims", numbered from 1 to 6, inclusive, and containing 373 acres of land. Defendant's "Union Lot 59A" was included within the boundaries of the six Trood claims. The plaintiffs thereafter performed annual labor upon each of said Trood claims in excess of the value of $100, and also expended some $30,000 in constructing buildings, purchasing machinery and making improvements for a mining enterprise.

Plaintiffs commenced this action to quiet title to said Trood placer mining claims. The defendant filed an answer and cross-complaint denying plaintiffs' alleged title to "Union Lot 59A", or any portion of that consolidated claim, and affirmatively asserted its ownership and right to possession thereof, together with another placer mining claim designated "Consolidated Lot No. 46". There is no dispute regarding the title to said Lot 46.

The court adopted findings to the effect that "Union Lot 59A" consists of not less than twelve separate contiguous placer mining claims which were duly located prior to 1866 in Kennebec Hill Mining District of Nevada County; that "subject to the paramount title of the United States," said claims became vested in Union Gravel Mining Company, a corporation, on or about February 11, 1875; that none of said claims was thereafter abandoned, forfeited or relocated; that by mesne conveyances titles to said claims were transferred to the defendant, San Juan Gold Company, a corporation, on or about June 30, 1906; that said contiguous placer mining claims, consisting of 192.32 acres of land, were combined and operated as one tract, and ever since 1909 the defendant "treated, regarded, and held out to all the world said 'Lot 59A' as a single placer mining claim;" that the defendant annually performed work of the value of $100 upon said consolidated "Union Lot 59A" and paid all taxes thereon except that in certain specified years during which the Federal statutes waived the performance of assessment work, none was done, but for said years of nonperformance affidavits of exemption were filed as required by law.

The court further found that subsequent to the original locations of said placer mining claims and defendant's acquisition of title thereto, the plaintiffs located six separate contiguous placer mining claims in Nevada County, during and after 1930, designated as the "Trood Placer Mining Claims" Nos. 1 to 6, inclusive, containing

373 acres of land and including within their boundaries "all the area comprising 'Lot 59A'", which Trood claims they thereafter occupied "subject to the claim of defendant corporation San Juan Gold Company to said 'Lot 59A'", and thereafter performed annual labor upon each of said Trood claims of the value of $100, and expended in further improvements and operating expenses on said premises the sum of $30,000.

Based upon those findings the court rendered judgment quieting title in the defendant, San Juan Gold Company, to the placer mining claims designated as "Union Lot 59A" together with another mining claim called "Consolidated Lot No. 46". Title to the remaining portion of the six Trood placer mining claims described in the complaint was quieted in plaintiffs as prayed for. From that portion of the decree quieting title in the defendant to "Union Lot 59A" the plaintiffs have appealed.

The appellants contend that the respondent forfeited its title to Union Lot 59A by failing to perform annual assessment work of the value of $100 on each of the claims contained within that tract, and that the burden was on the respondent to affirmatively prove that it had performed all assessment work thereon as required by the statutes and the rules of Kennebec Hill Mining District, in which said claims were located.

[1] The question of forfeiture of a mining claim, as distinguished from abandonment thereof, depends entirely upon proof of the violation of the Federal or State statutes with relation to the performance of annual assessment work, or upon a violation of the District Mining Rules in that regard. Kramer v. Gladding, McBean & Co., 30 Cal.App.2d 98, 85 P.2d 552. The sole question is whether the terms of the statutes or the district rules have been complied with. 2 Lindley on Mines, 3rd Ed., 1597, sec. 643. In the present case, the trial court found that Union Lot 59A consists of at least twelve contiguous claims, aggregating 192.32 acres of land, which claims were separately located by respondent's predecessors in title prior to 1866, and subsequently acquired by Union Gravel Mining Company, a corporation, on February 11, 1875, and thereafter purchased by the respondent on June 30, 1906, and consolidated by it for the purpose of operating a placer mining enterprise; that during certain designated years prior to 1930, when the plaintiffs relocated the claims, the respondent performed annual labor on said Union Lot 59A of the value of only $100 per year. In other language, by necessary inference the court found that the respondent failed to perform more than $100 worth of work on said entire consolidated group of claims during any one of those designated years. The record supports that affirmative finding. The theory upon which the court concluded that respondent's title to the claims was not forfeited for failure to perform the required annual assessment work was that, in spite of the fact that it had not performed $1,200 worth of work per annum on said twelve claims during those designated years, it had nevertheless fulfilled the requirements of the statutes by doing $100 worth of work per annum on Union Lot 59A because "ever since the year 1909" the respondent "treated, regarded, and held out to all the world said 'Lot 59A' as a single placer mining claim."

[2-4] When the law requires annual assessment work to be performed the owner of mining claims may forfeit his title for failure to conform to the law when someone else has entered with intention to relocate the claims. Kramer v. Gladding, McBean & Co., supra; 2 Lindley on Mines, 3rd Ed., 1598, sec. 643; 30 U.S.C.A. § 28. It is true that an association of persons, since May 16, 1872, may jointly locate a mining claim containing not more than 160 acres of land and may fulfill the requirements of the law by annually performing work on the tract for the benefit of all claims of the value of $100 only. Reeder v. Mills, 62 Cal.App. 581, 217 P. 562. But when several contiguous claims are separately located, even though they may be subsequently consolidated for mining operations, while annual assessment work may be done on one claim for the benefit of all of them, the work must aggregate in value the sum of $100 for each consolidated claim. Morgan v. Myers, 159 Cal. 187, 113 P. 153; Chambers v. Harrington, 111 U.S. 350, 4 S.Ct. 428, 28 L.Ed. 452; 17 Cal.Jur. 393, sec. 73; 2 Lindley on Mines, 3rd Ed., 1553, sec. 630(3); 30 U.S.C.A. p. 200, notes 323, 324. In the present case the respondent did not perform annual assessment labor during certain specified years of a value in excess of $100 on the consolidated claims designated Union Lot 59A.

[5] Since the record in this case does affirmatively show that Union Lot 59A consists of twelve placer claims which were separately located prior to 1866 by

respondent's predecessors in title, and that respondent performed only $100 worth of work annually on the entire tract during several years prior to plaintiffs' relocation of the claims, we are of the opinion the court erred in determining that was a sufficient compliance with the statutes and that its title was therefore not forfeited on that account. Since the twelve claims were originally separately located, the respondent was not authorized by law to subsequently purchase and consolidate them for placer mining purpose and thus escape from the necessity of fulfilling the statutes with respect to annual assessment work by merely performing $100 worth of labor per annum on the entire group of claims. This is true even though the purchaser of separately located claims subsequently consolidates them and "holds them out to the world" as one placer mining claim. There is a clear distinction between a "mining claim" and a "location". In 2 Lindley on Mines, 3rd Ed., p. 1539, sec. 628, the author says in that respect:

"A, B and C each perfect a lode location on the same vein, the locations being contiguous. Each is required, under the law, to work, or represent, his individual claim to the extent of one hundred dollars annually. A subsequently purchases the locations of B and C, and the three locations may constitute his 'claim' in a colloquial sense. But he will not be permitted thereafter to hold all three by performing simply one hundred dollars' worth of work within the limits of one, or distributing that amount in labor and improvements over the three."

On page 1540 of the text last cited, the author declares that separately located contiguous claims may not be subsequently purchased and consolidated so as to exempt the holder from performing more than $100 worth of work on the entire tract. He says in that regard:

"The individual locator of a twenty acre tract must necessarily perform one hundred dollars' worth of labor on his claim annually. By a purchase of other contiguous locations, and thus augmenting his surface area, we do not see how he can be relieved from fulfilling the requirement as to every individual location which may be ultimately grouped and constitute his 'mining claim,' in a colloquial sense. If such a rule were to prevail,—as there is no limit to the number of claims which one may acquire by purchase,—he might hold five hundred or more acres with the aggregate annual expenditure of one hundred dollars, and thus practically defeat the purpose of the law."

In Revised Statutes of the United States, Section 2324, 30 U.S.C.A. § 28, it is provided that:

"On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year."

[6] The same rule applies to both lode and placer claims. Carney v. Arizona Gold Min. Co., 65 Cal. 40, 2 P. 734; 36 Am.Jur. p. 366, sec. 115; 2 Lindley on Mines, 3rd Ed., p. 1534, sec. 625.

Section 2314 of the California Public Resources Code, St.1939, p. 1083, formerly Section 1426*l* of the Civil Code (Stats. 1909, p. 315), provides that:

"The amount of work done or improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States, to wit: One hundred dollars annually."

It follows that the court erred in holding that the respondent was not required to perform more than $100 worth of work annually on the twelve separately located claims even though it did subsequently purchase and consolidate them for placer mining purpose.

[7] Nor were the twelve claims composing Union Lot 59A exempt from the performance of annual assessment work as required by the Federal and State statutes above referred to, merely because they were actually located prior to May 10, 1872. In the case of Morgan v. Tillottson, 73 Cal. 520, 15 P. 88, that precise question was determined adversely to the respondent's contention in this case. In that case plaintiff's predecessors in interest located the placer mining claim in question in 1855, before the enactment of Federal statute, section 2324, above referred to. By mesne conveyances the plaintiffs subsequently acquired title thereto. In 1884 they performed annual assessment work of the value of only $26. In January, 1885, the defendants relocated the claim and thereafter performed all assessment work required by law. Plaintiffs commenced an action against the defendants to recover possession of the claim. The trial court determined the case in favor of the plaintiffs. On appeal that judgment was reversed on the ground that plaintiffs forfeited their title and right to possession of the claim for failure to perform an-

nual work on the claim in the year 1884, of the value of $100, as required by the Federal statute. By reference to the briefs filed in the Supreme Court in that case, we find that the very question as involved as to whether the performance of annual assessment work on claims which are located prior to May 10, 1872 is required. In the petition for rehearing we find this statement:

> "There is but one point in the cause, and that is sharply outlined in the record. * * *
>
> "The claim in question is a placer mining claim; it was located prior to May 10, 1872.
>
> "Does the law of Congress (Sec. 2324, Rev.Stat.), require annual expenditures upon such placer mining claims located prior to its enactment (May 10, 1872.)?"

On the authority of that case we are bound to conclude that the Federal and State statutes requiring the performance of annual work on placer mining claims applies to claims which were located prior to May 10, 1872, exactly as it does to those which are subsequently located.

[8-10] **It is true that the** law does not favor forfeitures. 17 Cal.Jur. 388, sec. 71. The burden was on the plaintiffs, as the subsequent relocators of the claims included in Union Lot 59A, to affirmatively prove by clear and satisfactory evidence, that the respondent forfeited its claims for failure to conform to the law. Callahan v. James, 141 Cal. 291, 74 P. 853; Quigley v. Gillett, 101 Cal. 462, 35 P. 1040; Goldberg v. Bruschi, 146 Cal. 708, 81 P. 23; Musser v. Fitting, 26 Cal.App. 746, 148 P. 536; Richen v. Davis, 76 Or. 311, 148 P. 1130; 40 C.J. 846, sec. 306; 30 U.S.C.A. p. 205, notes 366 and 367. But the uncontradicted evidence in this case shows that the defendants did not perform the annual labor required by law for the specified years prior to the plaintiffs' location of the claims in 1930, as the court found. We assume that fact is conceded. It is not disputed. Regardless of which side furnished that proof of failure to perform the annual assessment work, it is clearly and satisfactorily established and fully meets the requirements of the law with respect to the burden of proof. It follows that respondent's failure to perform the required assessment work resulted in a forfeiture of its title to the claims in question, and that the claims thereupon became "open to relocation in the same manner as if no location of the same had ever been made." U.S.Rev.Stat. Sec. 2324, 30 U.S.C.A. § 28.

When a case is tried on the theory that $100 worth of annual labor on a particular claim was actually performed, and the evidence supports that fact, the title to that particular claim may not be deemed to have been forfeited, merely because the labor performed is insufficient to cover the statutory requirement and may not inure to the benefit of other contiguous claims in a group. Utah Standard Mining Co. v. Tintic Indian Chief Mining and Milling Co., 73 Utah 456, 274 P. 950, 955; McGarrity v. Byington, 12 Cal. 426; 30 U.S.C.A. p. 200, note 324. That principle is raised for the first time in this case on petition for rehearing. We are directed to no evidence to sustain a finding that $100 worth of work was performed on a particular claim. The case was tried on the sole theory that $100 worth of annual work was adequate for the entire consolidated group of twelve claims designated as 'Union Lot 59A'. We are of the opinion we are not authorized to remand the case for trial on a theory entirely different from that upon which it was tried. The principle is not applicable under the circumstances of this case.

That portion of the judgment from which this appeal was perfected is reversed and the court is directed to render judgment in favor of plaintiffs quieting title in them to the placer mining claims included in Union Lot 59A, as prayed for.

ADAMS, P. J., and PEEK, J., concur.

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64 Cal.App.2d 113

WELLS v. WELLS.

Civ. No. 3127.

District Court of Appeal, Fourth District, California.

April 26, 1944.

1. Joint tenancy 🔑8

The word "income" as used in contract between plaintiff and defendant requiring defendant to divide with plaintiff income derived from property held by parties in joint tenancy and managed by defendant referred to something of value received by defendant from property and its use either by defendant or others for or under him, but did not include reasonable rental value of property when that rental value was not received by defendant. Civ. Code, § 748.

The word "income" means the return from one's business, labor, capital invested, or property; commercial revenue or receipts including wages or salaries, proceeds of agriculture or commerce, the rent of houses, or return on investments; or amount of money coming to a person or corporation within a specified time, whether as payment for services, interest, or profit from investment; its usual synonyms being "gain", "profit" and "revenue".

See Words and Phrases, Permanent Edition, for all other definitions of "Gain", "Income", "Profit" and "Revenue".

2. Appeal and error ⟹1178(6)

Where contract required defendant to divide income from property with plaintiff and record disclosed that defendant had received some income but failed to disclose amount thereof, a retrial of plaintiff's action for accounting was required on issue of income.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Eva M. Wells against Hyman B. Wells for an accounting. From a judgment for plaintiff, defendant appeals.

Affirmed in part, reversed and remanded in part, with instructions.

Alfred Siemon, of Bakersfield, for appellant.

Mack, Werdel & Bianco, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment in the sum of $1015.50 in an action for an accounting.

Plaintiff and defendant had been husband and wife but were divorced. They owned 286 acres of land near McKittrick in Kern County. In making a property settlement they conveyed the property to their children subject to the reservation of a life estate in themselves as joint tenants. Concurrently with the deed and by way of property settlement they executed a contract containing the following:

"Therefore, in consideration of the premises, it is agreed that the party of the first part (defendant) shall retain the right to manage and control the said property reserved in said deed of gift during his life time; that the income derived from said premises and the use thereof during the life time of the party of the first part and party of the second part (plaintiff) shall be divided equally between the parties hereto; * * *."

It was alleged in the complaint that defendant had occupied and used the land and had produced and received money therefrom, the exact amount of which was unknown to plaintiff, and had sold water from the wells. An accounting was asked which was to include the reasonable rental value of the premises and the selling price of the water.

The complaint expressly waived recovery for any income or rental value of the property received prior to the "proper period of the statute of limitations applicable to such agreements" which was assumed by the trial judge and counsel to be four years. The complaint was filed was on July 11, 1940.

The trial court found that defendant had paid plaintiff no money as the reasonable rental value of the property since November 10, 1936; that this "reasonable rental value of all said premises from the 10th day of November, 1936, to the 10th day of November, 1942, is Two Hundred Dollars ($200.00) per year", and further found that plaintiff was entitled to judgment for half this reasonable rental value, or $600. Defendant had also sold water of the value of $600, of which amount plaintiff was given judgment for $300. The balance of the judgment is made up of accrued interest in the sum of $115.50.

Defendant admits the correctness of the portion of the judgment awarding plaintiff $300, or half of the money received for the sale of water. He maintains that the portion of the judgment for $600 for one-half of "the reasonable rental value of all of said premises" cannot be sustained under the clear language of the contract and consequently that the portion of the judgment awarding interest on this sum cannot be supported.

The trial judge construed the portion of the contract of November 10, 1936, as a promise on the part of defendant "to pay plaintiff one-half (1/2) of the reasonable rental value of said premises". The correctness of the judgment depends on the reasonableness of this construction of the clear terms of the contract. If the "reasonable rental value" of the premises, whether rented to others or not rented and occupied by defendant, be included within his promise to pay plaintiff one-half of the "income derived from said premises and the use thereof", the judgment must be affirmed. On the other hand if the "reasonable rental value" when the property was not rented but occupied by defendant is not "income" this portion of the judgment is erroneous for the terms of the contract are clear and the trial court cannot place a contractual obligation on defendant which he did not agree to perform.

The obligation is to pay one-half of the income derived from the premises and the use thereof. It is clear that it is only one-half of the income from the property or from its use that must be paid to plaintiff. We think it clear that this income may be derived from the property, or its use, either by defendant himself or by his tenant or other person operating the property for or under him. Still it is only one-half of the income that must be paid plaintiff. As the question is not argued we need not decide whether he should pay her one-half of the gross or the net income received by him. This question is not clearly settled in the contract. The important question here is to determine whether defendant may be charged with the reasonable rental value of the property during those years when he occupied it himself and received little or no return from its use.

[1] In Black's Law Dictionary "income" is defined as, "The return in money from one's business, labor, or capital invested; gains, profit, or private revenue."

In Tax Commissioner, Trefry v. Putnam, 227 Mass. 522, 116 N.E. 904, 905, L.R.A. 1917F, 806, we find the following:

> "'Income' is the gain which proceeds from labor, business, or property; commercial revenue, or receipts of any kind, including wages or salaries, the proceeds of agriculture or commerce, the rent of houses, or the return on investments; or the amount of money coming to a person or corporation within a specified time, whether as payment for services, interest, or profit from investment, its usual synonyms being 'gain', 'profit', 'revenue.'"

In Coudon v. Tait, D. C., 56 F.2d 208, income was defined as the gain derived from capital or labor or effort or both. In Diefendorf v. Gallet, 51 Idaho 619, 10 P.2d 307, the Supreme Court of Idaho defined income as something derived from property, labor, skill or sound judgment or from two or more of them in combination. In Fairchild v. Gray, 136 Misc. 704, 242 N.Y.S. 192, income was held to mean that which comes in or is received from business by investment of capital irrespective of expenditures. Section 748 of the Civil Code provides as follows:

> "The income of property, as the term is used in this part of the code, includes the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property."

We think it clear that it must be held that income, as used in the contract, refers only to something of value received by defendant from the property and its use either by himself or by others for or under him and does not include the reasonable rental value of the property when that rental value was not received by him. To this extent the construction placed on the contract by the trial court was not justified and placed an obligation on defendant that he had not agreed to assume.

The portion of the record bearing upon the income received from the property during the years in question is very indefinite and uncertain. Defendant admitted having accounts showing his transactions concerning it, but was not required to bring them into court. If we understand his testimony correctly he admitted receiving money from Clemente Gallainena for sheep grazing rights on the property though exactly how much he received is not made clear. During one year he rented the land, or some of it, and received thirty sacks of wheat as rental. He farmed the land himself another year and harvested over 500 sacks of wheat. We are not informed as to the value or selling price of the wheat.

[2] As it appears that defendant did receive some income from the property, the amount of which cannot be determined from the record, that phase of the case should be retried and the accrued interest recomputed.

The portion of the judgment awarding plaintiff $300 for her share of the money received from the sale of water is affirmed. The portion of the judgment awarding plaintiff $600, as one-half of the reasonable rental value of the property, and $115.50 accrued interest, is reversed with instructions to the trial court to retry the issue of the income from the property received by defendant as "income" as here defined and to compute the accrued interest on the sum of $300, and on the income, if any, from the property, and enter a judgment for plaintiff accordingly. Neither party will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

LONG v. THOMPSON.

Civ. 14203.

District Court of Appeal, Second District, Division 2, California.

April 19, 1944.

Rehearing Denied May 12, 1944.

Hearing Denied June 15, 1944.

1. Costs 🔑137

If a judgment is entered after a nonresident plaintiff has failed to comply with statute regarding security for costs, the judgment is merely erroneous and not void. Code Civ.Proc. § 1030.

2. Costs 🔑136, 137

Where California judgment was rendered for a nonresident plaintiff, although he had failed to comply with statute regarding security for costs, an execution could have been levied on the judgment, and if defendant had failed to urge that the entry of the judgment was erroneous he would have waived plaintiff's failure to comply with the statute. Code Civ.Proc. § 1030.

3. Contracts 🔑71(7)

Where nonresident plaintiff failed to comply with statute regarding security for costs but obtained California judgment, contract of defendant to pay amount of judgment in consideration of plaintiff's not levying an execution for one year was supported by "consideration", since defendant received a benefit to which he was not lawfully entitled. Civ.Code, § 1605; Code Civ. Proc. § 1030.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

4. Appeal and error 🔑843(2)

In action for breach of defendant's agreement to pay California judgment based on a foreign judgment, contention that at time the California judgment was entered against defendant plaintiff's cause of action had been merged in prior judgment against defendant's joint obligor was immaterial and was not required to be decided, where the agreement had the essentials of a binding contract. Civ.Code, § 1550.

5. Contracts 🔑98

Where California judgment recovered by nonresident plaintiff was voidable because of plaintiff's failure to comply with statute regarding security for costs but defendant executed written agreement to pay judgment in consideration of plaintiff's not levying an execution for one year, in action for breach of the agreement defendant could not urge that agreement was entered into through mutual mistake of fact and law, in absence of rescission of the agreement. Code Civ.Proc. § 1030.

6. Contracts 🔑98

In absence of a rescission of a contract, because of a mistake of law or fact common to the parties, the contract is regarded as still subsisting and as determining the rights of the parties.

7. Contracts 🔑95(3)

Where California judgment recovered by nonresident plaintiff was voidable because of plaintiff's failure to comply with statute regarding security for costs but judgment would have supported a writ of execution, threat of plaintiff's attorney that he would levy execution on the judgment did not render defendant's agreement to pay judgment void on ground of duress. Code Civ.Proc. § 1030.

* * *

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Charles W. Long against George K. Thompson for breach of a written agreement. From a judgment for plaintiff, defendant appeals.

Affirmed.

Wilbert C. Hamilton, Edwin H. Casey and Zuckerman & Stein, all of Los Angeles, for plaintiff.

John M. Martin, Frank L. Martin, Jr., and John M. Farley, all of Los Angeles, for defendant.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for breach of a written agreement to pay the amount of a judgment, defendant appeals.

The essential facts are these:

On February 21, 1933, plaintiff, a resident of the State of Oregon, recovered a joint judgment in the State of Washington against defendant and George K.

Thompson, residents of California, for the sum of $10,000 plus costs.

On April 16, 1936, plaintiff filed an action in California against defendant and George K. Thompson predicated on the Washington judgment. On May 11, 1936, Charles A. Thompson having been duly served in the California action and having failed to appear, a default judgment was entered against him in the total sum of $12,730.27 and costs. On April 28, 1936, summons in the California action was served on defendant herein. On May 8, 1936, defendant herein filed a demurrer to the complaint and a demand in writing for security for costs pursuant to the provisions of section 1030 of the Code of Civil Procedure. Thereupon plaintiff's attorney filed a purported undertaking. This undertaking was not in the form required by law and no notice of the filing of the undertaking was given to defendant herein. Subsequently, the trial court overruled defendant's demurrer to the complaint and June 10, 1936, a default judgment was entered against defendant herein in the sum of $12,730.27.

Thereafter plaintiff caused an execution to be issued on the California judgment. This execution was returned unsatisfied on June 24, 1936. Subsequently, both Charles A. Thompson and defendant herein were examined by plaintiff's attorney upon supplementary proceedings.

Defendant herein, at the time the California judgment was rendered against him and thereafter, was endeavoring to establish himself in the construction business in California and told plaintiff's attorney, Mr. Wilbert C. Hamilton, he could not get anyone to back him financially if executions were to be levied against him on the California judgment. As the result of negotiations between defendant herein and Mr. Hamilton an agreement * was executed which is the basis of this suit. By this contract defendant herein agreed to pay the amount of the judgment which had been entered against him in consideration of plaintiff's not levying an execution for the period of one year.

Defendant herein reported from time to time to Mr. Hamilton that his contracts had not proved profitable. In March, 1940, plaintiff again caused an execution to be issued on the California judgment against defendant herein, and also obtained an order for defendant to appear in court and show cause why his interest as a partner in the Thompson-Markham Company should not be charged with the payment of the California judgment. Defendant resisted the charging order on the ground that the California judgment was not enforceable. On April 8, 1940, the trial court denied plaintiff's application for a charging order for the reason that there was no valid judgment against defendant herein because plaintiff had failed to file a proper undertaking and to give notice as required by section 1030 of the Code of Civil Procedure. This was the first time that either plaintiff or defendant knew that the California judgment was not enforceable.

On May 6, 1940, the United States Court of Claims awarded judgment in favor of defendant herein and Charles A. Thompson on the claim mentioned in the agreement of October 8, 1936. This judgment was paid on November 19, 1940. The present action was instituted July 20, 1942.

Defendant relies for reversal of the

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* This agreement read as follows:

"Mr. Geo. K. Thompson
"5301 Earl Dr.
"Los Angeles, Cal.

"In re: Long vs. Thompson

"Dear Sir:

"In accordance with our conversation of a few days ago, I have obtained authority to make the following agreement with you:

"No execution will be levied in the above entitled matter upon any contracts which you may enter into for construction, and so forth, for a period of one year, in consideration that you shall keep me informed of the contracts you enter into, a brief resume of the contract, and you agree to pay to me to apply on said Judgment ten per cent (10%) of the profits received by you on any and all contracts you enter into. In addition thereto, you agree to pay to me the Judgment in full as soon as the matter now pending, namely, your claim in the United States Court of Claims, is settled and the monies received by you.

"Your acceptance on the duplicate copy inclosed herewith will be considered an agreement between us upon its return to me.

"Yours very truly,
WCH.MR.
"(Signed) Wilbert C. Hamilton

"I accept and agree to the terms and conditions herein contained.

"Dated this 8th day of Oct. 1936.
"(Signed) Geo. K. Thompson."

judgment upon four propositions which will be stated and answered hereunder seriatim.

First: *There was not any consideration for the agreement which is the basis of this action because the California judgment against defendant herein was void and therefore unenforceable.*

This proposition is untenable. Any benefit agreed to be conferred upon a promisor to which he was not lawfully entitled at the time constitutes consideration. (Sec. 1605, Civil Code.)

[1] The law is established in California that if a judgment is entered after a nonresident plaintiff has failed to comply with the requirements of section 1030 of the Code of Civil Procedure, such judgment is merely erroneous (voidable). It is not void. (Carter v. Superior Court, 176 Cal. 752, 757, 169 P. 667; In re Estate of Baker, 176 Cal. 430, 434, 168 P. 881; Comstock v. Clemens, 19 Cal. 77, 80.)†

[2] Since the California judgment against defendant herein was not void an execution could have been levied thereon, and if defendant herein had failed to urge that the entry of the judgment was erroneous he would have waived plaintiff's failure to comply with the requirements of section 1030 of the Code of Civil Procedure.

[3] Therefore, when plaintiff agreed not to levy an execution for one year, defendant received a benefit to which he was not lawfully entitled and this constituted consideration for the agreement.

Second: *At the time the California judgment was entered against defendant herein plaintiff's cause of action had been merged in the judgment of May 11, 1936, against his joint obligor, Charles A. Thompson.*

[4] It is unnecessary for us to decide this proposition for the reason that it is immaterial to the decision of the present action. The instant action is founded upon the contract signed by defendant on October 8, 1936. This agreement had the essentials of a binding contract, to wit: (1) parties capable of contracting, (2) their consent, (3) a lawful object, and (4) a sufficient consideration. (Sec. 1550, Civil Code.)

It was the California action, reduced to judgment June 10, 1936, that was predicated upon the Washington judgment, not the present suit.

Had the above essentials of a contract been present defendant would have been bound by his agreement even if he had entered into a contract to pay the amount of a void judgment.

[5, 6] Third: *The agreement of October 8, 1936, was entered into through a mutual mistake of fact and law.*

This proposition may not be urged by defendant for the reason that in the absence of a rescission of a contract, because of a mistake of law or fact common to the parties, the contract is regarded as still subsisting, and as determining the rights of the parties. (Kyle v. Hamilton, 6 Cal. Unrep. 893, 897, 68 P. 484.)

[7] Fourth: *The agreement of October 8, 1936 was executed by defendant through duress.*

This proposition is untenable. The record fails to disclose that defendant was motivated at the time he signed the agreement by any threat other than of the attorney for plaintiff that he would levy execution on the California judgment. This statement of plaintiff's attorney was proper and within his legal rights as there was, as pointed out above, a voidable judgment existing against defendant at the time which would have supported a writ of execution. (Cf. Comstock v. Clemens, supra, 19 Cal. at page 80.)

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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† It is to be noted that (1) section 1036 referred to in the cited cases was amended and renumbered section 1030 by the Statutes of 1933, page 1900, and (2) Gadette v. Recorder's Court, 53 Cal.App. 72,[1] is erroneous wherein it is stated "that said defendant was at the commencement of said action a resident of another state." The record in the case discloses that the *plaintiff*, not the *defendant* was, at the commencement of the action, a nonresident of California.

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[1] Is plaintiff in 199 P. 817.

64 Cal.App.2d 70

HAMES et al. v. RUST et al.

Civ. 6727.

District Court of Appeal, Third District, California.

April 25, 1944.

Hearing Denied June 22, 1944.

1. Contracts 🔑237(2)

Any new agreement between parties to existing executory contract, made in substitution or modification of older contract and bilateral in benefit or burden, has, like primary contract, a sufficient consideration in the mutual advantages or obligations which it confers or imposes. Civ.Code, § 1605.

2. Mines and minerals 🔑59

Agreed forbearance by assignee of lease with option to purchase mining claims to sue owner of claims for conversion of property belonging to assignee was a sufficient consideration for written modification of lease and option and extension of time for making stipulated payments thereunder. Civ.Code, § 1605.

3. Mines and minerals 🔑59

Written modification of lease with option to purchase mining claims by which owner specifically released past due deferred payments and payments to become due before specified future date required no consideration. Civ.Code, § 1541.

4. Mines and minerals 🔑59, 64

Where modification of original lease with option to purchase mining claims and extensions of time were valid and binding they could not lawfully be rescinded by subsequent notice or by an effort on part of owner of mining claim to thereafter transfer his title or interest therein, and purported transfer of interest in original lease was subject to paramount title and contractual rights of original lessee.

◆

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Suit to quiet title to mining claim by J. T. Hames and another against John A. Rust, the Deer Creek Union Mining Company, and another, wherein H. Ward Sheldon, as administrator with the will annexed of the estate of J. T. Hames, deceased, was substituted as plaintiff in the place and stead of J. T. Hames upon his death pending appeal. Judgment for defendant last named, and plaintiffs appeal.

Affirmed.

Prior opinion, 136 P.2d 350.

H. Ward Sheldon, of Nevada City, for appellants.

Busick & Busick, of Sacramento, for respondent.

PER CURIAM.

This is an appeal by the plaintiffs from a judgment in favor of the defendant Deer Creek Union Mining Company, a corporation.

On October 27, 1934, one George O. Nihell executed to John A. Rust and S. W. Tull a written lease and option to purchase two mining claims for the sum of $30,000, to be paid in specified monthly installments together with ten per cent of all net proceeds derived from sales of ore extracted from the mines. The agreement was subsequently assigned by Rust and Tull to the respondent Deer Creek Union Mining Company on December 22, 1934.

Thereafter a series of events occurred as follows:

1. During the Fall of 1936, the time for the performance of the original agreement was extended.

2. On January 15, 1937, the defendant mining company was still in default of certain payments provided in said contract, and by a writing of that date Nihell waived such default "* * * till the financing program is completed * * *"

3. Regardless of the foregoing extensions of time and waiver, the owner, Nihell, on May 6, 1937, executed to plaintiff J. T. Hames, a lease and option to purchase the claims on terms similar to those contained in the original lease to Rust and Tull. No mention was made therein concerning the agreement between Nihell and Rust and Tull dated October 27, 1934.

4. Again on June 19, 1937, Nihell waived in writing further default of the defendant company until "September 1, 1937".

5. On June 21, 1937, Nihell executed another option to purchase the claims to plaintiffs J. T. and Jett A. Hames on similar terms, except that the purchase price was reduced to $20,000. This agreement was made subject to the October 27, 1934, agreement.

6. On the same date Nihell also executed to J. T. and Jett A. Hames an assignment

of his interest in the original agreement of October 27, 1934, authorizing the assignees to collect the payments due thereunder.

7. On August 12, 1937, Nihell executed and delivered to the mining company a modification of the lease and option of October 27, 1934, whereby the balance due "before the 15th. day of November 1937" under the terms of said original agreement, was cancelled, and the monthly payments due thereafter were reduced.

8. Lastly, on October 29, 1937, Nihell executed a third option to purchase the mining claim to J. T. and Jett A. Hames, on substantially the same terms as expressed in the original lease.

The present suit was to quiet plaintiff's title, and was commenced October 1, 1937, before the last mentioned instrument was executed, and a supplemental complaint was filed to cover the execution of the third option. The complaint alleged ownership in plaintiffs by virtue of the June 21, 1937, agreement, and for a second cause of action alleged default of defendants under the October 27, 1934, agreement between Nihell and defendants Rust and Tull.

The defendant Deer Creek Union Mining Company answered the complaint, denying the material allegations thereof, and affirmatively alleging that it held title to and possession of said mining claims, as assignee of the original lease and option to purchase the claims executed to Rust and Tull on October 27, 1934, and that said instrument was in full force and effect. It denied that the defendants were in default of any of the terms of that agreement, or that plaintiffs ever notified defendants of any default as required by the lease. The answer further alleged that the defendants fully performed all of the covenants of their lease and option to purchase; that they did not fail to operate the mines or to make payments as required by said agreement, and that on the contrary George A. Nihell and the plaintiffs waived any breach of covenants which might have occurred by modifying the contract in writing and by extending the times of payment thereunder. Finally it was alleged that plaintiffs had no right or title to said claims "superior" to those which were possessed by the mining company.

The defaults of defendants Rust and Tull were entered for failure to answer the complaint.

The cause was tried twice. The first suit resulted in a judgment in favor of the defendant mining company. A new trial was granted on the ground of insufficiency of the evidence, and on appeal that order was affirmed. Hames v. Rust, 14 Cal.2d 119, 92 P.2d 1010. The case was then retried before the court sitting without a jury, and at the conclusion thereof findings favorable to the defendant corporation were adopted.

Pending the appeal of this case the plaintiff J. T. Hames died, and the administrator of his estate was duly substituted as a party plaintiff.

The appellants contend that the waiver of the breaches of contract and extensions of time within which to make stipulated payments were given without consideration; that while consideration is not always necessary, a waiver not supported by consideration may be retracted at any time unless conditions amounting to an estoppel exist; that plaintiffs' notice of default on July 5, 1937, which was signed by plaintiffs and Nihell, gave defendants ample time to avoid a forfeiture, and that as defendants were already in default and could not have performed under the extension of time granted, there was no equitable reason why the extension could not be retracted without notice. It is further contended that the trial court erred in two of its findings. However, in view of the disposition of the other issues raised herein such contention becomes immaterial.

If, as the defendant corporation contends, Nihell was free to enter into the modification agreement of August 12, he could do so only if the June 19 agreement were valid, for obviously if the June 19, agreement were not valid, then the agreement of June 21 with the plaintiffs would control. It is necessary, therefore, to determine what rights, if any, were acquired by the two agreements last mentioned, those of June 19 and June 21.

[1] The record discloses what apparently was sufficient consideration for the granting of the extensions of time within which to pay the installments of money and to perform the covenants of the agreement. Sec. 1605, Civil Code; Lincoln Holding Corp. v. Levering, 219 Cal. 427, 27 P.2d 74; Brownfield v. McFadden, 21 Cal.App.2d 208, 68 P.2d 993; 6 Cal.Jur. 168, §§ 117–118; 12 Am.Jur. 990, § 412. In the authority last cited it is said in that regard: "Any new agreement between the parties to an existing executory contract, made in substitution or modification of the elder com-

pact and bilateral in benefit or burden, has, like the primary contract, a sufficient consideration in the mutual advantages or obligations which it confers or imposes. Where an agreement amounts to a waiver or discharge of mutual stipulations in a contract, either in whole or in part, the discharge of each by the other from the obligations of the contract may furnish a sufficient consideration."

Section 1605 of the Civil Code provides that: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

[2] There is evidence that the modification of the original lease and the extensions of time to make the specified payments were executed in writing in consideration of an agreed forbearance to sue Nihell for a truck and water pump belonging to the mining company which he was charged with selling and converting. That forbearance furnishes adequate consideration for the modification and extensions of time. No action was brought against Nihell for the truck and pump.

The appellants contend that as the extensions of time were given without consideration Nihell was therefore authorized to rescind them at any time prior to fulfillment of the modified covenants by the lessee, citing Atlantic Fish Co. v. Dollar Steamship Line, 205 Cal. 65, 269 P. 926; 6 Cal.Jur. 378, § 227. As authority for the further contention that mere forbearance is not consideration, unless such forbearance is pursuant to an agreement therefor, they cite Tiffany & Co. v. Spreckels, 202 Cal. 778, 262 P. 742.

The decision in the Atlantic Fish Co. case was founded on the assumption that the modification of the contract which was there involved, with respect to refrigeration of fish which were shipped, was "without any consideration to support it," [205 Cal. 65, 269 P. 927] while the Spreckels case did involve the principle of forbearance to sue, yet the court held that there "was no valid consideration to support any agreement" [202 Cal. 778, 262 P. 747], and the contract had been obtained by the "wrongful use of fear, induced by the threats of [plaintiff]." Moreover, the court held that while there was an actual forbearance to sue, there was no agreement to that effect, and stated: "The fact that it did forbear to sue without any agreement of forbearance does not constitute a consideration."

The foregoing rules have no application to the present case. We have previously held that the extensions of time were given for adequate consideration, consisting of forbearance to sue Nihell on an asserted valid claim, which was a benefit to him and a detriment to the lessee mining company, and therefore the situation herein presented comes squarely within the provisions of Section 1605 of the Civil Code.

[3] The modification of the lease herein with respect to the deferred payments and to all other payments to become due "before the 15th. day of November 1937" required no consideration because those obligations were specifically cancelled and released by the written instrument of August 12, 1937, wherein Nihell modified the respondent's lease of October 27, 1934, by executing and delivering to it a written instrument waiving all unpaid installments together with all payments which would accrue before November 15, 1937. Sec. 1541, Civil Code; Weddle v. Heath, 211 Cal. 445, 455, 295 P. 832; W. Ross Campbell Co. v. Sears, Roebuck & Co., 136 Cal.App. 765, 769, 29 P.2d 910; Rogers v. Kimball, 121 Cal. 247, 253, 53 P. 648. Section 1541 of the Civil Code provides that: "An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration."

The appellants concede that this release and cancellation of those obligations by the written instrument would be a complete defense to this action except for the alleged fact that the owner of the mining claims, Nihell, executed and delivered to J. T. and Jett A. Hames on May 6, 1937, another lease and option to purchase the claims. But the answer to this contention is that Nihell, in consideration of the mining company's forbearance to sue him for his alleged conversion of the pump and truck, as the trial court specifically determined, "in the Fall of 1936, granted the defendant mining company an extension of time in which to perform the terms and conditions of said contract"; that Nihell again, and by an instrument in writing, on January 15, 1937, extended its time for performance, and lastly, the time for performance was again extended on June 19, 1937. Therefore the original lease of October 27, 1934, was not terminated but remained in full force and effect.

[4] It follows that the modification of the original lease and the extensions of time were valid and binding and they could not lawfully be rescinded by subsequent notice or by an effort on the part of the owner of the mining claims to thereafter transfer his title or interest therein. The purported transfer of interest in the original lease to J. T. and Jett A. Hames was subject to the paramount title and contractual rights of the mining company.

The court, therefore, properly determined that the plaintiffs were entitled to take nothing by their action.

The judgment is affirmed.

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64 Cal.App.2d 35

DEMING et al. v. COMMUNIST PARTY OF THE UNITED STATES OF AMERICA et al.

Civ. 13993.

District Court of Appeal, Second District, Division 3, California.

April 21, 1944.

Hearing Denied June 19, 1944.

1. Action 🔑6

Where declaratory relief action to determine whether Communist Party was qualified to be certified by Secretary of State to participate in and nominate its candidates in primary election and whether its members and candidates were disqualified from participating in primary election was filed after primary election took place, such matters were moot. Code Civ.Proc. § 1060.

2. Action 🔑6

Petitioners seeking merely declaration of disqualification of Communist Party as a political party and disqualification of its candidates were not within scope of Code section providing for declaratory relief since no declaration was sought concerning petitioners' rights and there was no actual controversy. Code Civ.Proc. § 1060.

3. Action 🔑6

The Code section authorizing declaratory relief in certain instances does not authorize an inquiry into political rights of others. Code Civ.Proc. § 1060.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Lee Deming, Henry M. Mingay and Walter J. Hasse against the Communist Party of the United States of America and others, for declaratory relief, a writ of mandate and an injunction. From a judgment for defendants after their demurrer was sustained without leave to amend, plaintiffs appeal.

Affirmed.

William C. Ring, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Asst. Atty. Gen., for respondent Secretary of State.

Andersen & Resner and George R. Andersen, both of San Francisco, Herbert Resner, of San Francisco, and Leo Gallagher, of Los Angeles, for respondent Communist Party.

Arthur Garfield Hays and Osmond K. Fraenkel, both of New York City, and Wayne M. Collins and A. L. Wirin, both of Los Angeles, for American Civil Liberties Union, amicus curiae in behalf of respondent Communist Party.

DESMOND, Presiding Justice.

[1] In the year 1942, a primary election was held in the State of California on August 25th. Six days later, on August 31, 1942, the appellants, three in number and all of them electors of the State of California, filed in the County of Orange a document entitled, "Petition for declaratory relief, writ of Mandate and Injunction," naming as respondents, the Communist Party of the United States of America, a voluntary unincorporated association, the Secretary of State of the State of California, and eleven individuals, who, according to the petition, were all members of the Communist Party and were referred to as "Communist Party candidates." The writ of mandate was sought to bar the respondent Secretary of State "from canvassing the votes cast for the said purported candidates for nomination by said respondent, Communist Party", and from is-

suing to them certificates of nomination or facilitating the printing of their names on the general election ballot for November, 1942, as the nominees of said party. The petition prayed that an injunction issue restraining the Secretary of State "from committing each and all of said acts; and that pending the hearing of this petition upon the merits that a preliminary injunction issue so enjoining him pendente lite." The petitioners also asked the court to "adjudge *whether or not respondent, Communist Party of the United States of America, is qualified to be an organized political party under the laws of the State of California;* whether or not it was so qualified to be so certified by respondent, Secretary of State, to participate in and nominate its candidates for public office in said primary election of 1942; and *whether or not said respondent candidates are entitled to certificates of nomination from respondent, Secretary of State, and entitled to have their names, as such candidates, printed upon the ballot for the general election of November, 1942, in said state;* and that it be further adjudged that respondent party, its members and purported candiates are disqualified by said party's designation; and their foreign allegiance and control, and by their trasonable, subversive policies, objectives and activities from participating in said primary election; and *that said purported nominees of said party are not entitled to be certified as qualified to have their names printed upon said general election ballot.*" It will be noted that the foregoing quotation asked the court's consideration of certain matters which were already moot, the primary election having taken place before the filing of the petition. The only matters which were not moot, three in all, we have italicized in the preceding quotation and shall pass upon them in the present opinion.

Upon the filing of the petition, the court in Orange County signed the restraining order therein requested and the case was later, on September 19, 1942, ordered transferred to the County of Los Angeles. Meantime, general demurrers were filed by the Secretary of State, by the Communist Party and its individual candidates above named. On September 29, 1942, upon a hearing in the Superior Court of Los Angeles County, the defendants' motion to dissolve the restraining order was granted and the demurrers sustained without leave to amend, the order to show cause, which had been made, was discharged, and judgment was ordered for all respondents. The petitioners took an appeal from the judgment and, by an opinion filed in this court on July 9th, 1943, a motion to dismiss that appeal was granted as to the individual respondents, the eleven members of the Communist Party above named, on the ground that the cause had become moot as to them, the general election in November of 1942 having been duly and regularly held in which each and all of the Communist Party candidates failed of election. The petition contained the statement that "respondent, Communist Party, does not have and cannot have any candidates for any federal or state office, nominated by its members, to be voted upon in said general election * * * in the year 1942, *nor at any other time, or at all,*" and because of the words which we have italicized, we were not satisfied to dismiss the appeal as to the Communist Party on the ground that it had become moot and so denied the motion to that effect made in behalf of the Communist Party. No motion to dismiss on the part of the Secretary of State was made or acted upon.

We now consider, therefore, whether the court erred in sustaining the demurrers without leave to amend.

[2-3] Reading the provisions of section 1060 of the Code of Civil Procedure providing for declaratory relief, we fail to see where the petitioners bring themselves within the terms of that statute. It provides that "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of *his* rights or duties with respect to another, * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of *his* rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. * * *" (Emphasis added.) No deed, will or other written instrument is here involved, nor is there a contract in which any person is interested, the purpose of the petition being to secure a declaration "of the rights of respondent, Communist Party, and its said members, and of the duties of respondent, Secretary of State, concerning his certification of said Communist Party, as an organized political party, and the nomination of Communist Party candidates; and con-

cerning the enjoyment by said party and its members of the benefits of that certain statute of said state known as the Direct Primary Law," or as alternatively stated, that the "respondent, Communist Party, does not have and cannot have any candidates for any federal or state office, nominated by its members, to be voted upon in said general election * * * in the year 1942, *nor at any other time, or at all.*" (Emphasis added.) There is nothing here to show that any one of the petitioners is seeking declaratory relief in the form of a statement of *his* rights, but together they seek to have the court determine what may be the rights, if any, of the Communist Party and its candidates. Such an inquiry does not appear to be authorized by section 1060 of the Code of Civil Procedure. The petition in the instant case is somewhat similar to one passed upon by the Court of Appeals of Kentucky in Dietz et al. v. Zimmer et al., 1929, 231 Ky. 546, 21 S.W.2d 999, cited in Lenahan v. City of Los Angeles, 1939, 14 Cal.2d 128, 131, 92 P.2d 1014, in which the petitioners were denied declaratory relief under the statute of that state known as the Declaratory Judgment Act, a general demurrer being sustained and a dismissal ordered. There the petitioners instituted the action for a declaration of law respecting the rights of Charles Zimmer, Sr., and three other defendants to be candidates for certain offices in the City of Covington. Special and general demurrers to the petition as amended were filed and from the resulting judgment in favor of the respondents the plaintiffs prosecuted an appeal. Quoting from the opinion (21 S.W.2d at page 1000), "Appellant insists that the conduct of the candidates during the contest in the municipal primary was a violation of the law * * *. We intimate no opinion respecting the character, legality, or effect of the conduct or declarations of the defendants, as delineated by the pleadings. Decision of that question will have to be remitted to a proceeding appropriate for the purpose. Neither is it necessary at this time to indicate the remedy that may be available if the candidates were held to be guilty of a violation of the law. * * * The appellants rely solely upon the Declaratory Judgment Act for the remedy invoked. It is not apparent from the terms of the act that the court has power to make a binding declaration of rights or forfeitures in a case of this character. It provides that 'any person interested under a deed, will or other instrument of writing, or in a contract, written or parol; or whose rights are affected by statute, municipal ordinance, or other government regulation; or who is concerned with any title to property, office, status or relation; or who as fiduciary, or beneficiary in [is] interested in any estate, provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his rights or duties, even though no consequential or other relief be asked.' Civil Code, § 639 a-2. The appellants are not interested or concerned in anything embraced within those provisions of the statute. Their rights are not affected by any ordinance, regulation, or statute. They are not concerned with the title to any property, office, status, or relation. They present no actual justiciable controversy with respect to any rights of theirs, nor have they any duties to perform respecting which the direction of the court is desired or required. The appellants seek merely a declaration of disqualification of the named defendants and have failed to bring the case within any of the terms of the statute upon which the case is predicated. In the absence of a justiciable controversy requiring a declaration of the rights of the plaintiffs, or a definition of their duties, in respect thereof, the court has no jurisdiction to enter a binding judgment (citing cases). * * * It is apparent that the case at bar does not come within the provisions of section 1 of the act. The rights sought to be declared belong exclusively to the defendants, and do not affect any justiciable right of the plaintiffs. *There is no actual controversy pending between the plaintiffs and the defendants, but the plaintiffs sought merely to have certain of the defendants declared disqualified as candidates* and certain other defendants adjudged the right to appear as candidates in their places. *A right of action for such purpose is not conferred upon appellants by the Declaratory Judgment Act.*" We have used italics to show the close analogy between the Kentucky case and the one we are considering. The reasoning in that case seems correct and applicable to the present proceeding.

Judgment affirmed.

SHINN and PARKER WOOD, JJ., concur.

64 Cal.App.2d 55

MUIR v. CHENEY BROS., Inc., et al.

Civ. No. 3133.

District Court of Appeal, Fourth District, California.

April 24, 1944.

Hearing Denied June 22, 1944.

1. Release 🔑58(6)

In action for injuries to plaintiff whose truck was struck by defendant's truck, evidence was sufficient for jury on issue whether release of all liability obtained by defendant's liability insurer's adjuster was due to fraud and therefore void.

2. Automobiles 🔑245(14)

In action for injuries to plaintiff whose truck was struck by defendant's truck at a Y intersection, negligence of defendant's truck driver who was traveling on his left side of the highway at time of impact was for jury. Vehicle Code, § 527, St.1935, p. 182.

3. Automobiles 🔑245(80)

In action for injuries to plaintiff whose truck was struck by defendant's truck at a Y intersection, whether plaintiff was guilty of contributory negligence in allegedly failing to yield right of way to defendant's driver was for jury. Vehicle Code, §§ 86, 550, St.1935, pp. 99, 186.

4. Negligence 🔑136(9, 26)

The question of plaintiff's contributory negligence is usually one of fact, and becomes one of law only when evidence will support no other legitimate inference.

5. Negligence 🔑76

Violation of statute or ordinance constitutes negligence per se, and it constitutes contributory negligence if failure to comply with such statute or ordinance contributes directly to the injury.

6. Automobiles 🔑171(5)

Under statute relating to right of way at intersections, it is immaterial which of two roads is the more traveled. Vehicle Code, § 550, St.1935, p. 186.

7. Automobiles 🔑243(4)
Evidence 🔑119(1)

In action for injuries to plaintiff whose truck proceeding north was struck by defendant's truck approaching from the west at Y intersection, evidence that most of traffic on highway where defendant's truck was traveling followed the curve to the south and that not more than two or three out of 10 automobiles proceeded across intersection was inadmissible to excuse plaintiff for violation of any provisions of the law, but was admissible as part of res gestae on issue of plaintiff's contributory negligence. Vehicle Code, §§ 86, 527, 550, St.1935, pp. 99, 182, 186.

8. Damages 🔑132(3)

$12,000 to 29 year old man whose average earnings were $135 per month but who at time of accident was paid $285 per month, who sustained concussion of the brain, laceration of the forehead, injuries to chest and neck, and limitation of motion in knee, with probability of permanent headaches, was not excessive.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by John W. Muir against Cheney Brothers, Incorporated, and others, to recover for injuries and damages sustained in a truck collision. From a judgment for plaintiff, defendants appeal.

Affirmed.

Chester O. Hansen and Eckhart A. Thompson, both of Fresno, for appellants.

Galen McKnight, of Fresno, for respondent.

GRIFFIN, Justice.

On July 14, 1942, plaintiff was injured in an automobile collision near Coalinga, in Fresno County, when his Ford pickup truck was struck by a Mack truck owned by defendant Cheney Bros., Incorporated, and driven by defendant George L. Henslick. In his complaint he prayed for damages for his personal injuries, for medical expenses, and damages to his automobile. No damages were sought for lost wages. Defendants' answer denied negligence on their part, claimed contributory negligence on the part of the plaintiff, and pleaded a signed release of all claims as a bar to plaintiff's cause of action. A verdict for $12,000 in plaintiff's favor resulted. This appeal followed.

The accident forming the basis of this suit occurred at an intersection of Highway No. 33 (Avenal-Coalinga Highway) with Jayne Avenue. Jayne Avenue is 20 feet wide and runs east and west. The

Avenal-Coalinga Road formerly ran north and south and intersected Jayne Avenue at right angles. Subsequently, the Avenal-Coalinga Highway was reconstructed to obviate a sharp turn to the west. As now reconstructed, in traveling north, at a point about 250 feet south of the old intersection, that highway, which is about 25 feet in width, curves off to the left (west) in a sweeping turn, forming an arc. It joins with Jayne Avenue at a point about 250 feet west of the old intersection. It is at this new intersection or point where the accident happened.

The intersection thus formed is a rather unusual one and somewhat difficult of description. It is triangular rather than square and is entirely unobstructed. It resembles somewhat the shape of a "Y". Highway No. 33 is the main highway between Avenal and Coalinga. Plaintiff was driving his Ford pick-up north from Avenal on Highway No. 33 approaching Jayne Avenue. Defendant's Mack truck was being driven east from Coalinga as it approached the intersection here involved on Highway No. 33.

Plaintiff testified that the Mack truck was being driven on the extreme south side of the road and it appeared to him that it had started around the curve to the south; that he was familiar with the highway and knew that most of the traffic would follow the curve toward Avenal. Observing that the truck appeared to be heading around the curve to the south, he proceeded in a westerly direction on the north half of Highway No. 33 at a point where that highway intersects Jayne Avenue. It is his testimony that the driver of the Mack truck suddenly and without a signal or warning of any kind, turned sharply to the truck driver's left and swung over to the left or north side of the highway across the northerly lane of traffic and onto the northerly shoulder of the highway; that when plaintiff saw the Mack truck swing to the north he was just entering onto Jayne Avenue and, thinking then that the driver of the truck intended to go east on Jayne Avenue, he swung his pick-up to the north and to his right to get onto the north half of Jayne Avenue and to permit the truck to pass on the south half of Jayne Avenue; that he succeeded in clearing the southerly lane of traffic and was entirely in the northerly lane with his pick-up straightened out in a westerly direction; that the Mack truck did not pass in the southerly lane of traffic but continued onto the northerly shoulder and struck plaintiff's pick-up on its right side when the driver of the Mack truck was endeavoring to swing back to the south side of Jayne Avenue. As a result of the accident plaintiff received serious personal injuries.

Defendant Henslick, the driver of the Mack truck, was 16 years of age and did not have a chauffeur's license. He had possessed a driver's license only for a period of six months. He was not a regular truck driver but had been hired as a "swamper" and "grease monkey", and was not supposed to be driving the truck at the time. Clarence L. Williams, the regular driver of the Mack truck, was riding with Henslick when the accident happened. There was testimony that the brakes on the Mack truck were not in good condition. Immediately after the accident, Williams informed the highway patrol officer and another witness that he, and not Henslick, was driving the Mack truck. When the president of defendant corporation arrived at the scene of the accident both Williams and Henslick informed him that Williams had been driving. Henslick also made this misstatement to the insurance adjuster representing defendant corporation and then later admitted to the adjuster that the statement was not true. He later admitted that these statements were made because Henslick was under age, did not possess a chauffeur's license, and was not supposed to be driving a truck.

Defendant corporation was engaged in the business of commercial trucking and was insured with an automobile insurance company. One of the insurance adjusters talked to plaintiff on July 17, 1942, at the Coaling a Hospital, after the accident. At that time a cast was being put on plaintiff's leg. That same day he left the hospital and the adjuster followed him to his home where he discussed the facts of the case with him. He talked to him again on August 21st, and plaintiff agreed to a settlement. The adjuster stated that it was his job to make these "adjustments" as advantageously as possible to the insurance company; that he had made a complete investigation of the claim, including the taking of statements from plaintiff, Henslick, Williams, and the highway patrol officer; that he knew all the facts; and that he had discussed the provisions of the insurance policy with the insurance company.

Plaintiff testified that he was a "rough neck" in the oil fields; that his education had been limited to high school, and that he had no business experience; that he knew nothing about law; that he had no knowledge of the facts except what he himself had seen; that he did not know who was driving the Mack truck and had been erroneously informed by the patrol officer that Williams was the driver; that he had never seen the insurance policy and knew nothing about its provisions; that at the time of the settlement he had not recovered from the accident; that he was still on crutches and suffering from head injuries; that his only means of supporting his family was by hard labor; that he was not able to work; that he had lost his job as a result of his absence from work and didn't know when or where he could get another job; that he had no money and had no source of income except his wages, which were $135 a month, out of which he was making payments on a home and automobile and was supporting a wife and two children; that he had not been able to make his payments on his home or his automobile and was borrowing money to supply food for the family table; that most of these facts were known to the insurance adjuster; that the adjuster told plaintiff that the accident was a 50-50 proposition and that defendants were no more responsible for the accident than plaintiff; that the adjuster told plaintiff that he was representing defendants' insurance company and that defendants had "voided" their policy of insurance in permitting an unlicensed driver to drive the truck.

At the trial it was established that the policy was not voided for any reason.

Plaintiff further testified that the adjuster then told him that because the insurance policy had been "voided" he would not make a full settlement with respondent but was willing "to make a contribution to the settlement"; that his insurance company would make such a contribution only because Cheney Bros., Incorporated, had been insured with it for a long time; that the insurance adjuster told him that the settlement was for his loss of wages only; that the settlement for loss of wages would not prevent plaintiff from suing defendants for other expense and loss; and that plaintiff's loss of wages was $575. He then testified that the release was never given to him to read and that he never had it in his hands; that he would not have accepted the settlement if he had known that he was signing a complete release of all claims.

Plaintiff's special damages alone amounted to over $1,200, and the jury found that he was entitled to $12,000 upon his entire claim. The issues as framed respecting the validity of the release were submitted to the jury under proper instructions. The issues raised were decided in favor of plaintiff and against the defendants. Plaintiff accepted a demand draft containing the following statement: "In full settlement of all claims". He endorsed this draft and cashed it.

[1] Defendants cite many cases to the effect that courts will not set aside solemn binding written contracts, and proof of their invalidity must be clear and convincing. The Supreme Court of this state has declared exceptions to this general rule in many instances, and in the late case of Jordan v. Guerra, 23 Cal.2d 469, 144 P.2d 349, where the evidence as to fraud and undue influence was much weaker than in the present case, it sustained a finding of the jury that a similar release was repugnant to just dealing. In view of the decision in that case it cannot be here held that there was not sufficient evidence to support the conclusions reached by the jury in reference to the "release of all claims" here involved. It is of interest to note that the attorney endeavoring to uphold the validity of the release in the Guerra case is now using that opinion to support the judgment of the trial court setting aside the release in the instant case.

[2, 3] Little, if any, contention is made by defendants that there was no evidence of the negligence of the driver of the Mack truck. The evidence supports the conclusion reached by the jury that the driver thereof was guilty of negligence. The Mack truck was traveling on the north half of Jayne Avenue at the time of the impact. This fact, when considered with the other facts and the circumstances of the case, if believed by the jury, constituted negligence. Sec. 527, Vehicle Code, St.1935, p. 182; Bennett v. Chandler, 52 Cal.App.2d 255, 126 P.2d 173. The main portion of defendants' brief is devoted to the contention that plaintiff was guilty of contributory negligence as a matter of law. In this connection it is argued that plaintiff failed to yield the right of way to defendant driver and that the evidence undisputedly shows that defendants' vehicle entered the intersection first, citing Osgood v. City of San Diego,

17 Cal.App.2d 345, 62 P.2d 195; Ebert v. Tide Water Associated Oil Co., 54 Cal. App.2d 497, 129 P.2d 135; and similar cases. From the nature of the so-called intersection at the place of the accident it is difficult to legally define the boundaries thereof. The question as to which vehicle entered the intersection first is problematical. Plaintiff offered no instruction on the subject. However, defendants offered and the court gave an instruction in the language of section 86 of the Vehicle Code defining an intersection, which was followed by an instruction in the language of section 550, subdivisions (a) and (b) in reference to the right of way rule at intersections. At the request of the defendant the court specifically instructed the jury that if the driver of the Mack truck entered the intersection prior to the time the Ford pick-up entered it, the driver of the Mack truck had the right of way, provided he operated it in a careful and prudent manner and under such circumstances as would make it the duty of plaintiff to yield the right of way to the Mack truck.

At the request of the defendant the trial court also gave an instruction based upon the sudden peril rule. All of these issues were decided against defendants and in favor of the plaintiff. The evidence produced merely created a conflict for the determination of the jury and it cannot be held that the plaintiff was guilty of contributory negligence as a matter of law.

[4] In Ebert v. Tide Water Associated Oil Company, supra, cited by defendants, the court held that the question of right of way and of plaintiff's contributory negligence was a question of fact for the trial court and not a question of law for the appellate court. See, also, Casselman v. Hartford A. & I. Co., 36 Cal.App.2d 700, 98 P.2d 539; Enz v. Johns, 112 Cal.App. 1, 296 P. 115. The question of a plaintiff's contributory negligence is usually one of fact, and becomes one of law only when the evidence is of such a character that it will support no other legitimate inference.

[5-7] It is next argued that the trial court admitted error in permitting plaintiff to prove that most of the traffic proceeding in an easterly direction from Coalinga on the Avenal-Coalinga Highway followed the curve to the south toward Avenal and that not more than two or three out of every ten automobiles proceeded east on Jayne Avenue beyond the curve. It is defendants' argument that the testimony objected to was offered by plaintiff to excuse plaintiff's failure to yield the right of way. Plaintiff argues that the evidence was not offered for that purpose but was offered for the sole purpose of giving to the jury a full knowledge of all the facts and circumstances which existed at the time and place of the accident, and for the purpose of permitting the jury to pass upon the question of whether plaintiff conducted himself as an ordinary and reasonable person would have conducted himself in the light of those same circumstances, citing Willhite v. Freed, 137 Or. 1, 299 P. 691. It is a well settled rule in this state that the violation of a statute or ordinance constitutes negligence per se, and that it constitutes contributory negligence if the failure to comply with such statute or ordinance contributes directly to the injury. Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922; Ferguson v. Nakahara, 43 Cal.App.2d 435, 443, 110 P.2d 1091. Under statutes such as section 550(a) of the Vehicle Code, it is immaterial which of two roads is the more traveled. Casselman v. Hartford A. & I. Co., supra. The jury were thoroughly and properly instructed on the questions of law here involved. From the reported decisions it is apparent that the evidence was not admissible for the purpose of excusing the plaintiff for the violation of any provisions of the law. However, it was admissible as a part of the res gestae for the purpose of giving to the jury full knowledge of all the facts and circumstances which existed at the time and place of the accident, which were known to the parties, so as to permit the jury to pass upon the question of whether plaintiff conducted himself as an ordinary and reasonable person would have conducted himself in the light of all of the circumstances. Hatzakorzian v. Rocker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Dewees v. Kuntz, 130 Cal. App. 620, 622, 20 P.2d 733; Mace v. Watanabe, 31 Cal.App.2d 321, 87 P.2d 893; Scott v. Gallot, 59 Cal.App.2d 421, 138 P. 2d 685.

[8] Defendants argue that the award of $12,000 is entirely disproportionate to the injuries sustained and is therefore excessive. Plaintiff was 29 years of age at the time of the accident. His head struck the top of the cab. He was thrown forward, striking his knees against the instrument board and his chest against the steering wheel with sufficient force to knock the spokes out of the steering wheel. Although

he was not completely unconscious, he remained in a dazed condition for some time. He could remember some things that happened at the scene of the accident and could not remember others. His knee was broken in two places. He received a blow on the head resulting in concussion of the brain, a laceration of the forehead requiring sutures, an injury to his chest, and an injury to his neck. He received many bruises. After the accident he was taken to a doctor's office and a splint was applied to his knee. He was then removed to a hospital where he remained for three days with his leg elevated. A cast was placed about his leg from the ankle to the hip. He remained at home in bed for five weeks. He was carried in and out of the doctor's office and in and out of the hospital. After he was able to leave his bed he was on crutches for some time. A nerve in his knee was affected and after he was able to discard his crutches his knee would give out from under him on occasions. He still complains of headaches from the brain concussion. The pain in his knee bothers him when he uses it in certain ways or when he is tired, and he cannot bend it past a certain point. He illustrated this fact in open court. He testified that the injury to his knee handicaps him in his work, and that he walks with a limp when he is tired. In reference to his neck and chest injuries, he testified that they caused him severe pain. One physician testified that one year after the accident when he examined plaintiff, he still had a 30-degree limitation of motion in the knee which prevented him from bending his knee past that point; that the headaches from which plaintiff still suffered at the time of trial were due to brain injury from the concussion and that those headaches might remain with plaintiff permanently. He further testified that the condition of the knee was permanent; that there might be some improvement through physiotherapy, but improvement from that source was problematical and that there would be at least a 20 per cent permanent disability; that the stiffness was such as to handicap plaintiff in his work for the rest of his life. Plaintiff then testified that in a period of less than a year he had lost two jobs on account of his injuries; that although his average earnings were $135 a month, he was working at the time of the accident on a job that paid him $285 a month; that plaintiff's work required him to be down on his knees, to walk in the mud, to stoop and to squat. On a motion for new trial in which the question of the amount of damages was raised, the trial court denied the motion.

The jury and trial judge had the opportunity of hearing the witnesses testify and of observing the plaintiff. It cannot be said from the evidence produced that the verdict was excessive. O'Brien v. Edens, 125 Cal.App. 100, 13 P.2d 754; Hellman v. Los Angeles Ry. Corp., 135 Cal.App. 627, 27 P.2d 946, 28 P.2d 384; Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 108 P.2d 738; Holt v. Yellow Cab Co., 124 Cal.App. 385, 12 P.2d 472; Douglass v. Crabtree, 57 Cal.App.2d 568, 134 P.2d 912; Bennett v. Hardy, 108 Cal.App. 473, 291 P. 903.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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64 Cal.App.2d 922

CORNISH CROSS POULTRY, Inc., v. McKINNON et al.

Civ. No. 14478.

District Court of Appeal, Second District,
Division 2, California.
April 26, 1944.

Appeal and error 🔑356

Where judgment was entered July 12, order denying motion for new trial was entered August 12, and notice of appeal was not filed until October 4, appeal was dismissed.

◆

Action by Cornish Cross Poultry, Inc., against Ralph McKinnon and others. From a judgment for defendants, plaintiff appeals. On motion to dismiss the appeal.

Motion granted.

Fontana & Goldstone and Rowland P. Fontana, all of Los Angeles, for appellant.

Irsfeld & Irsfeld, of Los Angeles, for respondents.

PER CURIAM.

The motion of respondents to dismiss the appeal having been presented, there being no opposition thereto, and it appearing that the judgment was entered in the superior court on July 12, 1943, and the order denying the motion for a new trial was entered in the superior court on August 12, 1943; and it further appearing that the notice of appeal was filed on October 4, 1943, beyond the period prescribed for the filing of notice of appeal; now, therefore, it is ordered that the appeal be and it is hereby dismissed.

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64 Cal.App.2d 47

TAYLOR v. ADAM, Acting Warden.

Cr. No. 1866.

District Court of Appeal, Third District, California.

April 21, 1944.

1. Criminal law 🔑1202(1)

The theft of tobacco in North Carolina, which was of value of only $100, would not have constituted commission of crime of grand theft punishable by imprisonment in state prison if committed in California, and, hence, could not have supported charge of a prior conviction of felony for purpose of adjudging one to be an habitual criminal. Pen.Code, § 487, subd. 1; §§ 644, 668.

2. Habeas corpus 🔑85(1)

On habeas corpus, the well-established rules relating to presumption of verity of a judgment apply.

3. Criminal law 🔑1144(17)

A final judgment of conviction carries with it every intendment and presumption in support of its regularity and validity.

4. Habeas corpus 🔑85(1)

On habeas corpus to secure petitioner's release from confinement in state prison on ground that judgment of commitment under which petitioner received sentence was void in part and the maximum term prescribed under valid portion of judgment had been served, any condition of facts consistent with validity of the judgment of commitment would be presumed to have existed rather than one which would defeat the judgment.

5. Habeas corpus 🔑85(1)

On habeas corpus to secure petitioner's release from state prison on ground that judgment of commitment under which he received sentence was void in that part adjudging him to be an habitual criminal and that maximum term prescribed under valid portion of the judgment had been served, petitioner had burden of proving allegations of his petition, and rebutting presumption of verity in support of judgment of commitment. Pen.Code § 487, subd. 1, §§ 644, 668.

6. Criminal law 🔑1202(1)

A charge of prior conviction in North Carolina for the crime of larceny, a felony, was supported so as to form the basis of sentence as an habitual criminal, notwithstanding record showed a conviction for the charge of theft of tobacco of the value of $100 which would not be a felony in California, where record also showed that as part of the same offense petitioner was also convicted for the theft of a $400 automobile which would be a felony in California. Pen.Code, § 487, subd. 1; §§ 644 and 668.

◆

Original proceeding in the matter of the application of Wayne Taylor for a writ of habeas corpus directed to James Adam, Acting Warden of Folsom Prison.

Writ discharged.

Wayne Taylor, in pro. per.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Petitioner contends that his present confinement by the Warden of Folsom Prison is illegal in that the judgment of commitment under which he received sentence is void in part, and that the maximum term prescribed under the valid portion of the judgment has been served.

By an amended information filed in the Superior Court of Los Angeles County, on May 11, 1934, petitioner was charged with the commission of the crime of burglary, a felony, and also was charged with having suffered four prior convictions for crimes amounting to felonies.

Petitioner was found guilty by a jury of the crime of burglary in the second degree and also found guilty of having suffered two prior convictions and serving terms of imprisonment therefor. No evidence was produced in support of the allegations as to the other two prior convictions suffered, and the jury, upon advice of the court, found these prior convictions to be not true.

On June 4, 1934, the Superior Court of Los Angeles County pronounced judgment against petitioner for the crime of burglarly and for the two prior convictions. The court decreed that he be punished by imprisonment in the State Prison at Folsom for the term prescribed by law, and by virtue of the provisions of Section 644 of the Penal Code petitioner was adjudged to be an habitual criminal.

The petitioner has directed his attack against that portion of the amended information charging:

"That before the commission of the offense hereinabove set forth in this amended information, said defendant Wayne Taylor (under the name of J. A. Farrell), was, in the Superior Court of the State of North Carolina, in and for the County of Wilson, convicted of the crime of Larceny, a felony, and the judgment of said court against said defendant, in said connection was, on or about the 7th day of February, 1931, pronounced and rendered, and said defendant served a term of imprisonment therefor in the state prison."

In this regard it is his contention that the portion of the judgment decreeing him to be an habitual criminal is void in that the basis for such an adjudication, i.e. two prior convictions of a felony within the meaning and terms of sections 668, 487, and 644 of the California Penal Code, does not exist. In support of this contention petitioner has produced and submitted a certified copy of an indictment and judgment of Wilson County, North Carolina. He argues that as the North Carolina indictment charges him with the theft of tobacco of the value "of One Hundred Dollars" only, such prior conviction does not meet the requirements of Section 644 of the Penal Code; that to adjudge a defendant an habitual criminal he must have been convicted twice previously of felonies enumerated in said section, and that under the requirements of the provisions of section 668 of the Penal Code the crime committed in such other state, in order to constitute such a felony, must be an offense, which if committed in this state, would be punishable by imprisonment in the state prison. Therefore he argues theft of tobacco in North Carolina, of the value of only $100 could not constitute grand theft (one of the crimes enumerated in section 644) under the laws of California, as section 487, subdivision 1 of the Penal Code, in defining that crime, provides:

"Grand theft is theft committed in any of the following cases:

"1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars * * *."

In further support of his position petitioner cites the case of People v. Hayes, 3 Cal.App.2d 59, 39 P.2d 213, wherein the court held that mere proof of larceny in another state is not proof that such act would be larceny in this state.

He concludes that at the present time he has served the maximum term for second degree burglary with meritorious credits earned and allowed under the valid portion of the judgment, and that at this time, for the reasons stated, he is now serving the void portion of the judgment.

[1] Petitioner has properly construed the law concerning the application of section 644 of the Penal Code, which section invokes the necessary requirements in adjudging a defendant to be an habitual criminal. The theft of the tobacco in Wilson County, North Carolina, which was of the value of only $100 would not have constituted the commission of the crime of grand theft in this state and consequently could not have supported the charge contained within the information of a prior conviction of felony for the purposes of adjudging petitioner to be an habitual criminal. If nothing further was disclosed by the record before us we would feel compelled to grant the writ, but such is not the case. At the time of the hearing this court received, and now has on file, certified copies of the bills of indictment and judgments in the Superior Court of Wilson County, North Carolina in the case of State v. J. A. Farrell. These documents disclose that petitioner herein, under the name of J. A. Farrell, was, in said county and state, indicted and convicted for the theft of an automobile "of the value of four hundred dollars," on the same occasion of the indictment and conviction for the theft of tobacco "of the value of one hundred dollars." The North Carolina

indictment charging the theft of the automobile as having been committed on the same day as the theft of the tobacco, reads in part as follows:

> "* * * That J. A. Farrell late of the County of Wilson on the 15 day of December 1930, with force and arms at and in said county aforesaid an automobile of the value of four hundred dollars of the goods, chattels and moneys of one J. P. Barbour then and these being found, unlawfully and feloniously did steal, take and carry away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The North Carolina judgments of conviction for the theft of the automobile (No. 52) and for the theft of the tobacco (No. 53) are entered in the docket of the court as follows:

> "No. 52 State vs. J. A. Farrell-Larceny—The jury heretofore empannelled in this cause having said by their verdict that defendant is guilty, it is adjudged that he be imprisoned in the penitentiary for not less than one nor more than three years.
>
> "No. 53 State vs. J. A. Farrell-Larceny—The jury heretofore empanelled in this cause having said by their verdict that defendant is guilty, it is adjudged that he be imprisoned in the penitentiary for not less than one *now* more than three years—Sentence to run concurrently with sentence in No. 52."

The petition fails to mention the indictment and judgment of conviction for the theft of the automobile (No. 52). However, from an examination of the petition and the certified copy of the indictments and judgments of conviction we note that although the numbered designation remains the same, the docket entry relating to judgment No. 52 appears in the petition as the entry for judgment No. 53; consequently the wording, "Sentence to run concurrently with sentence in No. 52" did not appear in the petition as filed. It is difficult to believe that the wording appearing in the petition was the result of inadvertence.

The theft of the automobile of the value of $400 did constitute the commission of a crime which, if prosecuted in this state, would have amounted to grand theft as defined by section 487 of the Penal Code, and as a result constitutes the commission and conviction of the crime of grand theft as enumerated in section 644 of the Penal Code.

As heretofore indicated, the information filed in the Superior Court of Los Angeles County, charging petitioner with the crime of burglary, also charged certain prior convictions for felony; among those charged is the one in question which alleged a prior conviction and the serving of sentence therefor in the state prison for *"the crime of Larceny, a felony"* (italics ours) committed in Wilson County, North Carolina.

[2-6] Upon habeas corpus the well established rules relating to the presumption of the verity of a judgment apply. 13 Cal.Jur. 276. A final judgment carries with it every intendment and presumption in support of its regularity and validity. Ex parte Connor, 16 Cal.2d 701, 108 P.2d 10. Thus any condition of facts consistent with the validity of the judgment herein will be presumed to have existed rather than one which will defeat the judgment. In re Eichhoff's Estate, 101 Cal. 600, 36 P. 11. It therefore will be presumed that the complete record of petitioner's prior convictions in the state of North Carolina was before the trial court, and that the court in adjudging him to be an habitual criminal did so with due regard to the provisions of section 644 of the Penal Code. As petitioner has failed to maintain the burden of proof cast upon him to prove the allegations of his petition or rebut such presumptions (In re Mirando, 15 Cal.App.2d 443, 59 P.2d 544) the writ must be discharged.

The writ is discharged.

ADAMS, P. J., and THOMPSON, J., concur.

64 Cal.App.2d 104

SPEYER et al. v. SOUTHERN PACIFIC CO. et al.

Civ. 14350.

District Court of Appeal, Second District, Division 1, California.

April 26, 1944.

Rehearing Denied May 4, 1944.

Hearing Denied June 22, 1944.

1. Railroads ⚷338

Where automobile approaching railroad tracks passed truck which allegedly obstructed automobile driver's view of railroad locomotive approaching crossing and automobile collided with locomotive, resulting in death of driver and injury to occupant of automobile, and evidence indicated that every effort was made to stop locomotive when a collision seemed probable, the "last clear chance" doctrine was inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

2. Railroads ⚷350(34)

Where automobile approaching railroad tracks passed truck which allegedly obstructed automobile driver's view of railroad locomotive slowly approaching crossing and automobile collided with locomotive, resulting in death of driver and injury to occupant of automobile, and evidence indicated that every effort was made to stop locomotive when a collision seemed probable, evidence was insufficient for jury on question whether locomotive was operated in wilful, wanton or reckless manner

3. Railroads ⚷328(1)

Where automobile approaching railroad tracks passed truck which allegedly obstructed automobile driver's view of railroad locomotive slowly approaching crossing and automobile collided with locomotive, resulting in death of driver, and evidence indicated that every effort was made to stop locomotive when a collision seemed probable, record sustained determination that automobile driver was guilty of contributory negligence as matter of law.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Eva K. Speyer and others against Southern Pacific Company and others for damages for alleged negligence of defendants resulting in collision between defendants' locomotive and an automobile. From an adverse judgment, plaintiffs appeal.

Affirmed.

Wendell W. McCanles, of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

DORAN, Justice.

In this action for damages based on the alleged negligence of defendant, the court, at the close of plaintiffs' case, granted defendants' motion for a nonsuit and, from the judgment that followed, plaintiffs appeal.

The pertinent facts are as follows: Edwin J. Speyer was driving an automobile west on Highway No. 60 at a point a short distance east of Ontario, where the Southern Pacific Railroad tracks cross the highway at right angles. The automobile collided with defendants' locomotive which was crossing the highway, resulting in the death of Edwin J. Speyer and the injury of his brother, who was with him. The accident occurred at 3:40 P. M.; the weather was clear.

It is appellants' contention, first, that the doctrine of last clear chance applied and that the appropriate question in connection therewith should have been submitted to the jury; second, that the evidence supports the fact, as alleged in the complaint, that defendant operated the locomotive in a wilful, wanton and reckless manner; and, third, that the question of contributory negligence should have been submitted to the jury as well.

The record reveals no salient or impressive conflict in the evidence. It appears from the record that deceased, when about 200 feet from the railroad crossing, passed a truck traveling in the same direction. In this connection, appellants' brief recites the evidence as follows:

"The truck which deceased passed while approaching the track was driven by Max W. Fischer a poultryman from El Monte, California. It was a G.M.C. one ton truck with a six by eight bed filled with poultry four crates high and more than ten feet from the ground. It completely obscured the engine from the occupants of the automobile while passing.

"Fischer testified he had been driving the truck at about 25 miles per hour. That he was about 300 feet from the track when he first noticed the engine. That it was standing 15 to 20 feet north of the highway. That when he got within 200 feet of the track and about the time deceased's automobile passed him he saw the engine pass slowly by a light post some 10 or 12 feet north of highway.

" 'Q. Now when you first saw the locomotive where was it with respect to the highway? A. The first I noticed it was 15 or 20 feet from the highway.

" 'Q. What did you observe about it. Was it moving or still or what? A. It looked to me in the beginning it was standing still, and then it started to move a little.

" 'Q. How far in your judgment was your truck from the railroad track when the automobile went around you? A. I would say about 200 feet somewhere around there.

" 'Now I want to ask you this, Mr. Fisher; before that locomotive started 15 or 20 feet, did it sound any whistle? A. No, sir.

" 'Q. Did you hear any bell? A. No.

" 'The Court: You didn't hear any noise indicating that the locomotive was starting up, is that right? A. That is right. I didn't hear anything. I thought they were stopped.

" 'Q. State whether or not before or after the accident there was any man walking along in front of the engine as it went across the highway? A. No there was not. Nobody walked.'

"On cross-examination Fisher testified:

" 'Q. You were about 300 feet from the track when you first saw the locomotive? A. It was about 300 feet.

" 'Q. At that time you couldn't determine whether it was moving or not? Is that right? A. I thought it was standing.

" 'Q. Then you watched the locomotive? A. Starting up.

" 'The Court: And at the time you saw the train moving? In other words you saw it pass this pole—is that right? A. No, when I was here—(indicating).

" 'The Court: How far away? A. About 200 feet.'

"As to what happened after the locomotive passed the light pole and just prior to the collision Mr. Fisher was apparently confused and somewhat uncertain. In answer to the question as to what took place after the auto passed his truck he said: 'A. Well, from that time on all I did, I watched the engine, and I seen the collision and that is all I seen, but they run right into the engine and eventually my truck stopped about 60 or 65 feet from the track, and I ran off the edge to give them assistance.' "

With regard to the testimony of the engineer and fireman of the locomotive, appellants' brief contains the following:

"The fireman and engineer denied that the locomotive stopped but said that it approached the highway slowly at a rate of from three to five miles; that when the automobile swerved around the truck the nose of the engine was just entering the highway. That the fireman hollowed stop twice. That the engineer did everything he could to stop. That although the brakes were in good condition and the engineer had his hand on the air brake, the power already shut off, and the engine coasting on a dry track almost level, the train traveled a distance of forty-one feet before he could stop it.

"Fireman Edwards testified: 'Q. And you first noticed the automobile, you said, about the time it started around the truck. Where was it? A. No I noticed it just behind the truck, say, about 40 or 50 feet.' Again he testified, 'I saw it continually in my view as it was swerving around the truck.' 'Q. Now about how far down to the east was the truck from the railroad track when you first observed the automobile go around it? A. Well it was between 150 and 175 feet when he started around the truck. Q. Well now why did you holler and tell him to stop? A. Well, when he swerved around the truck I assumed that he didn't see the railroad tracks or had an idea that we were approaching the crossing. Q. And that is why you hollered? A. Yes.' As to the speed of the automobile he testified: 'Q. Can you give us an estimate of how fast the automobile was traveling? A. No. Q. Well, can't you give us your best estimate? You saw the car coming from some distance? A. Well it was a high rate of speed and I should judge it was between 50 and 60 miles an hour.' He testified that when it first went around the truck it speeded up. Edwards continued—As to the speed of the locomotive as it approached the track he testified: 'Q. As you approached the highway you were running from 3 to 5 miles an hour weren't you? A. Approximately.' "

The foregoing is the evidence upon which appellant relies to support the above mentioned three contentions on appeal. It should be noted in that connection, that Orren A. Clark, a traffic officer, who appeared at the scene of the accident shortly after it occurred, testified that the skid marks of the automobile extended easterly from the point of contact with the locomotive a distance of one hundred four feet; that said skid marks were all on the south side of the center line of the highway. Also, it appears from the testimony of the fireman and engineer that every effort was made to stop the locomotive when a collision seemed imminent or probable.

Approaching from the east, photographs in evidence show the view of the crossing to be unobstructed for a considerable distance both north and south of the highway. The hazard was indicated with large crosses and warnings painted on the surface of the highway at the usual distance from the crossing and at the tracks the familiar cross arms were erected.

[1] It is at once evident from the foregoing summary that the doctrine of last clear chance does not apply and that appellants' contention in this regard cannot be sustained. See Guyer v. Pacific Elec. R. Co., 24 Cal.App.2d 499, 75 P.2d 550; Young v. Southern Pac. Co., 189 Cal. 746, 210 P. 259.

With regard to appellants' second contention, namely, that defendant operated the locomotive in a wilful, wanton and reckless manner, the following argument is offered: "It is difficult to conceive of a more wanton, wilful, flagrant and culpable act of misfeasance on the part of the defendants than that disclosed from the evidence in this case. In broad daylight on a bright clear day, deceased operating an automobile on a U. S. Highway, at a lawful rate of speed, approaches a railroad crossing; sees a locomotive standing a safe distance from the highway; passes a truck traveling in the same direction; and while going around the truck 150 to 175 feet from the track, wholly unawares and oblivious of any danger, the locomotive starts up slowly at first and then with greatly increased speed, suddenly sweeps out in front of the automobile completely obstructs the path of the automobile which the driver is unable to stop by the exercise of ordinary care, a collision occurs, and the life of the driver immediately snuffed out. From the beginning to the end of this tragedy the defendant's fireman saw the approaching automobile, estimated its speed, was aware of its proximity to the track, its situation of danger and peril, and the inability of the driver to escape death or injury."

"In the case at bar when the fireman saw the exposed position of the automobile driven by deceased his negligence in causing, allowing and permitting the locomotive to be started suddenly forward without any signal of warning completely obstructing the path of the oncoming automobile at a time when it was apparent to him that the automobile could not stop, clearly constituted wanton, wilful and reckless conduct."

[2] The argument is zealous, but, in the light of the record, is not persuasive. No act on the part of defendant is assigned as unlawful or in violation of any rule or regulation. And the mere characterization of certain conduct as wanton and reckless does not make it so. The trial court evidently reached such a conclusion, for there is nothing in the record on appeal supporting such contention but the aforementioned argument. The decisions cited are not in point.

[3] Assuming, however, but only for the sake of argument, that the conduct of defendant presented an issue of negligence proper for the jury's consideration, nevertheless, the conclusion is inevitable in the circumstances, that the trial court determined that the driver of the automobile was guilty of contributory negligence as a matter of law. The record supports such a conclusion. The order granting defendant's motion therefore was proper.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

KING v. MORTIMER, Building and Loan Com'r.*

Civ. 12386.

District Court of Appeal, First District, Division 1, California.

April 18, 1944.

Hearing Granted June 15, 1944.

1. Building and loan associations ⇨2

The legislative declaration regarding building and loan associations constitutes a policy and, unless unconstitutional, should be made effective. St.1935, p. 798; Gen. Laws 1937, Act 986, §§ 2.03, 6.01, 6.02, 6.07, 6.08, 12.05, 15.03, 15.13.

2. Building and loan associations ⇨40

An assignee of building and loan association's depositors who after association ceased to pay withdrawals sold certificates at a discount, suing for money had and received, was required to show that certificates had matured, that notice of withdrawal had been given, that prior matured claims had been paid, and that funds were available for payment. Gen.Laws 1937, Act 986, §§ 2.03, 6.01, 6.02, 6.08, 12.05, 15.03, 15.13.

3. Building and loan associations ⇨40

In action for money had and received by assignee of building and loan association's depositors who, after association ceased to pay withdrawals, sold their certificates at a discount, evidence that certificates for valuable consideration and without fraud were acquired by association, which exchanged such certificates with approval of building and loan commissioner for property owned by the association, warranted judgment for the association. Gen.Laws 1937, Act 986, §§ 2.03, 6.01, 6.02, 6.07, 6.08, 12.05, 15.03, 15.13.

4. Building and loan associations ⇨40

An assignee of building and loan association's depositors who after association ceased to pay withdrawals, sold their certificates at discount, was estopped from recovering the difference from the association, where the association on faith of transfer of certificates changed its financial position. Gen.Laws 1937, Act 986, §§ 2.03, 6.01, 6.02, 6.07, 6.08, 12.05, 15.03, 15.13.

PETERS, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Action by Wesley King against Frank C. Mortimer, Building and Loan Commissioner of the State of California, substituted in the place and stead of Pacific States Savings & Loan Company, to recover the amount of original savings deposits, less what they were sold for to the Pacific States Savings & Loan Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

Raymond Perry and Alden Ames, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and John J. Dailey, Roy D. Reese, and Lenore D. Underwood, Deputies, for respondent.

WARD, Justice.

The following statement of the nature and character of this proceeding is quoted from appellant's opening brief:

"This is an appeal from a judgment for the defendant Pacific States Savings & Loan Company, a corporation (hereinafter referred to as Pacific States), entered in the Superior Court of the State of California in and for the City and County of San Francisco, Hon. Maurice T. Dooling presiding.

"The action was filed by Wesley King, as plaintiff, who is the assignee of thirty-two claims set forth in separate causes of action, all similar in character.

"This action is to recover from the Pacific States the amount of their original savings deposits, less what they were sold for to the Pacific States as hereinafter described.

"These claims were assigned by thirty-eight persons, some of whom unite on a single claim and others in a few instances have more than one claim. All of these assignors were holders of investment certificates evidenced by pass books or deposit vouchers issued by the defendant Pacific States for money deposited by them with that corporation.

"The defendant, Pacific States, is a corporation organized and existing under the laws of the State of California relating to building and loan associations and has been engaged in the business of a building and loan association with offices in various cities of this state, since about 1889."

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* Subsequent opinion 158 P.2d 561.

Defendant filed an answer. An agreed stipulation of facts was presented, and additional evidence produced at the hearing. The trial was not completed until the latter part of 1939. In the meantime, in March of that year, the then Building and Loan Commissioner had seized the property of the defendant corporation. Subsequently Frank C. Mortimer became commissioner and as such defends the action. Building and Loan Association Act, Gen.Laws 1937, Act 986, sec. 13.16; Stats.1931, ch. 269, p. 541, as amended by Stats.1933, ch. 431, p. 1089, ch. 1059, p. 2719, as amended by Stats.1935, ch. 451, p. 1500, ch. 163, p. 798. Some of the contentions on appeal, consisting of criticism directed toward the Attorney General and the Building and Loan Commissioner, are entirely outside the record, and may well be ignored. Condensed, the following questions are presented: Are the transactions involving the purchase of certificates legal, and is there an estoppel which prevents recovery?

The stipulation of facts contains the following:

"That if said assignors were called as witnesses they would testify that at a date or dates after February 1, 1934 and prior to the dates of the execution of the respective alleged assignments, they called at the office of the Pacific States Savings and Loan Company, and were then and there informed by said company that no funds could at that time be withdrawn under their certificates respectively.

"Said assignors sold their certificates because they needed the money and were afraid of losing their investments if they did not sell.

"Said assignors were further informed that if they wished to sell their certificates they could do so, and it was stated that they could only be sold at a discount."

Upon this stipulation it is contended that appellant's assignors "were the victims of coercion." No evidence in the record, other than the above quoted stipulation, is called to our attention in the briefs to uphold the contention, though counsel make broad statements that inducements and representations came from the Pacific States or its agents, and they refer to findings in another action as indicating an illegal and deliberate scheme on the part of Robert S. Odell, the president of Pacific States, who is referred to in appellant's brief as "the leader of the gang."

The trial court did not regard the facts set forth in the quoted portion of the agreed statement of facts as constituting "coercion." As a stipulation it is assumed that it states the truth, namely, that appellant's assignors "were afraid of losing their investment"; that "they needed money" and sold in order to obtain the needed money notwithstanding that it was necessary to sell "at a discount." No misrepresentation was made by Pacific States or anyone else. This is demonstrated by appellant's failure to allege that, throughout the transaction, any fraudulent purpose actuated Pacific States or its officers.

[1] The information given by the Pacific States that "no funds could at that time be withdrawn under their certificates respectively" was in conformity with the facts and provisions of the Building and Loan Association Act. The amendments of 1933 and 1935 applied to the emergency period of the depression years and therein the right of certificate holders to withdraw and receive payment was declared secondary to the duty of the association to provide a reasonable reserve for the payment of taxes, insurance, repairs, etc., provided, however, that an association "on notice" should not pay any dividends on its stock. Otherwise it appears that during such period the association was subject to the rules and regulations of the commissioner. There is no evidence that dividends were paid, or distribution of profits made to stockholders by defendants. During this period, also, any transactions involving the purchase of property or the method of transfer of investment certificates to an association required authorization by the commissioner. Furthermore, unless there was compliance with the rules promulgated by the commissioner the statute gave him authority to issue a "cease and desist order." Stats.1935, ch. 163, p. 798. The legislative declarations constituted a policy. Unless unconstitutional, the provisions should be made effective. "Building and loan associations are creatures of statute, and the authority to regulate and supervise their operations arises under the police power because of the public interest of their business." Trede v. Superior Court, 21 Cal.2d 630, 633, 134 P.2d 745, 746.

The statement that the certificates "could only be sold at a discount" was true. No evidence appears to the contrary. The facts concerning this matter appear in the transcript as follows: "Not until April, 1933, did Pacific States Savings furnish any names of its certificate holders to any outside brokers. Yet prior to that time, it was apparent that the names of many of its investors were in the possession of unlisted brokers, and by then the racketeering abuse had become so pronounced that this institution determined that it would be preferable, both for the institution and its investors, to have as an acknowledged and approved dealer in certificates a brokerage firm of unquestioned integrity and responsibility. Accordingly, at that time it furnished to Schwabacher & Company, members of the New York Stock Exchange, the names of only such certificate holders as had frequently been disturbing their accounts or pressing demands for funds, and this association approved a letter which Schwabacher & Company sent to this special list of certificate holders, in which that firm expressly stated that it believed that the Pacific States Savings was a well managed institution and that its certificates were intrinsically worth more than that firm was offering on an immediate cash conversion basis. In February 1934, after the suspension of withdrawals had been announced, the Pacific States Auxiliary Corporation itself applied to the Commissioner of Corporations for a broker's license to deal exclusively in outstanding investment certificates of Pacific States Savings, and in such application, expressly stipulated that it would not take any profit in any of its dealings in such certificates, and has fully and strictly lived up to this agreement. Subsequent to obtaining its broker's license, the Auxiliary Corporation has furnished names of investors to a selected list of brokers pledged to pay investors no less than the current price being paid by the Auxiliary Corporation direct. Moreover, such brokers have further pledged that in case of any certificate trades for other securities they will deliver securities of a comparable market value, and that in no case will they make any misrepresentations or spread any false rumors concerning this institution."

[2] The complaint in the present action is for money had and received. It was necessary that plaintiff show that the certificates in question had matured; that notice of withdrawal had been given in accordance with the statute; that prior matured claims had been paid and that funds were available for payment. The present record does not show such proof. King v. San Jose Pacific B. & L. Ass'n, 41 Cal.App.2d 705, 107 P.2d 442. In the King case, as in this, claims were assigned to plaintiff. The judgment against King was affirmed. (Petition to the Supreme Court denied.) The question involved is stated on page 706 of 41 Cal.App.2d, on page 443 of 107 P.2d: "Claiming that in refusing to pay withdrawals the defendant breached its contract, the plaintiff asserted that he was entitled to recover, as money had and received, the difference between the amount of the deposit claim of each of his assignors and the amount each of them received from his or her vendee." As in this case, it was claimed that defendant waived compliance with the requirement of notice, the court saying at pages 707, 708 of 41 Cal.App.2d, at page 443 of 107 P.2d: "And in section 6.01 of the Building and Loan Act * * * it is provided that each association must prescribe by its by-laws or prescribe in its contracts the period of intention to withdraw and that a notice of intention to withdraw must be in writing and served on the association. The record shows that said by-laws were adopted, also that the contract specified in the statute was entered into. However, the record shows no written notice was given by any single one of the assignors. The plaintiff asserts that the defendant waived compliance with the requirement to give notice. Watson v. Stockton Morris Plan Co., 34 Cal.App.2d 393, 407, 93 P.2d 855. That case rested on the facts there involved. Here the trial court by its judgment, in effect held there was no waiver. Plaintiff quotes no part of the record showing that the court's implied finding is not sustained by the record. We find no evidence to the contrary. It follows such assignors never fully performed their contracts and the plaintiff did not prove a case which entitled him to a judgment on a common count as for moneys had and received."

The primary purpose of building and loan statutes is to protect the investor (Building and Loan Association Act, secs. 2.03, 12.05, 15.03) and conditions may arise that prompt legislatures, particularly during financial depressions, to restrict "withdrawals" in the interest and for the protection of certificate holders. Withdrawals must be paid within a time limit. Secs. 6.01, 6.02, 6.08, 15.13. The time and circumstances of withdrawal as fixed by the legislature may also be changed by that body. Numerous withdrawals within a short period might very well precipitate a panic, resulting in harm to the certificate holders of building and loan associations and investors generally.

Appellant contends that the surrender of the investment certificates by their assignors was a void act and does not deprive them of their rights as depositors; that although there may have been no actual fraud there was constructive fraud. Appellant seeks to support this contention by reference to Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n, 94 Utah 97, 75 P.2d 669. This case was also relied upon in the King case, supra, 41 Cal.App.2d at pages 708, 709, 107 P.2d at page 444, where the court said: "The briefs recite certain facts which the plaintiff claims tend to show the defendant wrongfully broke down its financial obligations to the plaintiff's assignors for the purpose of benefiting the stockholders of the defendant. Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n, 94 Utah 97, 75 P.2d 669. It is sufficient to state that the record in the present case does not present such questions. They were not pleaded, there are no findings on them, and they did not enter into the judgment. Nevertheless the plaintiff introduced evidence to establish the theory set forth in the case of Ralph A. Badger & Co. v. Fidelity Building & Loan Ass'n, supra. We have carefully read that evidence. If the trial court had made findings thereon such findings must necessarily have been adverse to the plaintiff." In addition we may say that, unlike the present case, the plaintiff in the Badger case gave notice of withdrawal; the defendant made false and misleading statements as to the number of claims on file and its ability to pay, and the assignment was not signed. The Badger case was decided upon the theory that there was no accord and satisfaction as applied to the facts of that case which recited fraud.

If fraud on the part of Pacific States induced the certificate holders to part with their investment under certain circumstances as appears in Alexander v. State Capital Co., 9 Cal.2d 304, 70 P.2d 619, and Allen v. California Mutual B. & L. Ass'n, 22 Cal.2d 474, 139 P.2d 321, they would be entitled to share in liquidation, but such facts do not appear herein.

In the present case fraud was not pleaded and not proven. On appeal the position of appellant is that Pacific States was engaged in a deliberate scheme to defraud its certificate holders at a time when it was in fact insolvent. In substantiation of this contention we are referred to the evidence in another proceeding in which appellant contends these elements appear. If upon any theory appellant is justified in predicating the merits of this appeal upon the evidence appearing in another case on appeal relative to insolvency, our attention should have been called to In re Pacific States Savings & Loan Co., D.C., 27 F.Supp. 1009, 1014, which is final and wherein certain creditors sought to have the association declared a bankrupt. It was necessary to determine whether, due to its various activities, Pacific States was still in fact a building and loan association. The Federal court determined that it was and dismissed the proceeding upon the ground that the state of California "is now attempting to liquidate it" and that "it is within the exception provided for in paragraph a of Section 4 of the Bankruptcy Act." This case is interesting if for no other reason than that it appears to be the forerunner of a criminal proceeding in the District Court of the United States in and for the Southern District of California, Central Division, entitled United States of America v. Odell et al.,[1] wherein certain officers of Pacific States and officials of the California Building and Loan Commissioner's office were charged with a scheme to defraud, based upon the contentions of appellant in the present case. In this criminal proceeding in a "statement by the court" in which the evidence and the law were thoroughly considered, and in which the bankruptcy proceeding played a part, the eminent trial jurist presiding stated: "* * * the facts in the record show conclusively that this corporation has been and is now a building and loan association, for the control of which the State of California has been fighting through courts with the corporation's money to retain jurisdiction over it." The gist of the criminal charge appears therein as follows: "'That the defendants and each of them would falsely and fraudulently represent and pretend to exchange the assets of said Pacific States Savings and Loan Company for other assets which defendants represented or caused to be represented to be for the benefit and further security of persons intended to be defrauded but would in truth and fact dispose of said assets for cash, and with such cash illegally purchase bonds and real property, with the intent and purpose and with the effect that such bonds and real property so acquired could not be readily converted into cash but would consist of frozen assets, and this [thus] avoid the repayment to the persons intended to be defrauded of their money and property invested as aforesaid, and as required by the laws of the state of California;'" A number of cases, federal and state, were considered and the court expressed the following opinion: "There is no evidence that it was merely the alter ego of the other; it is evidence merely that it was satisfied with whatever ownership it derived through the ownership of stock, and did not seek to make a profit out of any transaction in which it entered into which ultimately redounded to the profit of the Pacific States Savings and Loan Company, and was willing that that should go to the certificate holders and to the shareholders of that corporation. * * * there isn't any evidence in the record upon which an inference can be drawn that the acts of the Auxiliary were not the acts of a separate entity; or, to put it positively, that the acts of the Auxiliary were the acts of Pacific States. On the contrary, all the evidence in the record shows that they were separate entities, and I have referred to some of these matters in what I said. * * * In their relationship with the commissioner and their relationship with the individual who dealt with them, there was no element of deception. The public was never deceived. The public never assumed that one corporation was the other corporation." Finally in reference to the transactions of certificates, cash and property and the method used by Pacific States the learned judge said: "Exchanges they were, exchanges they are, and everyone, including the Government of the United States, is bound finally by them. Not even the State of California could question them now. They are bound by their own record, in the absence of any showing of fraud, and there is no such showing."

Two of the assignors herein, Gilbert G. Davis and Mary F. Davis, held Fidelity Participating Certificates. It was held in Eggert v. Pacific States S. & L. Co., 57 Cal.App.2d 239, 136 P.2d 822, that such certificates arose out of a trust agreement whereby Pacific States was to liquidate the assets of Fidelity for the benefit of those beneficially interested in the Fidelity company; that is, those who retained their interest in Fidelity. "These too [certificates] were sold 1934," as appellant admits. The evidence shows an absolute sale. The Davis sale was identical with sales by other assignors and is in the same legal position as all others in this proceeding.

[3, 4] In the present case the trial court found "that said certificate (or certificates) was, prior to the commencement of this action, for valuable consideration, duly transferred to, and acquired by, Pacific States Auxiliary Corporation (a corporation) which corporation thereafter, pursuant to Section 6.07 of the California Building and Loan Association Act, exchanged said certificate (or certificates), with the approval of the Building and Loan Commissioner of the State of California, for property owned by defendant; that defendant thereafter duly cancelled said certificate (or certificates), and that said certificate (or certificates) was thereby extinguished and all right and liability thereunder released and terminated.

"It is also true that defendant on the faith of, and relying upon such assignment of said certificate (or certificates) by plaintiff's predecessor, or predecessors, in interest, named in said respective counts of said complaint, and of similar assignments made by other holders of investment certificates issued by defendant, thereafter made transfers of certain of its properties and assets, entered into obligations and otherwise changed its financial position, and that defendant would not have made such transfers, or entered into such obligations or so changed its said position, except for the fact that said transfer and assignment had been executed by plaintiff's assignor, or assignors, as aforesaid, and by other holders of said investment certificates of defendant, and that plaintiff is estopped by the facts hereinabove mentioned from asserting the claims herein sought in said counts respectively to be asserted, and that it would be unjust and inequitable if plaintiff were now permitted to make or assert such claim."

The foregoing narrative of the facts and the law compel us to reject the contentions of appellant.

Appellant further contends that there is no evidence showing approval by the Building and Loan Commissioner of the transactions. Such evidence appears throughout

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[1] No opinion for publication.

the transcript. For example, a witness testified: "The way that was handled was that the Pacific States Savings and Loan Company, through a broker, would sell a piece of property to a purchaser for a certain amount of money, and then that purchaser would put in escrow that amount of cash with the instruction to buy so many certificates, and those certificates were then acquired, and with the approval of the Building and Loan Commissioner the exchange would be made."

The judgment is affirmed.

KNIGHT, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

The plaintiff, as assignee of a number of investment certificates in Pacific States Savings and Loan Company, seeks by this action to have it determined that certain assignments made by his assignors of their investment certificates to Pacific States were void. The majority opinion correctly states that the basic question involved is whether the transactions by which Pacific States purchased the certificates were legal. The trial court, and the majority opinion, have answered this question in the affirmative. In so holding, the majority reaffirm the position they took on the same issue in Pacific States S. & L. Co. v. Hise, — Cal.App.2d —, 146 P.2d 427, which opinion is not yet final. In my dissent in that case I described in detail the means used by Pacific States to force certificate holders to sell their certificates at a discount. See — Cal.App.2d —, et seq., 146 P.2d 455. No useful purpose would be served by repeating what was there said. The record in that case, as does the record in this case, demonstrates, in my opinion, that the means used to compel certificate holders to sell their certificates at a discount were illegal, and in direct violation of the trust owed such certificate holders by the management of Pacific States. As is pointed out in my dissent in the prior case, many of the means used by Pacific States in stripping itself of cash, and in preventing the company from receiving cash—cash that otherwise would have been available for the protection of all investment certificate holders—were illegal, were not approved by the then commissioners with full knowledge of all the facts, and were not known to the certificate holders.

The case of King v. San Jose Pacific B. & L. Co., 41 Cal.App.2d 705, 107 P.2d 442, so heavily relied upon in the majority opinion, is not in point. It involved a different defendant, and entirely different transactions from those here involved. The majority opinion attempts to bolster what I consider its faulty reasoning by a long quotation from a federal trial judge's opinion in a criminal case involving some of the managing officers of the Pacific States. Of course, we have no way of knowing what the record there showed. That record is not before us. The rules of evidence, particularly as to the burden of proof, are so different in a criminal case than in a civil case, that rulings made in that criminal case can hardly be considered even as an argumentative authority in this civil case.

This court knows what the record was in the main Pacific States case, and, of course, the record in the instant case is before us. It is true that the record in this case is not identical with, nor as complete as, the record in the main Pacific States case. But it is also true that in the instant case the background of these transactions was developed in evidence, much of it being record evidence produced from the files of Pacific States. Many of the exhibits in this case were also used as exhibits in the main Pacific States case. Sufficient appears in the present record to show the means adopted by the management of Pacific States to accomplish its ends. If I am right in the position I took in my dissent in the main Pacific States case, the present judgment cannot stand. The problem is not one where the proved facts in the two cases are capable of different interpretations. The case is one where, on the facts contained in the record, the challenged transactions are, as a matter of law, either legal or illegal. The judgment rendered by the trial court in this case is totally irreconcilable with that rendered by the trial court in the main Pacific States case. Under such circumstances, the rule announced in Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847, is applicable. In that case two trial judges, in actions involving different plaintiffs, but the same defendant, on different records, but involving the same events, had reached different results. In holding that both judgments should not stand, the court stated (5 Cal.2d at page 548, 55 P.2d at page 849): "It would be most anomalous for such decisions to stand, reaching diametrically opposite conclusions as to the legal effect of the same occurrence, where the essential facts are similarly presented, and are in most particulars undisputed. The rule that a reviewing court is bound by the findings of the trial court on conflicting evidence cannot apply to a situation such as this, where two lower courts, dealing with substantially the same evidence, have reached different conclusions of law, on the legal issue of whether from this evidence legal responsibility is imposed by the law upon the defendant. It is within the proper function of this court, upon petition for hearing, to eliminate this confusion, and to determine the legal effect of the evidence in both cases." See, also, Colburn Biological Institute v. Shaffer, 12 Cal.2d 168, 82 P.2d 938; Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 780, 135 P.2d 569; Morris v. Fortier, 59 Cal.App.2d 132, 136, 138 P.2d 368; see, also, 24 Cal.L.Rev. 733.

For this reason I believe the disposition of this case must follow the final disposition of the main Pacific States case. For reasons stated at length in my dissent in that case I believe the transactions there described were illegal. For the same reasons I believe the transactions here involved—the same transactions involved on the prior appeal—were also illegal. For that reason it is my opinion that the judgment in the present case should be reversed.

24 Cal.2d 122

NATURAL MILK PRODUCERS ASS'N v. CITY AND COUNTY OF SAN FRANCISCO.

No. 16105.

Supreme Court of California.

April 13, 1944.

Appeal and error ⟹843(2)

In action to enjoin enforcement of an ordinance regulating sale and distribution of milk, question whether milk commission had authority under ordinance to require pasteurization of certified milk was not required to be determined where plaintiffs were not interested in selling certified milk, raw or pasteurized.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Natural Milk Producers Association of California against the City and County of San Francisco to enjoin the enforcement of an ordinance regulating the sale and distribution of milk. A judgment of the Supreme Court of California, 20 Cal. 2d 101, 124 P.2d 25, affirming a judgment for defendant, was vacated by the United States Supreme Court, 317 U.S. 423, 63 S. Ct. 359, 87 L.Ed. 375, which remanded the cause with directions. On remandment.

Former opinion adopted and judgment of trial court affirmed.

Philip S. Ehrlich, Albert A. Axelrod, and Julien R. Bauer, all of San Francisco, for appellants.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondents.

Sullivan, Roche & Johnson, Eustace Cullinan, Jr., Bartley C. Crum, and Pillsbury, Madison & Sutro, all of San Francisco, amici curiae on behalf of respondents.

PER CURIAM.

The above entitled cause was heard and determined by a decision of this court on April 2, 1942 (Natural Milk, etc., Ass'n v. City, etc., of San Francisco, 20 Cal.2d 101, 124 P.2d 25), in which decision the judgment of the trial court was affirmed. Thereafter plaintiffs appealed to the Supreme Court of the United States. That court made the following order in 317 U.S. 423, 63 S.Ct. 359, 360, 87 L.Ed. 375: "In this case appellants contend that the San Francisco Milk Ordinance violates the Fourteenth Amendment because it requires non-pasteurized raw milk sold in San Francisco to be certified by, and to conform to standards prescribed by, the Milk Commission of the San Francisco Medical Society, instead of by a public board or officer, while at the same time prohibiting the sale of all other non-pasteurized milk, including 'guaranteed raw milk' which appellants allege is the same as certified raw milk. Subsequent to the trial of the case, the Milk Commission of the San Francisco Medical Society determined that non-pasteurized milk could not be certified by it as free from harmful bacteria, and promulgated an order accordingly, effective January 15, 1939. This fact, which apparently was not called to the attention of the Supreme Court of California, renders moot the federal questions raised by appellants, since all milk sold in San Francisco, not certified by the Milk Commission of the Medical Society, is required by the ordinance to be pasteurized, and since appellants do not by this suit challenge the validity under the Fourteenth Amendment of the pasteurization requirement. In order that the state court may make proper disposition of the case in the light of the fact that the federal questions cannot be decided here, we vacate the judgment, without costs to either party in this Court, and remand the cause to the Supreme Court of California for such further proceedings as it may deem appropriate."

The instant action is one by plaintiffs seeking to have enjoined the enforcement of an ordinance of the city and county of San Francisco on various constitutional grounds. As evident from the foregoing order of the Supreme Court of the United States the issue of whether or not the ordinance was discriminatory because it permitted the sale of certified milk, a raw milk, was considered moot because since the trial of the action the Milk Commission of the San Francisco Medical Society adopted a resolution requiring certified milk to be pasteurized, and further, that no claim was made by plaintiffs in the Supreme Court of the United States that a law requiring all milk to be pasteurized is unconstitutional.

Plaintiffs again advance substantially the same arguments as heretofore made before this court. We adhere to the views expressed in our former opinion and adopt them now as the decision of this court.

Plaintiffs do not desire to sell certified milk in San Francisco. They assert that they should be entitled to sell raw milk. The fact that the Milk Commission made its pasteurization requirement for certified milk does not alter the result. Whether or not it had the authority under the ordinance to require pasteurization of certified milk (the ordinance appears to indicate that certified milk may be raw milk) need not be decided inasmuch as plaintiffs are not interested in selling certified milk, raw or pasteurized. The trial court denied the injunction and as we adhere to our former decision there is no ground for reversing the judgment of the trial court.

For the foregoing reasons we hereby adopt our former opinion and affirm the judgment of the trial court.

SCHAUER, J., did not participate.

EDMONDS, Justice (dissenting).

I was not in agreement with the conclusions stated by my associates in the opinion upon which the former decision was based (20 Cal.2d 101, 124 P.2d 25) and do not join in the present determination of the case.

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64 Cal.App.2d 273

REES et ux. v. DRINNING et al.

Civ. 7019; Sac. 5633.

District Court of Appeal, Third District, California.

May 6, 1944.

Hearing Denied June 29, 1944.

1. Easements ⇨15

The elements necessary to create an "easement by implied grant" are a separation of the title, before separation takes place the use which gives rise to easement must be so long continued and so obvious as to show that it was intended to be permanent, and easement must be reasonably necessary to the beneficial enjoyment of land granted. Civ.Code, § 1104.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement by Implied Grant".

2. Easement ⇨15, 36(1)

The term "reasonably necessary to the beneficial enjoyment" of the property conveyed, as an element necessary to creation of an easement by implied grant, means no more than for benefit thereof, and plaintiffs asserting implied easement in driveway located in part on their lot and in part on defendants' adjoining lot were not required to show that driveway as it existed was only possible way of access to their garage. Civ.Code, § 1104.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonably Necessary to the Beneficial Enjoyment".

3. Easements ⇨36(3)

Evidence that common grantor of plaintiffs and defendants when he owned their adjoining residences constructed a driveway in part on each lot, and that driveway was in use up and until grantor sold residence now owned by plaintiffs, supported finding that use was sufficiently long continued and driveway sufficiently obvious and necessary for enjoyment of plaintiffs' property to create an easement by implied grant. Civ.Code, § 1104.

4. Appeal and error ⇨877(2)

Where defendants denied that any easement existed in driveway located in part on their lot and in part on plaintiffs' adjoining lot, defendants could not complain that trial court erred in limiting length of easement decreed.

◆

Appeal from Superior Court, Napa County; W. T. Belieu, Judge.

Action by William A. Rees and Ruth Rees, his wife, against Ralph E. Drinning and Dorothy L. Drinning, his wife, to establish plaintiffs' rights in a driveway and to enjoin defendants from obstructing it, wherein the defendants filed a cross-complaint. From a judgment in favor of plaintiffs, the defendants appeal.

Affirmed.

Charles D. Sooy, of San Francisco, for appellants.

Clarence N. Riggins, of Napa, for respondents.

ADAMS, Presiding Justice.

Plaintiffs and defendants own adjoining residences fronting on the south line of

Elm Street in Napa, defendants' property lying to the west of plaintiffs' lot. Both homes were built in 1938 by Will F. Bishop who then owned both properties and lots adjoining same on both sides. The Drinning house was built first, and was rented for several years. It was then sold by Mr. Bishop, and in January, 1942, came into the possession of defendants. After the construction of the house now owned by plaintiffs, Bishop rented it for a short time to George Provine, then sold it to Dr. George Loye. In December, 1938, Dr. Loye sold it to plaintiffs. The garage on the Rees property was built under two bedrooms at the rear of the house, and access thereto was gained by means of a driveway between the two houses, this driveway being in part on each lot. It is the right of plaintiffs to the use of the portion of this driveway which is upon defendants' lot that is in controversy here. No controversy over its use appears to have arisen until the present defendants acquired their property, after which time they threatened to obstruct the driveway, particularly the portion of same covering their land. Thereupon plaintiffs brought this action to establish their rights in the driveway, and to enjoin defendants from obstructing it.

Defendants filed an answer and cross-complaint denying that plaintiffs had the easement claimed by them, and praying that plaintiffs be decreed to have no right, title or interest in the land of defendants.

The trial court rendered judgment in favor of plaintiffs, and found, among other things, that while both properties were owned by Bishop and his wife they "improved the same by erecting thereon residences and garages and laying out driveways thereon, and that, in the course of said improvements and while they owned all of said property, the said common owners erected the houses and garages now standing on the property so owned and occupied by plaintiffs and by the defendants, Drinnings, as aforesaid and laid out, constructed, and surfaced a driveway over the land lying between said two houses from Elm Street, a public highway, on which the houses front, to the rear of the lots on which they stand, which driveway was located partly on the land now owned by the plaintiffs and partly on the adjacent land now owned by the defendants, Drinnings, and is the only means of access by automobile to the rear of said lots, and to the garage built on the lot now owned and occupied by the plaintiffs as aforesaid, and is necessary to the convenient use and occupation of plaintiffs' property for residence purposes." The decree which followed adjudged that plaintiffs and defendants own their respective properties subject to the easement of a mutual open right of way over the driveway, describing same as a strip of land 11 feet wide running from Elm Street and parallel to the common boundary line of the two properties a distance of 79 feet and five inches, 4½ feet in width thereof being on the land of defendants, and 6½ feet in width thereof on plaintiffs' land, and that both parties are entitled to use said driveway for access to their several properties.

From said judgment defendants have appealed, contending in this court that the use of the driveway prior to the severance of title was not of sufficient duration to give rise to an easement by implication, that there is no evidence in the record of an obvious and permanent roadway between the houses at the time of severance of title, and no reasonable necessity for a driveway on defendants' land, and that, in decreeing the limits of the easement the trial court gave effect to material alterations made by plaintiffs long after severance of title.

Plaintiffs, in support of their complaint, called Mr. Bishop who testified that at the time he owned both properties he laid out the driveway between the two houses, and surfaced it with what is commonly known as "black top"; that he had recently visited the property and believed that the driveway now there is the same driveway laid out by him; that he noticed no change in the location of the driveway except that a curb that Dr. Rees installed "shoved the driveway over a little toward Drinning." This curb was described as one running along the east side of the driveway from the house to the sidewalk a foot or so from the line of the house; and Mr. Bishop said that he thought it encroached a little bit on the driveway, that the curb was built to take care of the lawn when the ground was filled in.

Plaintiffs also called George Provine, who testified that he used the driveway when he lived on the Rees property, that he had visited the premises recently and that the houses and driveway seemed to him to be in about the same location as they were during his period of occupancy, except that the cement curb had not then been built and there were then no lawn or fences. Mrs. Rees testified that there had been no change in the location of the driveway since they had bought the property some four years previously; that the driveway was surfaced when they went there. Dr. Loye testified that during his ownership and occupancy of the Rees property there was a driveway between the two houses which he used to gain access to his garage. When asked if there was a surface on it when he went there he said: "A It had—well, when I took over the property, the driveway was in poor condition and Mr. Bishop, who sold the property to me, put some gravel on for me to make the driveway. Q I see. Put that the full width of that driveway? A Yes. . . . MR. RIGGINS: Q How much of the driveway did he put the gravel on? A All of the driveway." Dr. Rees also testified that there had been no change in the house or the driveway since he had been living there. A surveyor who surveyed the properties located the driveway as covering the 6½ feet on plaintiffs' property and 4½ feet on defendants' lot; and the length as found by the trial court was the distance from Elm Street to a cross fence which had been erected by Dr. Rees, and not the full depth of the lots.

Defendants called a witness to testify as to the necessary width of a driveway, which he estimated to be from 92 inches to 20 feet, depending upon the driver; but said he thought 96 inches would give ample clearance.

Mr. and Mrs. Drinning testified in their own behalf, but their testimony is not of importance on this appeal, except that Mrs. Drinning stated that at least once since they acquired their property they had used the common driveway to have materials hauled into their back yard, and that such driveway was their only means of access to the rear of their property.

Whether the driveway was laid out by the owner of both lots prior to severance of title, whether there was an obvious and permanent driveway at the time of severance, and whether or not its location had been changed were questions of fact for the determination of the trial court. Its determination finds ample support in the evidence and will not, therefore, be disturbed by this court. The testimony of Dr. Loye, Mr. Provine, and Dr. and Mrs. Rees that there has been no change in the location of this driveway fully sustains the trial court's findings. Mr. Bishop's testimony that he laid out the driveway and topped it when he owned both lots, and Dr. Loye's testimony that when he bought the Rees property Mr. Bishop put gravel on it for its full width, is sufficient to show that Mr. Bishop created the driveway and that, when he sold to Dr. Loye, he recognized it as an existing encroachment upon the Drinning lot, title to which he retained for some four years thereafter. While Mr. Bishop did testify that the curb built by Dr. Rees encroached a little bit on the driveway, it does not follow from that statement that it shoved the west line further over on defendants' lot; and whether it did or did not, was, as above stated, a question for the trial court which it has resolved against defendants. Furthermore, the trial court inspected the premises, and could see what is shown by the map in evidence, that the side lines of the driveway are defined by the width of the approach over the cement sidewalk in front of the premises, and that the curb built by Dr. Rees does not encroach upon the driveway.

Section 1104 of the Civil Code provides:

> "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed."

[1] It is said in 9 Cal.Jur. 958, that: "Three things are necessary thus to create an easement by implied grant: (1) A separation of the title; (2) before the separation takes place the use which gives rise to the easement must have been so long continued and so obvious as to show that it was intended to be permanent; and (3) the easement must be reasonably necessary to the beneficial enjoyment of the land granted."

If then, when Mr. Bishop conveyed to Dr. Loye, the use of the driveway had been so long continued and was so obvious as to show that it was intended to be permanent, and it was reasonably necessary to the beneficial enjoyment of the land granted, a grant of the easement is implied. Rose-

brook v. Utz, 45 Cal.App.2d 726, 729, 114 P.2d 715; Fischer v. Hendler, 49 Cal.App. 2d 319, 321, 322, 121 P.2d 792; Quinlan v. Noble, 75 Cal. 250, 252, 17 P. 69; Kallenburg v. Long, 39 Cal.App. 731, 735, 179 P. 730; Nay v. Bernard, 40 Cal.App. 364, 368, 369, 180 P. 827; Cheda v. Bodkin, 173 Cal. 7, 13, 14, 158 P. 1025; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 415, 129 P. 593; 9 Cal.Jur. 957–959.

[2, 3] Appellants argue that the easement in controversy had not been so long continued and so obvious as to show that it was intended to be permanent, and, also, that it was not necessary to the enjoyment of plaintiffs' property because they have room enough—92 inches—for a driveway solely on their own property; but the court said in Fischer v. Hendler, supra [49 Cal. App.2d 319, 121 P.2d 794], that "reasonably necessary to the beneficial enjoyment" of the property conveyed means no more than "for the benefit thereof," and that plaintiffs were not required to show that the easement as it existed was the only possible way of access to their garage. And as to length of the continuance of the use to give rise to an easement, that must necessarily be a relative term. Here the driveway was laid out when the Rees house was built and was used until the property was sold. It was therefore used for the maximum period possible under the circumstances; and the trial court was justified in finding from the evidence before it that the use was sufficiently long continued and the driveway sufficiently obvious and necessary for the enjoyment of plaintiffs' property to create the easement.

Also in this case, the fact should not be overlooked that it is conceded by plaintiffs that they took their property subject to the right of the owners of the defendants' property to use the driveway and the 6½ feet of width thereof on plaintiffs' land; also that defendants have no other means of access to the rear of their premises.

[4] Appellants make one other contention, towit, that if the easement exists, the driveway should have been held to extend to the rear of both lots, and should not have been limited in length to the 79 feet and 5 inches decreed. We are unable to find anything in defendants' pleadings that indicates that they made this an issue in the case before the trial court. On the contrary, they denied that any easement whatsoever existed. They are not, therefore, in a position to complain that the driveway was limited in its length to the 79 feet, 5 inches established by the court.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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64 Cal.App.2d 239

BECKER v. BECKER.

Civ. 12614.

District Court of Appeal, First District, Division 2, California.

May 4, 1944.

1. Divorce 🔑245(1), 286

Modification of award of alimony rests within discretion of trial court, whose order in such respect may not be set aside without a clear showing of abuse of discretion.

2. Divorce 🔑245(2)

"Circumstances of the parties", a change in which is necessary to justify modification of award of alimony in divorce decree, refers to needs of the parties and their abilities to meet such needs, and, in measuring such circumstances, consideration should be given to property owned and obligations to be met, as well as to ability to earn and actual earnings.

See Words and Phrases, Permanent Edition, for all other definitions of "Circumstances of the Parties".

3. Divorce 🔑285

On appeal from order reducing award of alimony from $75 to $45 per month, record did not disclose abuse of discretion, in making reduction.

4. Divorce 🔑286

Where record on appeal from order reducing award of alimony from $75 to $45 per month did not show testimony given at divorce hearing upon which initial award was based or at hearing on previous motion to modify which was denied, every presumption was in favor of order of modification.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Divorce action by Emily M. Becker against Frederick Becker. Defendant served and filed a notice of motion for modification of the decree of divorce therein entered in favor of plaintiff, and, from an order modifying the decree by reducing the amount to be paid by defendant to plaintiff for support from $75 per month to $45 per month, plaintiff appeals.

Order affirmed.

Wm. R. Biaggi, of San Jose, for appellant.

Edward M. Fellows and Robert E. Hayes, both of San Jose, for respondent.

SPENCE, Justice.

Plaintiff appeals from an order modifying a decree of divorce by reducing the amount to be paid by defendant to plaintiff for support and maintenance from $75 per month to $45 per month.

The interlocutory decree had been entered in favor of plaintiff on December 19, 1941, after defendant's default. The final decree, embodying the terms of the interlocutory decree, had been entered on January 13, 1943. On February 2, 1943, defendant served and filed a notice of motion for modification and the motion was thereafter denied on February 11, 1943. On May 7, 1943, defendant served and filed a second notice of motion for modification and the motion was thereafter granted on May 26, 1943. The reporter's transcript of the testimony taken on the hearing of the second motion is before us on this appeal but there is no transcript of the testimony taken upon the hearing of the divorce proceeding or upon the hearing of the first motion for modification. The second motion was heard upon the affidavits of the parties and upon the oral testimony of the parties and other witnesses.

Upon the hearing, it appeared that defendant was earning about $50 per week and that his family consisted of himself and his second wife. It further appeared that he was indebted in the sum of several hundred dollars in addition to the sum of $150 which he had borrowed shortly before the hearing to pay to plaintiff on account of alimony. The only property owned by defendant was a dwelling house of small value at Carmel, an automobile and a tractor which was being held as security for some of his indebtedness. It appeared that plaintiff was the owner of a dwelling house of small value in which she was residing in Santa Clara. This property had apparently come to her in a division of the community property made by the parties, plaintiff having taken the Santa Clara property and defendant having taken the Carmel property. Plaintiff had been able to work and had worked during part of the married life of the parties and thereafter, but she testified that more recently she had worked only irregularly because of her health. She presented letters from two doctors which were admitted in evidence. These letters showed a normal woman, 49 years of age, except for her claimed "nervousness, feeling of weakness, periods of crying, unable to continue to work, inward feeling of shakiness." One doctor's report states, "She thinks she is about through the change of life although she still has hot flashes." Her trouble was diagnosed as neurasthenia. Complete rest was recommended by one doctor but the other doctor made no recommendation, stating only, "She is unable to do regular work." These reports were based largely upon subjective symptoms which plaintiff had described to the doctors and the trial court may well have believed that plaintiff had exaggerated or even misrepresented these symptoms. The trial court may also have been of the opinion that these symptoms had been more pronounced at the time of the divorce hearing and at the time of the hearing on the first motion and that plaintiff's nervous difficulties had practically terminated at the time of the hearing of the second motion and would terminate entirely upon the completion of this controversy with her former husband.

[1] Plaintiff contends that there was no evidence "showing any new facts or change of circumstances" and that therefore the evidence was insufficient to sustain the order made granting the second motion to modify. She cites and relies upon Snyder v. Snyder, 219 Cal. 80, 25 P.2d 403, and other similar cases. It will be noted, however, that in the Snyder case the second application was made "upon practically an identical affidavit" and that the second application was granted "under said affidavit alone, without the development of a single new fact * * *." 219 Cal. at page 81, 25 P.2d at page 403. In the present case oral testimony was taken upon the divorce hearing, upon the hearing of the first motion to modify and upon the

hearing of the second motion to modify, but nevertheless, none of such testimony, other than that taken upon the hearing of the second motion, is before us on this appeal. Under these circumstances we are of the opinion that the decision in Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697, is controlling. The court there said at page 151 of 21 Cal.2d, 130 P.2d at page 700:

> "Appellant's final contention with respect to the allowance for her support is that the evidence presented to the trial court is insufficient to warrant a reduction of the payments originally ordered. It is clear that a modification of an award pursuant to section 139 of the Civil Code, supra, rests within the discretion of the court, and its order may not be set aside without a clear showing of an abuse of discretion. See, for example, Whitehead v. Whitehead, 45 Cal.App.2d 447, 114 P.2d 403; Willen v. Willen, 119 Cal.App. 483, 6 P.2d 554; Marshall v. Marshall, 196 Cal. 761, 765, 767, 768, 239 P. 36; Bruton v. Tearle, 7 Cal.2d 48, 59, 59 P.2d 953, 106 A.L.R. 580; cf. Wilder v. Wilder, 214 Cal. 783, 7 P.2d 1032. Mrs. Leupe argues, however, that there is no room for an exercise of this discretion unless the moving party is able to show a substantial change in the circumstances of the parties between the entry of the interlocutory decree and the application for its modification. We cannot say on the record before us that the evidence was not sufficient to support a finding of changed circumstances justifying the reduction that was made. First, the testimony upon which the interlocutory decree was based has not been made a part of the record upon appeal, and pursuant to stipulation no findings of fact were made. Therefore we do not know what was considered by the trial court and are unable to determine whether or not different facts were established upon the motion for modification. This situation is almost identical with that recently presented in Valentine v. Valentine, 47 Cal.App.2d 438, 118 P.2d 17. A similar order modifying an interlocutory decree was affirmed in that case over an objection that there was no showing of a change of circumstances, the court saying (47 Cal.App.2d at page 440, 118 P.2d at page 18): 'As the record at the former hearing is not before us, we cannot say that the proof was the same as that adduced at the original hearing. In support of the order, we must assume that other and different facts were established at the second hearing.' This reasoning is particularly applicable in the instant case because the same trial judge presided at both hearings, and we cannot assume that he would have altered the award in the absence of such a showing."

[2] As we understand the phrase "circumstances of the parties" as used in the decisions, it refers to the needs of the parties and the abilities of the parties to meet such needs; and in measuring such circumstances, consideration should be given to property owned and obligations to be met as well as to ability to earn and actual earnings. The evidence showed that plaintiff owned her home and was free from debt; and the trial court was justified in concluding that plaintiff had the ability to do some work and to meet her needs at least in part. On the other hand, the evidence showed that defendant owned but little property and had comparatively heavy obligations; and the trial court was justified in concluding that he had only the ability to meet plaintiff's needs in part. We are therefore of the opinion that under the evidence presented plaintiff could not have successfully claimed on appeal that the trial court abused its discretion in awarding her a sum no greater than $45 per month if said sum had been made as an initial award of alimony.

[3, 4] While this appeal is from an order modifying an initial award of $75 per month, we do not believe that plaintiff may successfully claim that the trial court abused its discretion in making the modification in the absence of a more complete showing than that found in the record before us. The testimony on the former hearings may have shown that plaintiff's needs were then greater and that her ability to meet those needs was then less than that shown at the hearing of the second motion. The testimony may have further shown that defendant then owned more property, including cash on hand, and that his obligations were then less. But all these matters remain in the realm of conjecture upon the record before us. Plaintiff claims that the record shows that defendant's earnings were greater at the time of the hearing of the second motion but we do not believe the evidence compels that inference. As we read the record, the testimony given on the hearing of the second motion regarding defendant's former income while ranching may have related to his income from that source rather

than to his entire income. But in any event, the record does not show the testimony given on the divorce hearing and upon which the initial award of $75 per month was based. Under the authority of Leupe v. Leupe, supra, every presumption is in favor of the order of modification and in the absence of a record of the testimony on the former hearings, we must assume that other and different facts and circumstances were established on the hearing of defendant's second motion for modification.

The order is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

64 Cal.App.2d 922

Ex parte NYQUIST.

Cr. 1876.

District Court of Appeal, Third District, California.

May 5, 1944.

Habeas corpus ⚷99(1)

In habeas corpus proceeding involving custody of child, where it appeared that Nevada court had entered a decree divorcing petitioner from her former husband and awarding custody of the child to petitioner and it was stipulated between counsel for petitioner and counsel of parties having custody of minor child that child should be surrendered to petitioner, order would be entered accordingly.

◆

Proceeding in the matter of the application of Barbara Pauline Nyquist, in behalf of Marlene Russell, a minor, for a writ of habeas corpus.

Order in accordance with opinion.

Robert E. Levy, of San Francisco, for petitioner.

Wm. M. MacMillan, of Quincy, for respondent.

PER CURIAM.

Barbara Pauline Nyquist, formerly Barbara Pauline Russell, filed in this Court on the 19th day of April, 1944, a petition for a writ of habeas corpus in behalf of Marlene Russell, aged five years, the child of petitioner and her former husband, Sydney Allen Russell, alleging that said child was being illegally detained by Fred Russell and Pearl Russell, uncle and aunt of said minor. A writ having duly issued, directed to said Fred Russell and Pearl Russell, returnable before this Court on the 5th day of May, 1944, said Fred Russell and Pearl Russell appeared with their counsel Wm. M. MacMillan, produced said child before this Court, and filed herein a return and answer to said petition and an affidavit in support thereof made by their said attorney Wm. M. MacMillan. Petitioner also appeared with her counsel Robert E. Levy and filed in this Court a certified copy of a decree of divorce rendered on the 12st day of August, 1943, by the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, dissolving the marriage between the petitioner herein and her former husband Sydney Allen Russell and awarding the custody of the minor child of said parties, Marlene Russell, to petitioner herein. The matter was argued by counsel for both parties and at the conclusion of such argument it was stipulated by said counsel in open court that the custody of said child should be surrendered to petitioner by respondents Fred Russell and Pearl Russell.

And it appearing to this Court that petitioner is legally entitled to the custody of said child as against respondents, and in pursuance of the stipulation aforesaid, it is hereby ordered that the minor child Marlene Russell be discharged from the detention and custody of said respondents and that she be committed to the custody of the petitioner Barbara Pauline Nyquist.

In re MOOREHOUSE'S ESTATE.

MOOREHOUSE et al. v. ROBINSON et al.

Civ. 14191.

District Court of Appeal, Second District,
Division 2, California.

May 1, 1944.

Rehearing Denied May 24, 1944.

Hearing Denied June 29, 1944.

1. Wills 🔑**527**

Where, on death of testator's wife and son, testator added two codicils giving daughter $1,000 and reaffirming original will devising one-half of "rest, residue and remainder" to daughter and other half to two sons of testator's deceased son less any amount owed by such grandsons, and later a third codicil giving other specific property to daughter and providing that such daughter's daughter should share equally with the two grandsons in the "residue" of estate, giving her one-third of residue "with due regard to any indebtedness of my grandson", testator's daughter was entitled to one-half of the residue in addition to the specific bequests and the indebtedness of grandsons to the estate was required to be considered in determining their shares in the other one-half of the residue.

2. Wills 🔑**587(1)**

There is no substantial difference between the words "remainder" and "residue", the latter being derived from "residuus", which means that which remains of an estate after all charges, debts, and bequests have been paid, and "residue" is defined as what remains after paying the legacies of the will and the debts and expenses of administration, whereas "remainder" is derived from "remanere", which means to be left over, and in law means the residual interest of an estate remaining over after part has been taken away, and residue and remainder are commonly given as synonyms.

See Words and Phrases, Permanent Edition, for all other definitions of "Remainder", "Remanere", "Residue" and "Residuus".

3. Wills 🔑**184(1)**

Dispositions made by will are not to be disturbed by codicil further than is absolutely necessary in order to give that codicil effect, and a clear bequest is not revoked by a doubtful expression or by an inconsistent disposition in the codicil. Probate Code, § 104.

4. Wills 🔑**435, 439**

The court's function is to construe a will, not to make one, and to ascertain the testator's intention as expressed, and not some undeclared, imaginary purpose.

5. Wills 🔑**441**

If the language of a will is ambiguous, the circumstances of its execution may be resorted to.

6. Wills 🔑**439**

The cardinal rule of construction requires that the intention of the testator be ascertained and that if lawful it be given effect, even though the disposition of testator's estate is inequitable, unwise, or capricious.

7. Wills 🔑**82**

One may transmit one's property by will without regard to moral or natural claims upon one's bounty.

8. Wills 🔑**82**

One is not bound to bequeath one's property so as to gain the approbation of one's contemporaries, the wise, or the good.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Proceeding in the matter of the estate of Lemuel E. Moorehouse, also known as L. E. Moorehouse, deceased, on petition of Dr. Cecil L. Moorehouse and Floyd A. Moorehouse, against Stella Robinson and Cleo L. Tallman Carter, for a declaration as to who were entitled to share in the distribution of the estate and the proportions of each. From those portions of the decree denying right of petitioners to share equally with Cleo L. Tallman Carter in the residue of the estate, the petitioners appeal.

Affirmed.

Kenneth Sperry, of Long Beach, for appellants.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondents.

MOORE, Presiding Justice.

Cecil and Floyd Moorehouse, grandsons of deceased, petitioned the court below to ascertain and declare who are entitled to share in the distribution of the estate and the proportions of each. Following a hearing upon such petition and the answer thereto the court entered its decree making such determination. This appeal is from those portions of the decree which "deny the right of said petitioners to share equally" with their cousin Cleo in the residue of decedent's estate which remains after first deducting the costs of administration, a legacy of $1,000 and a specific devise to Stella Robinson. The latter is Cleo's mother who was awarded one half of the residue in addition to the specific bequests.

The intent of the testator is expressed in four separate documents, namely: his will and three successive codicils. He published his will on the 19th day of April, 1933. At that time he had a living wife and two children: Stella Robinson and Ora J. Moorehouse. Appellants are the sons of Ora.

By his will he first directed his executors to pay the expenses of his last illness and burial and "all claims against my estate." He then bequeathed to his wife "all of the rest, residue and remainder of my estate." By paragraph Fourth he devised that in the event his wife should predecease him then "all of the rest, residue and remainder of my estate" shall be distributed as follows:

(a) One half to Stella Robinson; (b) $1,000 to Ora; (c) "the remainder thereof" one half to Cecil; the other half of such remainder to Floyd, then in parts unknown, provided the latter should return.

On the first of July 1935, he executed his first codicil which declared the recent death of Ora. He revoked the bequest to his son and in lieu thereof made a special bequest to Stella to save her from the loss of a loan which she had made to Ora on the latter's note in the sum of $1,000. In a concluding clause he reaffirmed all the provisions of his "said Last Will and Testament."

On September 10, 1937, his wife having deceased, in a second codicil the testator reaffirmed his Last Will and his first codicil and that one half of the remainder of his estate should go to Floyd (who had returned), as provided in Fourth (c) of his will. A third paragraph of this codicil declared that in the event Cecil or Floyd should owe him any money at the time of his death his executors should "adjust the same to the end that said notes be cancelled, and the amounts or property to be received by my two grandsons, as aforesaid, shall be equalized taking into consideration their obligations to me."

October 27, 1938, Mr. Moorehouse executed a third codicil in which he declared:

First: the execution of his last will and testament and the two succeeding codicils.

"Second: I do hereby desire to add a codicil to my Last Will and Testament aforesaid and other Codicils as follows:

"(a) I give and devise unto my daughter, Stella Robinson, if she survives me, or in the event of her prior death then equally to her heirs by right of representation, my home property at 2373 Linden Avenue, Long Beach, California, together with the furniture, furnishings, dishes, silverware, pictures and other articles of furniture, my clothing and personal effects therein contained at the time of my death.

"(b) I direct that my granddaughter, Cleo L. Tallman, who resides in Los Angeles, California, shall share equally with my two grandsons, Cecil L. Moorehouse and Floyd A. Moorehouse, in the residue of my said estate, and I do hereby give, devise and bequeath unto my said granddaughter, Cleo, a one third of the residue of my estate, real, personal or mixed and wheresoever situated at the time of my death, with due regard to any indebtedness of my grandsons Cecil and Floyd, due me at the time of my death in order to equalize the shares to each of my grandchildren as herein set forth.

"In all other respects save as herein and in my other codicils modified, I do reaffirm and redeclare my Last Will and Testament."

The decree entered by the court named the parties to this proceeding as the legatees and devisees of the testator under the will and the three codicils and provided that said persons are entitled to succeed to the net remainder of the estate of decedent available for distribution after all claims, taxes and costs of administration and other charges are deducted and paid as follows: (a) Unto Stella Robinson, the home on lot 20 of tract 2463 in Long Beach and the furniture and furnishings therein, together with the rents, issues, and profits therefrom, less taxes, repairs and other costs of maintenance subsequent to the death of decedent. (b) One half of the net remainder unto Stella after deducting claims, taxes, costs, charges and the bequest of the home place. (c) After deducting the devise and legacy to Stella as specified in (a) and (b) the decree awards to Stella $1,000 with interest at 6 per cent from the

date of the note executed by Ora to Stella.
"(d) The remainder of said net estate, after deducting the legacies and devises specified in subdivisions (a), (b) and (c) of paragraph 2 hereof, as aforesaid, shall be divided equally between Dr. Cecil L. Moorehouse, Floyd A. Moorehouse and Cleo L. Tallman Carter, taking into consideration the obligations of Dr. Cecil L. Moorehouse and Floyd A. Moorehouse to said estate to the end that the shares of the said Dr. Cecil L. Moorehouse, Floyd A. Moorehouse and Cleo L. Tallman Carter shall be equalized, including in said computation said notes or any other obligations of the said Dr. Cecil L. Moorehouse and Floyd A. Moorehouse to said estate or said decedent, as aforesaid."

[1] Appellants contend that the court's interpretation of the four testamentary documents is contrary to the plain intent as found therein. We find no substantial basis for this contention. The third codicil does not enlarge the shares of the estate to be awarded Cecil and Floyd. On the contrary, that codicil diminishes the percentage each should receive by virtue of the provision whereby Cleo is to share with them on equal terms in the remainder of the estate after payment of expenses of administration, distribution of Lot 20, and the payment of the legacies to Stella. Nothing contained in the last codicil indicates an intention to reduce the amount of property or of the money to be awarded Mrs. Robinson, but on the contrary subparagraph (a) betrays a definite aim to "add" to her share by bequeathing to her the home at Long Beach. The evidence also reveals decedent's deep solicitude for his daughter in his act of conveying to her, shortly after executing the third codicil, another property in South Gate worth $2,500. Not a word appears in his valedictory codicil to indicate a cooling of the father's interest in or affection for his own daughter, but rather does an increase of zeal for her comfort appear in the series of testamentary instruments. At first he gave her only one half of the residue. In codicil 1 he added to such one half the $1,000 legacy to save her from loss on her loan to her brother. In codicil 3 he makes her the additional bequest of his home and its furnishings, followed by the gift of the South Gate property.

They contend also that the court's interpretation is wrong in that it is contrary to the established principles of human behavior. It is not abnormal for a father to prefer his only child as against his grandchildren. He may with propriety, if he choose, exclude his grandchildren altogether. Especially would such procedure be proper and justifiable where the testator's only child is a widowed daughter and he has reared and educated his grand children and advanced them moneys to become established in business and they are in robust health and self-supporting. Mrs. Robinson had herself reached an advanced age; had no earning power; was dependent upon her possessions for support. As long as it was his expressed desire that she should have specific bequests and one half of the residue of the estate, the court has no power to rewrite his will according to the wishes of those who are disappointed.

[2] Appellants contend that by a fair construction subparagraph (b) of the third codicil was intended to bequeath to the three grandchildren in equal shares the "residue" of the estate after deducting the expenses of administration and the specific gifts for Stella because of the technical distinction of the word "residue" as used in that sub-paragraph. They argue that by the use of that word he impliedly revoked all special bequests made to her in the three preceding documents. There is no substantial difference between the words "remainder" and "residue." Residue is derived from the word residuus which means that which remains of an estate after all charges, debts, and bequests have been paid. It is defined to be "what remains after paying the legacies of the will and the debts and expenses of administration." McDougald v. Low, 164 Cal. 107, 110, 127 P. 1027, 1028. Remainder is derived from remanere which means to be left over and in law means the residual interest of an estate remaining over after part has been taken away. The two words are commonly given as synonyms. See 54 C.J. 715; Webster's International Dictionary; Oxford Dictionary.

But in construing a will the aim is to ascertain the meaning of the testator rather than the meaning of the words used. All instruments constituting the testamentary disposition must be "construed together as one instrument." Sec. 101, Probate Code. Such interpretation must be given to the words of a will as will give to every expression some effect, rather than one which will render any of the expressions inoperative. Ibid. sec. 102. All parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail. Ibid. sec. 103. A clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct. Ibid. sec. 104. "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. * * * technical words in a will are to be taken in their technical sense, unless the contest clearly indicates a contrary intention * * *." Ibid. 106. A devise of the residue of real property or a bequest of the residue of the personal property passes all the real or personal property of the testator not "otherwise effectually devised or bequeathed by his will." Ibid. 126.

Subdivision (a) of the fourth paragraph of the original will distinctly devised to Stella Robinson one half of the "residue" and "remainder" of the estate. There is no suggestion in either the first or second codicil that such half of the residue and remainder should go to another. The intention of the testator to bequeath one half of the residue to his daughter is emphasized by his express declaration in the second paragraph of the third codicil in which he says, "I do hereby desire to *add* a codicil." By subdivision (a) thereof he devises the Linden Avenue home and its furnishings, silverware, clothing, and personal effects; and by the final clause reaffirms the Will in all other respects save as modified by the three codicils.

[3-8] It is the established rule of construction that dispositions made by a will are not to be disturbed by a codicil further than is absolutely necessary in order to give that codicil effect, and a clear bequest is not revoked by a doubtful expression or by an inconsistent disposition in the codicil. In re Estate of Dominici, 151 Cal. 181, 189, 90 P. 448; In re Norrish's Estate, 135 Cal. App. 166, 26 P.2d 530. The court's function is to construe a will, not to make one; to ascertain the testator's intention as expressed, not some undeclared, imaginary purpose; and, if the language be ambiguous, to resort to the circumstances of the execution of the testamentary document. In re Estate of Johnson, 107 Cal.App. 236, 239, 290 P. 314. The cardinal rule of construction requires that the intention of the testator be ascertained and that if lawful it be given effect (In re Estate of Young, 215 Cal. 127, 130, 8 P.2d 846; In re Estate of McCray, 204 Cal. 399, 402, 268 P. 647) even though the disposition of his estate be unequitable, unwise or capricious. He may transmit without regard to moral or natural claims upon his bounty. In re Estate of Lindsay, 136 Misc. 555, 241 N.Y.S. 513, 517. Neither is he bound to bequeath it in such a manner as to gain the approbation of his contemporaries, the wise or the good. In re Estate of Wayne, 134 Or. 464, 291 P. 356, 294 P. 590, 79 A.L.R. 1427.

In view of such established rules, of a reasonable construction of the four documents, and of the final clause of the third codicil, we are reassured that the decision of the trial judge should be approved.

The order is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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64 Cal.App.2d 236

HOLLIN v. ELAM et al.

Civ. 12600.

District Court of Appeal, First District, Division 2, California.

May 4, 1944.

1. Evidence 🔑448

Where written agreement whereby defendants employed plaintiff as a salesman at a salary of $100 per month plus a drawing account of $100 per month and 50 per cent. of net profits from business developed by him unambiguously defined "net profits", admission of plaintiff's testimony as to pre-contracting conversations from which he drew his conclusion that his salary was not to be deducted from gross profits in determining net profits was erroneous.

2. Master and servant 🔑81

In suit for an accounting under written contract whereby defendants employed plaintiff as a salesman at a salary of $100 per month plus a drawing account of $100 per month and 50 per cent. of net profits from business developed by him, evidence supported finding that amount paid for warehousing steel pending its shipment was a necessary expense which was deductible in computing net profits under the contract.

3. Master and servant ⚷70(2)

Where written agreement employing plaintiff as a salesman in defendants' exporting and importing business expressly stated that it was to cover business transacted by plaintiff in "the Philippine Islands, the Orient, and the Far East", plaintiff could not recover commissions under the contract for a sale made in Nicaragua.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Suit for an accounting by John G. Hollin against Grover C. Elam and another, copartners, doing business under the firm name and style of Grover C. Elam Company, wherein the defendants filed a cross-complaint. From an adverse judgment, the defendants appeal.

Reversed.

Rowland R. King and Herbert Chamberlin, both of San Francisco, for appellants.

Roland Becsey and Russell W. Cantrell, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff and defendants entered into a written agreement whereby defendants employed plaintiff as a salesman in their exporting and importing business between the United States, the Philippine Islands, the Orient, and the Far East, for a period of one year beginning May 1, 1940. Plaintiff was to receive monthly a salary of $100, and was allowed a drawing account of $100 each month. He was also to receive 50% of the net profits from business developed by him. In a suit for an accounting the trial court entered judgment for plaintiff. An account prepared by defendants in the action in the trial court was stipulated as being correct except for certain disputed items. Defendants on this appeal contend that the evidence will not support a verdict for the plaintiff on any of the disputed matters.

[1] As to the compensation to be paid plaintiff the contract provided: "Second Party is to receive a salary of One Hundred ($100.00) Dollars per month and a drawing account in the sum of One Hundred ($100.00) Dollars per month payable semi-monthly on the 15th day and the last day of each and every month during the continuation of the within agreement. Second Party is to receive as *additional salary* from First Party fifty per cent (50%) of all of the net profits, *less drawing account payments,* * * * the words 'net profit' as used herein are hereby defined to include all of the aforesaid gross profits *less the following expenses* in connection with said business, to wit: cables, long distance phone calls, travelling expenses, *and salary; there is to be deducted from any net profits* due from said First Party to Second Party all moneys received by said Second Party from said First Party *as a drawing account.* * * *" (Emphasis ours.) Defendants in accounting had deducted from the gross profits the monthly salary paid plaintiff. The trial court, on the theory that the contract was ambiguous, and over the objection of defendants, permitted plaintiff to testify to the pre-contracting conversations from which he drew his conclusion that his salary was not to be deducted from gross profits. The admission of this testimony is claimed by defendants to have been erroneous under the parol evidence rule. Plaintiff contends that the testimony did not alter the terms of the contract, but was merely explanatory of certain preliminary conversations and the circumstances under which the contract was made. The objection was entered after the witness had testified, but even if the objection were not made within time, the testimony does not support the contention of plaintiff. The contract is plain and unambiguous. The language left no room for an "explanation." Plaintiff's statement that the salary was not to be chargeable to sales was in direct conflict with the terms of the written contract. The parties went to extreme care to define in their contract their meaning of the term "net profits." They expressly provided that the "salary" paid to the plaintiff should be deducted from the gross profits in computing net profits, and to make it clear and beyond dispute provided that the moneys received by plaintiff "as a drawing account" should be deducted from the net profits. Hence, there should have been deducted from the gross profits the monthly salary paid to plaintiff.

[2] The item of $1086.71 was paid for warehousing steel pending its shipment to a buyer in the Orient. Plaintiff testified that the charges were unnecessary and that defendants had promised to absorb the charge. As to the latter he was corroborated by another witness. Defendants contend that the

charges were a necessary expense, caused by an honest mistake in judgment and they denied assuming the charge. We must assume that the trial court accepted the evidence offered by plaintiff, and this was sufficient to support the conclusion that this item should not be charged to the plaintiff. But the parties are not agreed whether the final account as approved by the trial court credits plaintiff with the correct amount and this should be disposed of in another hearing.

[3] The items of $328.10 and $161.69 are not supported by any competent evidence. The parties agreed that the first item was covered by other entries in the account offered by defendants and accepted by plaintiff. The second item represents a commission allowed plaintiff for a sale made by defendants to Nicaragua. The contract of agency covered business transacted by the plaintiff in "the Philippine Islands, the Orient, and the Far East." The plaintiff had negotiated a sale of a quantity of steel to be shipped to a customer in the Orient. The British Shipping Commission refused to grant a permit for its shipment. The defendants, without the aid of plaintiff, sold a portion of the goods to a customer in Nicaragua. This sale was not within the terms of the contract of agency. Hence there is no basis upon which the plaintiff can claim a commission upon this sale under that contract.

The judgment is reversed.

STURTEVANT, and SPENCE, JJ., concur.

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64 Cal.App.2d 123

In re WILSON'S ESTATE.

JENSEN et al. v. WILSON.

Civ. No. 14169.

District Court of Appeal, Second District,
Division 3, California.
April 27, 1944.

1. Husband and wife 🔑263

Property may be shown to be community property no matter what may be the form of the deed under which it is held.

2. Husband and wife 🔑264

Evidence sustained finding that real estate in wife's name at time of her death was community property, notwithstanding that title was procured in wife's name before marriage, later was in name of husband and wife as joint tenants and subsequently the husband conveyed his interest to the wife.

3. Husband and wife 🔑274(1)

The statute providing for descent of community property to brothers and sisters under certain circumstances, if deceased dies without spouse or issue, has no application where deceased dies testate or is survived by a spouse. Probate Code, § 228.

Appeal from Superior Court, Los Angeles County; Florence M. Bischoff, Judge pro tem.

Proceeding in the matter of the estate of Marie Jensen Wilson, also known as Mrs. Andrew Wilson, deceased. From an order overruling objections to the petition of Andrew Wilson, surviving spouse, for distribution to himself as sole distributee of the estate property, and from order distributing the property to the legal representative of the surviving spouse who died while the proceedings were pending, Oscar Jensen and Gudmund Jensen, brothers of the deceased Marie Jensen Wilson, appeal.

Affirmed.

M. F. Buffum, of Yreka, and Montgomery G. Rice, of Whittier, for appellants.

Bert G. Wetherby, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

This is an appeal by Oscar Jensen and Gudmund Jensen, brothers of the late Marie Jensen Wilson, from orders in probate, overruling their objections to the petition of Andrew Wilson for distribution to himself as sole distributee, without rendering an account as administrator, of the estate of his wife, Marie Jensen Wilson; also determining that Andrew Wilson was the sole heir of Marie Jensen Wilson and ordering distribution of the property of their deceased sister to the legal representative of Andrew Wilson, who died while these proceedings were pending.

At the hearing on December 29, 1942, before a probate commissioner, who, as judge pro tempore, passed upon the matters submitted, no oral testimony was introduced, the parties stipulating that the deposition of Andrew Wilson, which had been taken on the 3rd day of December, 1942, might be introduced in evidence. It was further stipulated as follows: "That the decedent Marie Jensen Wilson was married to Andrew Wilson aforesaid in 1925 and died in Los Angeles County, California, intestate and without issue her surviving, on February 11, 1942, and that said Andrew Wilson her husband survived her and is now the duly appointed, qualified, and acting administrator of her estate. That both the parents of the decedent were dead at the time of the death of the decedent leaving as their sole issue in addition to the decedent, their sons and brothers of the decedent, Oscar Jensen and Gudmund Jensen sometimes otherwise called Goodman Jensen, said sons being the objectors herein. * * * In 1923 John E. Lewis and Marie N. Lewis entered into a contract with Marie E. Jensen who was then unmarried, to sell to her the real property which is a part of this estate the legal description of which is: Lot 12 in Block 10 of Vista Del Oro Tract. * * * That at the time of the making of said contract the said Andrew Wilson was a married man. That on May 18, 1927, the said John E. Lewis and Marie N. Lewis executed and delivered their grant deed to said property to 'Marie Jensen Wilson, a married woman formerly Marie E. Jensen' the decedent herein * * *.

That on or about May 18, 1927, the said Marie Jensen Wilson decedent herein made, executed and delivered her grant deed conveying the said real property to one Ruth Sumner who at the same time and as part of the same transaction made, executed and delivered her grant deed conveying said real property to the said Andrew Wilson and Marie Jensen Wilson decedent herein as joint tenants. * * * That on February 2, 1934, the said Andrew Wilson made, executed and delivered his Deed of Gift conveying said property to Marie Jensen Wilson his wife, the decedent herein, * * * that, on the hearing, with the consent of the court, the case shall be submitted on said evidence and such argument of counsel as the court shall desire and permit."

From Mr. Wilson's deposition, it appeared that in 1923, Marie Jensen, being then a single woman, entered into an installment contract to purchase the real estate hereinbefore mentioned. The deponent testified that he gave her the sum of $500 from his own funds to make the down payment on the contract, and further that she made the succeeding monthly payments "always after that" from money which he gave her from his salary. The testimony in regard to his transfer of interest on February 2, 1934, to his wife, formerly Marie Jensen, whom he had married in 1925, was as follows:

"Q. Now, was there any discussion between you and your wife concerning that property, that is, the nature of the transaction as to whether it was a gift, or the nature of the property, or anything of the sort? * * * A. No, there wasn't any gift. It was a case of community property. We figured it was going to be community property all the way through.

"Q. Was that so stated by you? A. Yes. * * *

"Mr. Wetherby: Q. Did you intend to make a gift to her? A. No.

"Q. Now, were all the payments that were made on this property, as well as the payments made on the car, made with funds which you furnished her? A. Yes, those were the only funds there were.

"Q. Now, going back a bit, you have stated that it was your intention to become married to Marie Jensen Wilson as soon as you were divorced from your then wife, and were there any understanding or agreement with Marie Jensen Wilson relative to the ownership of this property when it was first purchased in 1923? * * * A. It was to be our home place.

"Q. Then there was discussion wasn't there? A. That is what we were buying it for, was for a home. I don't just get that.

"Q. Why was the property placed in your wife's name when it was first purchased? A. Well, the only reason was if anything should happen to me there would be no trouble about who would get it.

"Q. And when you executed the deed covering a part of the property in 1934, was that for the same purpose? A. Yes, I didn't want anybody else to have it, because I had nobody. My sister died, and she had nobody, and it was a case of just the two of us, and I wanted her to get it if anything happened to me, the same that she wanted me to get it if anything happened to her.

"Q. But you didn't intend to make a gift to her, is that correct? A. No, no gift. It was freely and entirely community property. Whoever it was left, it was supposed to be their property.

"Q. And that was the understanding? A. All the way through.

"Q. That was true not only of the real property, but of the car, or anything else that you owned? A. Well, everything we owned. I bought a lot of the property in the house on my own. All the property was to go to the one or the other."

[1, 2] The trial court concluded that the real property which had been the subject matter of so many deeds was, at the time of Mrs. Wilson's death, the community property of the Wilsons, and the first, and most important, question on this appeal is to determine whether or not such a conclusion is legally possible under the evidence. Appellants points to the several deeds and insist that between the years 1927 and 1934 the Wilsons held title as joint tenants, a title inconsistent with a community interest, and that in any event from the date of the deed of gift to her death Mrs. Wilson owned the land as her separate property. If the conclusion of the trial court had to be based upon the deeds alone, that is, if the nature of the Wilsons' interest in the property which was their home was determined entirely by the written instruments, appellants' contention would have a sound basis. But, as between Mr. and Mrs. Wilson and those claiming through them, the character of their interest in the property is not necessarily that which would follow from the form of the deeds. It is now too well settled to justify more than the citation of the authorities that in spite of the mold into which a deed would seemingly press a title, either because of the intent with which the deed was made (Horsman v. Maden, 1941, 48 Cal.App.2d 635, 640, 120 P.2d 92), or made and received (Williamson v. Kinney, 1942, 52 Cal.App.2d 98, 102, 125 P.2d 920), or because of an oral agreement between a husband and wife, carried into effect, determining their respective interests in real estate (Kenney v. Kenney, 1934, 220 Cal. 134, 136, 30 P.2d 398; Schipper v. Penkalski, 1941, 46 Cal.App.2d 28, 32, 115 P.2d 231; Marvin v. Marvin, 1941, 46 Cal.App.2d 551, 556, 557, 116 P.2d 151; In re Estate of Sehabiague, 1941, 47 Cal.App.2d 793, 799, 119 P.2d 30; and see In re Estate of Watkins, 1940, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1, and cases cited) property which, measured by the deed, would not be community property, nevertheless may be just that. The Supreme Court has recently enunciated the same principle. Tomaier v. Tomaier, 1944, 23 Cal.2d 754, 146 P.2d 905. A reading of the cases and the additional authorities they cite makes plain that the trial court had ample justification for concluding that at the death of Marie Jensen Wilson the property in question was the community property of herself and Andrew Wilson.

[3] Appellants contend, further, that even if it should be determined that the property was properly found to be community property, the decree of distribution was in error in not awarding one-half of it to them. This phase of their case is based upon the provisions of section 228 of the Probate Code, reading: "If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse * * * such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation."

Appellants' argument is disposed of by the fact that the order of distribution appealed from was made in the proceedings to administer Mrs. Wilson's estate. She did not die leaving "neither spouse nor issue." If appellants are entitled to any interest in the property in question it is because it belonged to Mr. Wilson and his previously deceased spouse as community property at the time of her death, and the matter of its distribution to appellants will be a question to be passed upon in the administration of Mr. Wilson's estate. He may have disposed of it by will, in which case section 228, Probate Code, will not be applicable. Estate of Taitmeyer, 1943, 60 Cal.App.2d 699, 141 P.2d 504, 511. Be that as it may, it was not error, in the proceedings under review, to refrain from making a distribution of Mr. Wilson's property.

The various orders appealed from are affirmed.

PARKER WOOD, J., and BISHOP, Justice pro tem.

64 Cal.App.2d 65

In re SCHELLER'S ESTATE.

SIMS v. MARTIN et al.

Civ. No. 12589.

District Court of Appeal, First District,
Division 1, California.

April 25, 1944.

Hearing Denied June 22, 1944.

1. Executors and administrators 🔑128

An executrix' attorneys, filing final account reciting payment of attorneys' fees, waived right to recover their fees from testator's estate, but where executrix undertook to pay such fees personally, attorneys could recover amount thereof from executrix' estate after her death without attacking decree of distribution in her testator's estate. Probate Code, § 931.

2. Executors and administrators 🔑202(1), 510(2)

Where executrix undertook to pay her attorneys' fees personally, though her final account and decree of distribution recited payment of such fees, attorneys' sole remedy for recovery thereof was not by appeal from decree settling such account, but they had right to present claim for fees against executrix' estate after her death.

3. Witnesses 🔑133, 134

On hearing of exception by residuary legatee to account showing payment of attorneys' fees in estate of which decedent had been executrix on ground that order settling final account of deceased executrix recited the payment of all claims, attorneys were competent to testify, since there was no action by them against deceased executrix' executrix. Code Civ. Proc. § 1880, subd. 3.

4. Witnesses 🔑126

The statute prohibiting parties to action on claim or demand against decedent's estate from testifying as to matters or fact occurring before decedent's death is strictly construed. Code Civ.Proc. § 1880, subd. 3.

5. Executors and administrators 🔑216(2)

Testimony of deceased executrix' attorneys that executrix had no representative account, but took all cash proceeds from her testator's estate and deposited them to her personal account, from which she paid estate debts and administration expenses, was sufficient to support attorneys' claims against such executrix' estate for fees earned and costs advanced by them in probate of her testator's will, though executrix' final account and distribution decree in such testator's estate recited payment of such fees and attorneys did not testify expressly that executrix personally agreed to pay them.

6. Executors and administrators 🔑216(2)

Attorneys' claims against deceased executrix' estate for fees earned in probate of her testator's will became acknowledged debts of such executrix' estate, when allowed by executrix thereof and approved by court, and were prima facie correct, so as to cast burden on one contesting deceased executrix' account to prove invalidity of claims by evidence that decedent did not personally assume obligation to pay them. Probate Code, § 713.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

In the matter of the estate of Ceda Scheller, deceased. From an order granting a petition by Margaret Martin Lion, executrix of the estate, for settlement thereof, and denying exceptions by Margaret Sims to the executrix' final account as to allowance of claims presented by Henry B. Martin, Jr., and another for attorneys' fees, contestant appeals.

Affirmed.

Ernest K. Little, of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for executrix and respondent Margaret Martin Lion.

Henry B. Martin, Jr., and Vincent H. O'Donnell, both of San Francisco, in pro. per.

WARD, Justice.

This is an appeal by a residuary legatee from an order approving certain disbursements in the account of an executrix.

Upon the death of Victor A. Scheller his wife, Ceda, sole devisee under his will, was appointed executrix of his estate. Henry B. Martin, Jr., and Vincent H. O'Donnell acted as attorneys in the probate thereof, their statutory fees amounting to the sum of $2,234.75. The first and final account of the executrix, duly sworn to by her and signed by the above attorneys, presented with a petition for settlement and distribution, contains an item of disbursement under March 30, 1940, as follows: "Attorney's fee, allowed by law, and computed on the sum of $140,475, as follows: * * * $2,234.75." It also contains the following: "All debts of said decedent and of said estate, and all expenses of administration thus far incurred, and all taxes that have been assessed to or that have accrued against said estate, including city, county and state, have been fully paid, discharged, or otherwise provided for, and said estate * * * is in a condition to be closed." The decree of settlement made thereafter recited that the attorneys were present during the proceedings; that the executrix was examined, and that from oral and documentary evidence in support thereof it was found that the account is true and correct and supported by proper vouchers; that "All of the debts, claims and expenses of the administration of said estate, and all taxes chargeable against said estate, including city, county and state, have been fully paid and discharged, and said estate is now fully administered and ready for distribution and in a condition to be closed." The decree of settlement also contained the following: "Wherefore, it is hereby ordered, adjudged and decreed that the first and final account of said executrix be, and the same is hereby ratified, approved, settled and confirmed, and all of the payments therein stated to have been made by said executrix are, and each of them is, hereby allowed and approved, and each and all of the acts and things done by said executrix for and on behalf of said estate are hereby ratified, approved and confirmed."

About eight months after distribution in the matter of the Victor Scheller estate, his wife passed away, and letters testamentary were granted to Margaret Martin Lion in the matter of Mrs. Scheller's estate. Vincent H. O'Donnell appeared as attorney for the executrix.

Among the claims presented, approved, allowed and paid in the matter of Mrs. Scheller's estate, was one by Messrs. Martin (the brother of the executrix herein) and O'Donnell, who had represented Mrs. Scheller in the probate of her husband's estate, in the amount of $2,256.41. The account was made up as follows: $2,234.75 attorneys' fees in the matter of the estate of her predeceased husband; $26.01 costs in the same connection and $1,000 for services rendered Mrs. Scheller subsequent to the distribution of her husband's estate, less $1,004.35 paid by Mrs. Scheller on account. The first account filed by the executrix showed the payment of the above $2,256.41 as a deduction. Margaret Sims, one of the residuary legatees excepted to the account alleging that the attorneys' fees and costs in the estate of Victor Scheller had been paid in the course of the administration of his estate as evidenced by the final account of Ceda Scheller, executrix, and the decree of the probate court settling that account. After trial the executrix' petition for settlement was granted, and Margaret Sims' exceptions denied. From this order the latter has appealed. She contends (1) that the presentation of a claim against the estate of Ceda Scheller, deceased, for attorneys' fees in the estate of Victor A. Scheller, deceased, constitutes a collateral attack upon the order settling and allowing Mrs. Scheller's account as executrix of her husband's estate; (2) that the attorney for the executor or administrator is now recognized as "a party in interest" in the estate with the right of appeal from an order adversely affecting his interest; (3) that O'Donnell, claimant herein, was not a competent witness as to any matter occurring during the lifetime of Ceda Scheller.

[1] Appellant's first contention is that the decree of distribution is a conclusive determination that the attorneys' fees had been paid; that to permit respondents to recover in this action is to attack collaterally the decree of distribution in the husband's estate. It is true that a decree of

distribution is not subject to collateral attack, Probate Code, § 931, but can it be said that the attorneys' claim for fees in Mrs. Scheller's estate is a collateral attack upon the decree of distribution in her husband's estate? When the attorneys filed a final account in the Victor Scheller estate which recited that attorneys' fees had been paid, they waived any right to recover their fees from that estate. However, such recital and the provisions of the decree to the same effect would not prevent Mrs. Scheller from assuming the fees as a personal obligation which would be enforceable against her estate. The decree established only that as to the estate of Victor Scheller the attorneys' claim for fees had been satisfied and discharged. The attorneys may recover their fees from her estate without in any way attacking the decree of distribution in her husband's estate.

[2] Appellant's second contention involves the same fallacy as the first. That is, it is argued that respondents' sole remedy was by way of appeal from the decree settling the final account in the Victor Scheller estate. This contention like the first would be true if respondents were attempting to have their fees paid from the assets of the Victor Scheller estate. But the evidence establishes that Mrs. Scheller undertook to pay the fees, so that the attorneys would have had no reason to complain of the decree of distribution in her husband's estate. They were no longer looking to the estate for payment, but to Mrs. Scheller personally.

[3, 4] The contention that Code of Civil Procedure, sec. 1880, subd. 3, is applicable is not well founded. The subdivision provides: "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person," may not testify as witnesses. The testimony does not come within the literal terms of the statute. The action is not against the executrix but is a protest against a claim allowed by the executrix. A strict construction has been applied to the provisions of subdivision 3. Sedgwick v. Sedgwick, 52 Cal. 336; Humes v. Humes, 56 Cal.App.2d 126, 133 P.2d 39; Jones v. Clark, 19 Cal.2d 156, 119 P.2d 731; Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706; Silva v. Dias, 46 Cal.App.2d 662, 116 P.2d 496.

[5] Attorneys Martin and O'Donnell filed a claim for $2,256.41, as stated, in the estate of Ceda Scheller. The claim set forth that it consisted of an unpaid balance of $1,256.41 for fees and costs advanced in the probate of the Victor Scheller estate, plus $1,000 charged for services rendered in the settlement of Federal estate tax claims against Ceda Scheller arising out of the receipt by her of all of the distributable estate of Victor Scheller. It further set forth that $1,004.35 had been paid by Mrs. Scheller and credited against the probate fees and costs. O'Donnell testified on the trial herein that the only payment made in the matter of the fees was the sum of $1,000. Appellant relies upon the provisions of the accounting and decree only as establishing payment. She offered no other evidence to show payment in fact. We have held above that the decree is not a conclusive determination that respondents are without right to recover from the estate of Mrs. Scheller. The trial court was entitled to believe the testimony of O'Donnell that the fees had not been paid.

Respondents, apparently through oversight, did not testify expressly that Mrs. Scheller had personally agreed to pay their attorneys' fees, but O'Donnell did testify that Mrs. Scheller had no representative account; that she took all cash proceeds from the estate of Victor Scheller and deposited them to her own personal account, from which she paid the debts and expenses of administration. From this it can reasonably be inferred that it was understood that the attorneys' fees, which O'Donnell testified were unpaid, were to be paid by her personally. This inference is supported by the fact that Mrs. Scheller gave O'Donnell an individual check for $1,000 which he credited on the fees owing in the Victor Scheller estate.

[6] Furthermore, the claim of respondents for attorneys' fees was allowed by the executor and approved by the court and thereby became an "acknowledged" debt of the estate. Probate Code, sec. 713. A claim approved by the court is prima facie correct and the burden of proving its invalidity rests upon the contestant. In re Estate of Roberts, 49 Cal.App.2d 71, 120 P.2d 933; Bryant v. Superior Court, 16 Cal.App.2d 556, 61 P.2d 483; Shiels v. Nathan, 12 Cal.App. 604, 108 P. 34. Since

appellant did not offer proof that Mrs. Scheller had not personally assumed the claim, its prima facie validity was not rebutted. She did not meet the burden of proof cast upon her, a contestant of an approved claim. The trial court had no alternative but to deny her contest.

The order appealed from is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

64 Cal.App.2d 76

In re HENRY'S ESTATE.

DEPARTMENT OF INSTITUTIONS v. KATZ.

Civ. 12575.

District Court of Appeal, First District, Division 1, California.

April 26, 1944.

Hearing Denied June 22, 1944.

1. Executors and administrators 🔑17(1)

The preferential right to letters of administration in matter of deceased person's estate as provided by the Probate Code must be followed in accordance with the status of the parties. Probate Code, § 422.

2. Executors and administrators 🔑24

Statute providing that, if person under commitment to Department of Institutions dies leaving an estate and having no relatives at time residing within state, the department shall be entitled to administer the estate, does not provide for priority over public administrator. St.1941, p. 2506, § 6660; Probate Code, §§ 420, 422, 423, 425–427.

3. Executors and administrators 🔑17(1)

The term "any person entitled", in statute regarding appointment of administrator, is general in its designation and applies to persons in the same or inferior classes and, if in the same class, the selection is discretionary with the court. Probate Code, §§ 420, 422, 423, 425–427.

See Words and Phrases, Permanent Edition, for all other definitions of "Any Person Entitled".

4. Executors and administrators 🔑17(2)

Under statute providing that, if person under commitment to Department of Institutions dies leaving an estate and having no relatives at time residing within state the department shall be entitled to administer the estate, the department is not eligible for appointment if deceased had relatives residing in state at time of his death. St.1941, p. 2506, § 6660; Probate Code, §§ 401, 409, 420.

5. Executors and administrators 🔑32(1)

Under statute providing that, if person under commitment to Department of Institutions dies leaving an estate and having no relatives at time residing within state, department shall be entitled to administer the estate, letters issued to department should be revoked if decedent had surviving spouse, parent, etc., residing in state, or if relative in state requested appointment of competent person. St. 1941, p. 2506, § 6660; Probate Code, § 450.

6. Executors and administrators 🔑17(1)

Where section of Political Code providing that, if person under commitment to state hospital shall die leaving an estate and leaving no relative at time residing within state, the Secretary of State Department of Institutions shall be entitled to administer the estate in preference to any other person, was re-enacted as a section of the Welfare and Institutions Code but with the preference provision eliminated, the continuation of certain clauses in force was merely a substitution for the original act but the elimination of the preference provision was a repeal of that provision. St.1941, p. 2506, § 6660.

7. Statutes 🔑141(1, 2)

If a subsequent act leaves in full operation all of provisions of prior statute to which subsequent act relates, constitutional provision relating to amendment of statutes is not violated by failure to re-enact or publish prior statute or section as revised or amended; but, if subsequent act has effect of altering, revising, or changing operation or provisions of existing statute or section in any respect, the failure to observe the constitutional requirement brings purported revision or amendment within evils aimed at by the Constitution. Const. art. 4, § 24.

8. Statutes 🔑141(1)

The purpose of constitutional provision that no law shall be revised or amended by reference to its title is to prevent the title of a subsequent act from being made a cloak or artifice to distract attention from substance of act and to protect legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under title of another. Const. art. 4, § 24.

9. Constitutional law 🔑48

It cannot be presumed that Legislature intended to pass an unconstitutional act or to do anything unconstitutional or beyond its power.

10. Constitutional law 🔑48

If there is an inference which may be drawn from an act, the effect of which is to render the act unconstitutional, it is to be presumed, in absence of an express provision to that effect, that such inference was not intended.

11. Executors and administrators 🔑17(1)

Where section of Welfare and Institutions Code providing that, if a person under commitment to Department of Institutions dies leaving an estate and leaving no relatives at time residing within state, the department shall be entitled to administer the estate, contained no reference to section of Probate Code establishing order of priority of right to letters of administration, the former statute did not establish a new order of priority, in view of constitutional provision that no law shall be revised or amended by reference to its title. St. 1941, p. 2506, § 6660; Probate Code, § 422; Const. art. 4, § 24.

12. Constitutional law 🔑70(1)

It is the imperative duty of courts to abstain from attempting to exercise legislative functions.

13. Executors and administrators 🔑17(1)

The only purpose of the statute providing that, if person under commitment to Department of Institutions dies leaving an estate and having no relatives at time residing within the state, the department shall be entitled to administer the estate, was to make the department eligible to receive letters of administration. St.1941, p. 2506, § 6660; Probate Code, §§ 422, 427.

14. Executors and administrators 🔑17(1)

Under statute providing that, if person under commitment to Department of Institutions dies leaving an estate and leaving no relatives at time residing within the state, the department shall be entitled to administer the estate, letters of administration may be granted to the department only when persons having priority fail to claim letters for themselves. St. 1941, p. 2506, § 6660; Probate Code, §§ 422, 427.

PETERS, P. J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Marcus Henry, deceased, wherein the Department of Institutions of the State of California and the Public Administrator filed applications for letters of administration. From an order appointing Phil C. Katz as administrator of the estate of Marcus Henry, deceased, the Department of Institutions appeals.

Affirmed.

Robert E. Hatch, John R. Golden, and Clarissa Shortall, all of San Francisco, for appellant.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for respondent.

WARD, Justice.

The Department of Institutions appeals from an order of the probate court appointing the Public Administrator of the City and County of San Francisco administrator of the estate of Marcus Henry, deceased. It is the contention of appellant that, as a matter of law, it was entitled to letters of administration on such estate.

The facts are not in dispute and are as follows: Marcus Henry died intestate on November 24, 1942, at the Stockton State Hospital. At that time he was under commitment to the Department of Institutions, having been committed in December, 1941. At the time of his death he was a resident of San Francisco. Both the Department of Institutions and the Public Administrator applied for letters of administration.

The trial court found that all of the allegations of the petition of the Public

Administrator are true. The petition alleged: "That the value and character of the estate of said deceased as far as known to your petitioner are unknown. That the names, ages and places of residence of the heirs at law and next of kin of said deceased are unknown; That your petitioner is informed and believes, and therefore alleges, said deceased died intestate." On the above facts the trial court further found "that the right to administer the estate of said decedent of the Department of Institutions, if any, is subject to and subordinate to the right and priority of said Public Administrator to administer said estate."

For a great many years the order of priority in which the probate court must issue letters of administration in the matter of deceased persons' estates has been fixed by section 422 of the Probate Code and its predecessor, section 1365 of the Code of Civil Procedure; and the determinative question presented here is whether by the enactment of the 1941 amendment, St.1941, p. 2506, to said section 6660 of the Welfare and Institutions Code, the legislature intended to and did in effect revise or amend section 422 of the Probate Code so as to alter or change the order of priority established thereby for the issuance of letters of administration.

[1, 2] The preferential rights as provided by section 422 must be followed in accordance with the status of the parties. In re Estate of Herriott, 219 Cal. 529, 28 P.2d 355; In re Estate of Olcese, 210 Cal. 262, 291 P. 193. Appellant contends that the purport of section 6660 is to create a new classification as though it were designated subsection 7(a), sec. 422, Probate Code. Any amendment to the provisions of section 422, or any statute that impliedly amends that section, should be specific, otherwise confusion may occur in the interpretation of section 422 and other sections in relation to the appointment of administrators. See sections 420, 423, 425, 426, 427.

Section 6660 of the Welfare and Institutions Code (Stats.1941, Ch. 920, p. 2506) is not an amendment to chapter 4 of the Probate Code, which includes section 422, but is a distinct statutory provision primarily for the benefit of the insane in state hospitals. It provides that: "If a person under commitment to the Department of Institutions dies, leaving any estate, and having no relatives at the time residing within this State, the Department of Institutions shall be entitled to administer the estate and to have letters of administration on the estate issued to the department." Assuming that it creates competency in the state Department of Institutions to act as administrator, it does not provide for priority over the Public Administrator. The words "shall be entitled to administer the estate," as used in section 6660, should therefore be interpreted as meaning one who is "legally competent" (sec. 422, subd. 10); that is, one "entitled to letters" (sec. 422). Immediately following "entitled to letters" appear these words—"in the following order." The word "shall" (sec. 6660) does not add further force or weight; it merely emphasizes the intention of the legislature that under certain conditions the Department of Institutions is a proper party to act as an administrator.

[3] The term "any * * * person entitled" is general in its designation. It applies to persons in the same or inferior classes. In re Estate of Turner, 143 Cal. 438, 77 P. 144, 145. If in the same class, the selection is discretionary with the court.

[4, 5] An administrator must be a resident of this state. Secs. 401, 409, 420, Probate Code. The words "having no relatives at the time residing within this State" (sec. 6660) merely means that under no circumstances would the Department of Institutions be entitled, that is, be eligible for appointment if decedent had relatives residing in this state at the time of his death. In the event of the appointment of the Department, if the decedent had a surviving spouse, parent, etc., or if a relative in this state requested the appointment of a competent person, the letters if issued to the Department should be revoked. Probate Code, sec. 450.

A consideration of the history of the legislative enactments further supports the conclusion reached herein. In 1903 Political Code section 2179, the forerunner of Welfare and Institutions Code, sec. 6660, provided that the secretary of the state commission in lunacy, in case an "insane person has no guardian, may apply to a court of competent jurisdiction for the appointment of a guardian of the estate of such insane person" if the person committed to a state hospital should be the owner of property, real or personal. The purpose is plain. If the person had sufficient estate it would be the duty of the guardian to pay for necessary expenses of support and maintenance of the inmate at the hospital. Stats.1903, Ch. 364, p. 505. In other words, the appointment of the secretary would insure the payment of the state claim.

In 1909, Political Code section 2179 was amended to provide that "where an insane person shall die in a state hospital leaving an estate, and having no relatives or guardian, or in case the secretary of the state commission in lunacy shall be such guardian, such secretary may apply for letters of administration on such estate." Stats. 1909, Ch. 65, p. 72. There is no provision in the foregoing amendment that the secretary should be preferred to any other legally competent person.

In 1929 section 2179 was amended as follows: "Where an insane person under commitment to a state hospital shall die leaving any estate, and having no relatives at the time residing within this state, the secretary of the state department of institutions shall be entitled to administer said estate and to have letters of administration on such estate issue to him *in preference to any other person.*" (Italics added.) Stats.1929, Ch. 761, p. 1485. If the deceased inmate had relatives within the state the provision did not apply. For the first time it appears that it was necessary to legislatively declare that the secretary of the commission was a competent person "entitled to administer" and that under such circumstances he should have preference over any "other person" legally competent. Probate Code, sec. 422, subd. (10). If not legally competent the secretary was not entitled to appointment and therefore could have no "preference." Stated in another form, before "preference" could be considered it must be shown that the secretary was "entitled" to administer upon proof that he was a "person legally competent" to administer. Probate Code, sec. 422, subd. (10).

[6] In 1937 Political Code section 2179 was omitted and Welfare and Institutions Code, sec. 6660, enacted practically in the language of section 2179 as it appeared in 1929, but the provision that *preference* should be given to the secretary of the state Department of Institutions was eliminated. St.1937, p. 1158. The continuation of certain clauses in force was merely a substitution for the original act, but the elimination of a portion of the original section is a repeal of that particular provision. Pierce v. Solano County, 62 Cal. App. 465, 217 P. 545; Loew's, Inc., v. Byram, 11 Cal.2d 746, 82 P.2d 1; People v. Western Fruit Growers, 22 Cal.2d 494, 140 P.2d 13; Evans v. San Joaquin County, 58 Cal.App.2d 799, 138 P.2d 805; Greeley v. Suey Sing Benev. Ass'n, 28 Cal. App.2d 536, 83 P.2d 54. The revision of the provision indicates that the secretary was still a competent person and therefore eligible to appointment as administrator, but without preference over any other legally competent person referred to in subd. (10) of sec. 422, Probate Code. In all subsequent amendments to section 6660 of the Welfare and Institutions Code no reference is made to a preference. That provision was effectively repealed.

Appellant in the following language attempts to justify its position by reference to the provisions of section 6660 as they refer to guardianship proceedings:

"* * * it is the legal guardian of many estates, by virtue of appointments by the superior court, of inmates who are still living. Similarly, it assumes to help and protect the property rights of inmates in innumerable instances where appointments have not been made.

"Thus, for instance, frequently it comes to the Department's attention that inmates have *possible* claims and rights in connection with estates and property, and without action and cooperation of the Department of Institutions there is no one to look out for such matters."

The title of chapter 920 (Stats.1941, sec. 6660) refers only to the administration of "inmates'" estates. The statute provides for the appointment of the Department of Institutions when the incompetent "has no guardian." If appellant's contention should be upheld, the Department under the wording of the statute—"shall be entitled to administer"—would have priority over the guardian of the estate or the Public Administrator irrespective of any interest as creditor or otherwise in the estate of the deceased.

[7, 8] Referring once more to appellant's contention that Probate Code section 422 has been amended to create a subdivision which might be designated 7(a), we are confronted with constitutional prohibitions. Section 24 of Article IV of the California Constitution declares: "* * * No law shall be revised or amended by reference to its title; but in such case the Act revised or section amended shall

be reenacted and published at length as revised or amended * * *." In applying the foregoing constitutional provision it has been held that if a subsequent act leaves in full operation and effect all of the provisions of a prior statute to which the subsequent act relates, the constitutional provision above quoted is not violated by failure to re-enact or publish the prior act or section as revised or amended; but that if on the other hand the subsequent act has the effect of altering, revising or changing the operation or the provisions of an existing law or section in any respect, then the failure to observe the constitutional requirement brings such purported revision or amendment within the evils aimed at by the inhibition of the constitution. Hellman v. Shoulters, 114 Cal. 136, 150, 44 P. 915, 45 P. 1057; Matter of Coburn, 165 Cal. 202, 211, 131 P. 352. The purpose of the constitutional provision is to prevent the title of a subsequent act from being made a cloak or artifice to distract attention from the substance of the act and to protect legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another. Heron v. Riley, 209 Cal. 507, 289 P. 160; People v. French, 61 Cal.App. 275, 214 P. 1003.

[9-11] If appellants contention is correct—that the purpose and effect of the enactment of the 1941 amendment to section 6660 was to establish a new priority by adding a new subdivision—then it must be held that it is unconstitutional in so far as it attempts to revise the order of priority fixed by section 422 of the Probate Code, for the reason that neither in the enactment of the 1941 amendment to section 6660 nor any of its predecessors was any reference whatever made to a revision of section 422 of the Probate Code or its predecessors, nor has section 422 been reenacted and republished at length as so revised and amended. If, on the other hand, as respondent contends and the trial court held, the 1941 amendment to section 6660 does not revise or alter the order of priority of the issuance of letters of administration but merely grants to the Department of Institutions the right to letters pursuant to classification (10) of section 422 as it now stands, the 1941 amendment to section 6660 is not violative of the constitutional provision above quoted. It has been repeatedly declared that "it must be presumed that the legislature has considered and discussed the constitutionality of all measures passed by it. Certainly it can never be presumed that the legislature intended to pass an unconstitutional act, or do anything unconstitutional or beyond its power. If there is an inference which may be drawn from the act, the effect of which is to render the act unconstitutional, it is to be assumed, in the absence of an express provision to that effect, that such inference was not intended." 5 Cal.Jur. pp. 629, 630. Therefore, applying the well settled rules governing the determination of the constitutionality of legislative acts, it cannot be here presumed that the legislature intended to violate the constitutional provision above quoted.

Incidentally, section 422 was amended subsequent to the last amendment to section 6660 and no reference was made therein to the provisions of section 6660.

[12] We are in full accord with all that is said in the dissenting opinion respecting the imperative duty of courts to abstain from attempting to exercise legislative functions. But after redeclaring these "primordial rules of construction" with moving force and fluency, and with the implied admonition that they should be jealously guarded and preserved, the dissenting opinion proceeds at once to violate those rules in a pronounced fashion by assuming the exclusive legislative function of revising and rewriting section 422 of the Probate Code, first, by inserting therein an entirely new provision, to be known as classification 7½ or 7(a), the obvious effect of which would be to establish a new and different order of priority in which probate courts are required to issue letters of administration, and secondly, by modifying the first classification set forth in section 422 by giving priority to the Department of Institutions of the right to letters over the appointee of a surviving non-resident spouse.

It was doubtless within the province of the legislature, if it saw fit so to do, thus to revise and rewrite section 422 of the Probate Code to conform to the provisions of section 6660 of the Welfare and Institutions Code; but to accomplish that purpose it was necessary to follow the mandatory requirements of section 24 of Article IV of the state Constitution. Therefore, since the legislature made no attempt at all to revise section 422 in any manner, certainly the courts, under the guise of giving effect to a section of the Welfare and Institutions Code, which makes no reference whatever to any section of the Probate Code, may not assume to exercise the legislative function of revising and revamping a Probate Code section to conform to the needs of the Welfare and Institutions Code. In view of the conclusion reached herein the remaining contention of respondent that the statute is unconstitutional need not be considered.

[13] The only purpose in the passage of section 6660 was to make the Department eligible, otherwise it could not act under any of the subdivisions of section 422.

[14] Appellant falls within the provisions of subdivision (10) of section 422, and letters of administration may be granted when "persons having priority fail to claim letters for themselves." Probate Code, sec. 427; Estate of Turner, supra.

The order appealed from is affirmed.

KNIGHT, J., concurs.

I dissent.

Section 1858 of the Code of Civil Procedure provides that: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." This section embodies several primordial rules of construction. There are many cases holding that it is the function of a court to declare the law, not to make it; that the courts should construe, declare, administer and enforce a statute as enacted by the legislature, and should not, in the guise of construction, substitute its idea of the intent of the law for the obvious intent of the legislature; that courts should enforce a statute in its entirety and should not, because of its ideas of policy, disregard or, in effect, repeal, any portion of a statute; that if a statute works a hardship upon a certain class of persons resort must be had, not to the courts, but to the legislature, which alone has the power to modify statutory rules. See many cases collected and commented upon 23 Cal.Jur. p. 727, § 108; 10 Cal.Jur. Ten Year Supp. p. 392, § 108; 1942 Pocket Part for vol. 10 of Ten Year Supp. p. 111, § 108; 1943 Secondary Pocket Part for vol. 10 of Ten Year Supp. p. 26, § 108; 2 Sutherland, Statutory Construction, 3rd ed. p. 334, § 4702.

I believe that a reading of § 6660 of the Welfare and Institutions Code, and of § 422 of the Probate Code, will demonstrate that the majority opinion, in the guise of construction, has, in fact, repealed a material portion of § 6660 in direct violation of the above quoted rules of construction. The majority opinion does not interpret the section, it redrafts it. Were I a legislator, I believe I would agree with the conclusions of the majority, as a judge I cannot do so.

As amended in 1941 (Stats. of 1941, Chap. 920, p. 2506), § 6660 of the Welfare and Institutions Code provides that where an incompetent person, who has been committed to the Department of Institutions, has no guardian, but is the owner of property, the Department may apply to a court for appointment as guardian of the estate of the incompetent. The second paragraph of the section provides that: "For the purposes of this section, the Department of Institutions is hereby made a corporation and may act as executor, administrator, guardian of estates * * * under appointment of any court or by authority of any law of this State, and may transact business in such capacity in like manner as an individual * * *." The third paragraph is the one particularly involved in this proceeding. The first sentence of this paragraph provides: "If a person under commitment to the Department of Institutions dies, leaving any estate, and having no relatives at the time residing within this State, the Department of Institutions shall be entitled to administer the estate and to have letters of administration on the estate issued to the department."

The section goes on to provide that the Department shall be appointed guardian or administrator without bond, but requires the secretary designated by the Department to give a bond of not less than $100,000 for the joint benefit of the several estates and the state. The section also permits the Department to "receive such reasonable fees for its services as such guardian or administrator as the court allows," and provides for the disposition of these fees.

This section says, without any possibility of doubt, that if a person under commitment shall die leaving an estate, and such person shall have no relatives residing in this state, the Department of Institutions "shall be entitled to administer the estate" and to have letters issued to it. Is there any ambiguity in that language? Of course not. But, says the majority opinion, this statute must be construed with § 422 of the Probate Code, which provides, generally, for the order in which persons shall be entitled to administer estates. The first seven subdivisions of that section provide in what order the relatives of the decedent shall be entitled to letters. After the relatives, subd. 8 provides that the public administrator shall next be entitled, subd. 9 provides for creditors, and subd. 10 for "any person legally competent."

The majority opinion says that the only effect of § 6660 of the Welfare and Institutions Code was to render the Department of Institutions competent to act as administrator, and that the Department, therefore, falls within class 10 of § 422 of the Probate Code. Undoubtedly § 6660 rendered the Department competent to act as administrator, but that is not all it did. By express language it provided not only that it could act, but when it was "entitled" to act. The pertinent language of the section is that if a person under commitment to the Department dies leaving any estate "and having no relatives at the time residing within this State" the Department "shall be entitled to administer the estate and to have letters of administration on the estate issued to the department." The two phrases quoted state, without ambiguity, that, if such a person dies and such person has no relatives residing in this state, the Department is entitled to have letters issued to it. Stated another way, unless the decedent leaves relatives residing in this state the Department is entitled to administer. The interpretation contained in the majority opinion completely disregards the phrase first quoted referring to relatives. Section 422 of the Probate Code is a general section referring to the persons entitled to administer estates. Section 6660 of the Welfare and Institutions Code is a specific section referring to who shall be entitled to administer estates of persons of a particular class—i. e., persons committed to the Department. Under elementary principles a general statute is controlled by a specific statute, particularly where, as here, the specific statute is subsequent in time. See cases collected 23 Cal.Jur. p. 743, § 119.

The two statutes are not inconsistent. Section 6660 of the Welfare and Institutions Code created a new independent class —that is, as to committed persons, leaving no relatives residing in this state, the Department of Institutions is entitled to administer. The legal effect of the amendment was to add, by special statute, and by implication, a new class between class 7 and 8 of the old general statute. The majority opinion, in apparent realization of the fact that the construction contained therein disregards the plain language of § 6660, attempts to justify such strained construction by the argument that otherwise § 6660 would violate § 24 of Art. IV of the Constitution. Resort is then had to the argument that statutes should be construed so as to make them constitutional, if possible. The basic premise of this argument is unsound. Section 6660 of the Welfare and Institutions Code did not "amend" § 422 of the Probate Code within the meaning of the constitutional provision in question. Section 6660 is an independent statute which affects § 422, but it does not "amend" it. Every new law dealing with a particular subject matter does not have to re-enact all the old laws dealing with that subject. If the rule stated and applied by the majority were the law, every new statute in pari materia with others would be unconstitutional unless it re-enacted all the old statutes. That, of course, is not the law.

There can be no doubt but that § 6660 affects § 422, and, in legal effect, amends, by implication, the last mentioned section. But the law is well settled that the constitutional provision in question has no application at all to situations where a new provision amends by implication an old one. In disposing of the identical argument made by the majority in the instant case, the Supreme Court, in Matter of Coburn, 165 Cal. 202, 211, 131 P. 352, 356, stated: "Finally, the constitutionality of the act is questioned on the ground that it seeks to revise or amend an existing law (i. e., the Code of Civil Procedure) by reference to its title, instead of re-enacting and publishing at length the act revised or section amended. (Const., art. IV, § 24.) If the adoption of section 1767 amended the existing law as declared in the Code of Civil Procedure, it amended it by implication only, and it is established by our decisions that the constitutional provision relied upon has no application to such implied amendments. Hellman v. Shoulters, 114 Cal. 136, 153, 44 P. 915, 45 P. 1057; Deyoe v. Superior Court, 140 Cal. [476], 490, 74 P. 28, 98 Am.St.Rep. 73. Such, too, is the prevailing rule in other states which have a similar constitutional restriction. People v. Mahaney, 13 Mich. 481; Cooley Const.Lim. (7th Ed.), 216 and cases cited."

This same well settled rule was stated as follows in People v. Peete, 54 Cal.App. 333, 368, 202 P. 51, 66: "If it be true, as counsel assert, that section 1089 by implication amends or repeals section 1123 of the Penal Code, the section may not for that reason be held to be unconstitutional. Section 24 of article 4 of the Constitution declares that—'No law shall be revised or amended by reference to its title; but in each case the act revised or section amended shall be re-enacted and published at length as revised or amended.' It is established by the decisions of this state that an act is not revised nor a section amended, within the purview of the above inhibition, by an act which adds a new Code section and does not purport to repeal or amend any of the sections of the Code to which it is added. An amendment by implication is in no proper sense of the word an 'amendment' within the meaning of this constitutional provision. It is not within the evils aimed at by the inhibition. [Citing cases.]" In addition to the above two cases, and the cases cited therein, see Pennie v. Reis, 80 Cal. 266, 22 P. 176; University of California v. Bernard, 57 Cal. 612; Evans v. Superior Court, 215 Cal. 58, 8 P.2d 467. The majority opinion not only attempts to exercise the legislative function by interpreting out of the section a material portion thereof, but attempts to overrule the legal principle established by these cases.

There is nothing in the history of § 6660 of the Welfare and Institutions Code that leads to any other conclusion than that the legislature has provided that in cases falling within the section, after relatives, the Department of Institutions shall be entitled to letters. The majority opinion correctly points out that the forerunner of the section was § 2179 of the Political Code, adopted in 1903. That section permitted the secretary of the state commission of lunacy, where the insane person had no guardian, to apply to be appointed guardian. Then in 1909 the legislature provided that when an insane person shall die in a state hospital and "having no relatives or guardian," or where the secretary was already guardian, the secretary may apply for letters of administration. Thus, for the first time appears the concept that where the incompetent has no relatives the department may act as administrator. In 1929 the section was amended to provide that where the insane person dies in a state hospital "having no relatives at the time residing in this State" the secretary shall be entitled to letters "in preference to any other person." Then in 1937, when the section was carried over into the Welfare and Institutions Code as § 6660, St.1937, p. 1158, the provision in reference to preference was omitted. In 1941 it was again added in the language quoted in the first part of this opinion. Thus is to be observed a quite consistent policy since 1929, and with the exception of the period 1937–1941, to provide that the Department of Institutions or its secretary should be entitled to letters after relatives residing in this state.

Respondent makes several arguments not mentioned in the majority opinion which should be mentioned. It is urged that if § 6660 of the Welfare and Institutions Code be interpreted as it is in this dissent, it is unconstitutional for several reasons. It is urged that § 6660 is a limitation on local self-government. Under § 7½ of Art. XI of the Constitution, a county may frame a charter providing for public administrators. The charter of the City and County of San Francisco provides for such an officer. Sections 1140 and 1141 of the Probate Code set forth the duties of a public administrator. It is argued that if the powers and duties of the public administrator can be changed by "special acts of the State Legislature, then any attempt to provide for such powers and duties in the charter is an idle act * * *." (Resp.Br. p. 11.) Because the Constitution provides that counties may have public administrators, and the statutes prescribe their duties and powers, it does not follow that the legislature cannot, by separate statute, limit their duties in favor of another class of persons or another agency of the state. As a matter of fact, § 422 of the Probate Code fixing the order in which persons shall be entitled to administration, limits the rights of public administrators and relegates them to class 8. As already pointed out, all that § 6660 of the Welfare and Institutions Code does is to create a new classification.

Respondent also objects to the provision that the Department, unlike most other administrators, is not required to file a bond in each estate. While no specific bond is required for each estate—a needless expense when a state agency is involved—the act does require that the secretary or other officer designated by the Department must give a bond in such amount as may be deemed necessary by the director of the Department but which in no case may be less than $100,000. This bond is intended to protect the estates administered and the State of California.

Section 6660 provides: "The Department of Institutions shall receive such reasonable fees for its services as such guardian or administrator as the court allows." Respondent contends that since the Probate Code fixes the fees of administrators, to allow a special rule for the Department would be a violation of paragraph 12, § 25, Art. IV of the Constitution, which provides that the legislature shall not pass special or local laws "Affecting estates of deceased persons, minors, or other persons under legal disabilities." No fees have been awarded to the Department in the instant case, so that this issue is not now before the court. However, it is the duty of the courts to interpret statutes so as to uphold them, if reasonably possible. The obvious interpretation of the phrase "reasonable fees for its services * * * as the court allows" is that the Department is entitled to such fees as have been declared by the legislature to be reasonable in § 901 of the Probate Code. So interpreted, the statute simply gives to the Department, as guardian or administrator, the same fees as are allowed to other guardians and administrators.

Respondent admits that corporations may be formed by special act for a public purpose, but argues that the administration of the estate of a deceased person is not a public purpose. This argument loses sight of the rather obvious consideration that administration of estates of deceased persons in certain instances becomes a public responsibility, i. e., when they have no relatives. If the people of the state have sufficient interest in such estates to furnish county officials to administer them, then surely there is sufficient public purpose in administering the estates of persons who die in state institutions without relatives, to warrant making the Department a corporation for that purpose. The purpose is clearly a public purpose.

Respondent quotes Deering's General Laws 1937, Act 1749, page 880, § 1, which provides that private corporations acting as executors, administrators, or guardians must have a paid-up capital of $250,000. This argument is predicated on the theory that the Department is made a private corporation. It is not. It is a public corporation. Because this requirement is made for private corporations, it does not follow that different standards may not be set up for public corporations.

Finally respondent argues that § 6660 of the Welfare and Institutions Code creates an arbitrary classification of persons in violation of the Constitution. It should be noted that this section also provides that the Department may become the guardian of the estates of incompetent persons. Evidently the purpose of the legislation was to protect incompetents committed to the Department, during their lifetime, by permitting the Department, where there are no relatives residing in this state, to be appointed guardian of such incompetent, and to protect the estates of such incompetents after their death by permitting the Department to administer them. Inmates of such institutions frequently have claims and rights against third persons. The Department is in a position to protect such inmates and their estates. In most cases where the Department will be entitled to administer the estate of such incompetent, it will already be administering that estate as guardian. These various considerations obviously motivated the legislature in making the classification. The classification is a reasonable one and is not arbitrary.

In my opinion the order appealed from should be reversed.

STOCKWELL v. BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY et al.

Civ. 12520.

District Court of Appeal, First District, Division 1, California.

May 1, 1944.

Rehearing Denied May 31, 1944.

Hearing Denied June 29, 1944.

1. Negligence 🔑32(1)

The general rule is that an owner in occupation of the premises violates his duty to an invitee when he negligently allows conditions to exist that imperil the safety of persons upon the premises, and for such violation he is responsible in damages to the injured person.

2. Colleges and universities 🔑10

In action by student against university for loss of eye as result of being struck by shot from BB gun discharged by unknown boy, whether university negligently permitted use of ground by boys using BB guns though campus was game refuge was for jury.

3. Trial 🔑142, 165, 178

A nonsuit or a directed verdict may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and all legitimate inferences which may be drawn therefrom the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff if given.

4. Appeal and error 🔑927(3), 989

On appeal from a judgment of nonsuit, only the evidence favorable to plaintiff and all legitimate inferences therefrom can be considered, inconsistencies in the evidence must be disregarded, and the evidence construed as strongly as possible in favor of plaintiff, who is entitled to a judgment on the merits if there is any substantial evidence in his favor.

5. Negligence 🔑136(9)

Negligence is the ultimate fact to be inferred from many probative facts, and, when different conclusions as to negligence can be reasonably drawn from the admitted facts, it is not for the court to instruct jury as to which one is to be adopted.

6. Negligence 🔑136(14)

The question whether reasonable care has been used by an owner in the maintenance of premises is for jury, and if there is any doubt it is the duty of the trial court on motion for nonsuit to let the case go to the jury.

7. Colleges and universities 🔑10

In action by student against university for loss of eye as result of being struck by shot from BB gun discharged by unknown boy, where student adduced evidence that university had permitted promiscuous use of grounds by boys using BB guns, it could not be inferred on university's motion for nonsuit that injury was entirely due to a willful and malicious act.

8. Negligence 🔑136(25)

The question of proximate cause, where it is claimed that an intervening cause has broken the chain of causation, is a question of fact for the jury.

◆

Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Action by Eugene Stockwell against Board of Trustees of Leland Stanford Junior University and others for personal injuries. From a judgment dismissing the action, plaintiff appeals.

Judgment reversed.

J. T. Blalock, of Los Angeles, and Raymond G. Wilkins, of San Jose, for appellant.

Campbell, Hayes & Custer, of San Jose, for respondents.

KNIGHT, Justice.

The plaintiff, Eugene Stockwell, eighteen years of age, was enrolled as a student at Stanford University in the freshman class, and while on the university campus sustained personal injuries resulting in the loss of his right eye. Alleging that his injuries were proximately caused by the negligence of the university in failing to use reasonable care in maintaining its premises in a safe condition, he brought this action to recover damages for the loss of his eye. The cause came on for trial before a jury, but when plaintiff rested his case the trial court granted a nonsuit. From the judgment of dismissal entered thereon plaintiff appeals.

The circumstances under which plaintiff was injured are not disputed. Once a year, in accordance with an established custom of the university, all classes are dismissed and the students are requested and expected to go over to the grounds surrounding Stanford Convalescent Home located on the campus and operated by the university, to help clean up the grounds, after which a barbecue is held. On May 4, 1938, plaintiff was one of some two thousand other students who participated in that activity, and toward the end of the afternoon they started home. Plaintiff was riding with several other students in the open body of a small made-over pick-up truck, and was facing the rear of the truck. They were travelling in a line of cars on the roadway running along San Francisquito Creek, which separates the campus from the town of Menlo Park. When they were about half way between the convalescent home and the main state highway 101, or about 250 yards from the highway, and while still on the university campus, plaintiff was struck in the right eye by a bullet fired from a BB gun. Plaintiff and those riding with him did not realize at first the severity of plaintiff's injuries, but he was driven at once to the campus hospital where he was treated by a doctor, and it was ascertained that the bullet had penetrated and lodged in the eyeball, destroying the eye. He remained there over night and the next day was removed to the Stanford Hospital in San Francisco where X-rays were taken and the bullet was extracted from the eyeball. Sometime afterwards it became necessary to remove the eyeball.

Neither plaintiff nor any of those riding with him in the truck saw who fired the shot, but the student driving the car directly behind the one in which plaintiff was riding, named Bernard Kane, saw plaintiff suddenly "double up and clutch his face over his eye" and Kane then looked to the side and saw two boys standing about 20 feet from the roadway in the low bushes, within the university grounds, and one of them had a BB gun. On account of the heavy traffic Kane was unable to stop his car at that point, but as soon as he reached the state highway he stopped, ran back and overtook the boys, and told them to get off the campus; and the boys ran down into the creek bed. He did not obtain their names because he did not know at that time that plaintiff had been badly hurt. Consequently the identity of the boy who had the BB gun was never ascertained. He is referred to in the record as Richard Roe.

[1] Plaintiff was admittedly an invitee on the premises. He was a student at the university, and had paid the regular tuition fees required. At the time of the injury he was attending an annual function authorized by the university; the place where the injury occurred was upon the university's premises, and it occurred at a place where plaintiff was expected and invited to be. The general rule is that "An owner in occupation of the premises violates his duty to an invitee when he negligently allows conditions to exist on the property which imperil the safety of persons upon the premises. For such violation he is responsible in damages to the injured person. * * *" 38 Am.Jur. p. 756. In other words, as said in 19 Cal.Jur. pp. 618, 619: "Not only must an owner of land or a proprietor of premises abstain from willfully injuring an invitee, but he owes such person the duty of maintaining his property in a safe condition, and of exercising reasonable care in protecting the invitee from injury through his negligence. * * * The question whether reasonable care has been used in the maintenance of premises is for the jury. * * *"

[2] In the present case plaintiff produced evidence to the effect that although the university campus is officially declared a game refuge and that signs are displayed at numerous places forbidding hunting and the possession of guns, for two years or more preceding the day on which plaintiff was injured there had been a promiscuous use, on the campus and particularly along San Francisquito Creek, of BB guns and to some extent small rifles by young boys and some students, and that this was well known to those charged with the responsibility for the safe condition of the university grounds. He also produced evidence which he claimed was legally sufficient to support the fair inference that under the existing circumstances the university failed to exercise reasonable care to protect its students from the danger of being injured by the use of BB guns, and that this was especially true on this particular day when it knew that in response to its request a large number of students would be required necessarily to travel back and forth over this very road in order to participate in this college activity. Plaintiff contends, therefore, that in view of such evidence showing the existence of the above conditions, the question of negligence on the part of the university was not one of law to be determined by the court, but was one of fact which he was entitled to have submitted to and passed upon by the jury.

It is our opinion that plaintiff's contention must be sustained.

[3] The often quoted rule defining the power of a trial court to grant a nonsuit is: "A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.' [citing numerous cases] Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." Estate of Flood, 217 Cal. 763, 21 P.2d 579, 580; Estate of Lances, 216 Cal. 397, 14 P.2d 768.

[4] The same doctrine relating to evidentiary matters governs a reviewing court in the consideration and determination of an appeal from a judgment of nonsuit. Gove v. Lakeshore Homes Ass'n, 54 Cal. App.2d 155, 128 P.2d 716; Montgomery v. Nelson, 211 Cal. 497, 295 P. 1034; Harper v. Northwestern Pac. R. Co., 34 Cal.App.2d 451, 93 P.2d 821. In the determination of such an appeal the reviewing court is not permitted to argue inconsistencies in the evidence. Perkins v. Maiden, 41 Cal.App. 2d 243, 106 P.2d 232. It must construe the evidence as strongly as possible in favor of a plaintiff, since he is entitled to a judgment on the merits if there is any substantial evidence in his favor. Cain v. Marquez, 31 Cal.App.2d 430, 88 P.2d 200. Moreover it must disregard all evidence in conflict with that in plaintiff's favor. Birch v. County of Orange, 186 Cal. 736, 200 P. 647. Every favorable inference fairly deducible from the evidence and every favorable presumption arising therefrom must be considered as facts established by plaintiff (Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; Harper v. Northwestern Pac. R. Co., supra), and where the evidence is susceptible of two constructions or if several inferences reasonably may be drawn therefrom, the reviewing court must take the view most favorable to plaintiff. Southern Cal. Tel. Co. v. Los Angeles, 45 Cal.App.2d 111, 113 P.2d 773.

So construing the evidence in the present case, among the facts established thereby were these: Police officers employed by the university to patrol the campus admitted having known that for several years past boys were accustomed to come upon the grounds to shoot BB guns and rifles; that trails up and along the banks of San Francisquito Creek had been made and used by them to come upon the grounds; that on numerous occasions the police officers had seen boys along the creek with BB guns; that they were not always able to catch the boys, and that on some occasions when they did catch them their guns were confiscated. In this connection one officer testified that there was some question as to whether it was legal to confiscate the guns, so on some occasions they would temporarily take possession of the guns and advise the boys to have their parents call for them; and the parents were told at that time that if the boys were again found in possession of a gun on the grounds they would take legal action; other times the police would tell the boys that they would have to take their guns home and not transport them through the university grounds. Plaintiff also produced several witnesses who testified that they had many times seen boys on the grounds with BB guns and that they had never seen the boys chased off. One boy testified that during the year prior to the accident he and other boys came upon the university grounds two or three times a month with their guns and were never chased off. Students at the university were produced as witnesses who testified that they had seen BB guns used on the campus, and one witness whose father was an officer of the university testified that he had used a BB gun on the campus; that his father instructed him not to shoot game or birds on the campus, but did not tell him he could not use the gun on the campus.

The campus covers some 9000 acres, and the university had a student population of between 4000 and 5000, plus a large staff of employees; and at the time plaintiff was injured the university had in its employ seven or eight police officers. However only two of them, besides the chief of police, were on duty during the daytime, and those two were not on duty during the same hours. The other officers came on duty at night. Although some 2000 students were gathered at the convalescent home on this particular day neither of the two officers who were assigned to duty that day were there present, nor at or near the scene of the shooting. One of them was not on duty at all; it was his day off; and the other was not sure whether he came on duty at two or four o'clock in the afternoon, and he did not remember whether he had been around the convalescent home at all that day nor whether he was present during the barbecue. He testified that ordinarily on this annual occasion he would go through the convalescent home grounds only after the roads were cleared to see if the barricades had been removed. At any rate he knew nothing of the injury to plaintiff until some two weeks later. At athletic functions the board of athletic control employed a number of students to do police work, and some were present performing that duty at the convalescent home, but their duties consisted chiefly in directing traffic and aiding in parking cars.

[5, 6] As said in the case of Hennesey v. Bingham, 125 Cal. 627, 58 P. 200, 202: "Negligence is the ultimate fact to be inferred from many probative facts. The inference is within the province of the jury, even when the facts are undisputed. When different conclusions as to negligence can reasonably be drawn from the admitted facts, it is not for the court to instruct the jury as to which is to be adopted by them." Again in Souza v. Underwriters' Fire Patrol, 116 Cal.App. 13, 2 P.2d 200, wherein a judgment of nonsuit was reversed, the court said that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be drawn from the evidence. Moreover, as heretofore stated, the question of whether reasonable care has been used by an owner in the maintenance of the premises is for the jury (16 Cal.Jur. p. 619) and it is the duty of the trial court on motion for nonsuit, if there is any doubt, to let the case go to the jury. Bush v. Weed Lumber Co., 55 Cal. App. 588, 204 P. 24; Elder v. Rose, 63 Cal.App. 545, 219 P. 74.

Applying the foregoing legal rules to the factual situation presented, it becomes apparent not only that the question of whether under all the circumstances shown the university exercised reasonable care to protect its students from the perils of the promiscuous use on the premises of BB guns was one of fact which plaintiff was entitled to have submitted to and determined by the jury, but also that if a verdict favorable to plaintiff had been returned, it would not have been lacking in evidentiary support; and that therefore the court was not justified in granting the nonsuit.

There is no disputing the legal principle upon which defendants seem strongly to rely, that a person invited upon the premises of another may recover damages from such owner for injuries received owing to the dangerous condition of the premises known to the owner and not known to the person so injured, but that such owner is not bound to keep his premises absolutely safe. Dingman v. A. F. Mattock Company, 15 Cal.2d 622, 104 P.2d 26; Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793. However, there is nothing in the statement of such legal principle indicating that the question of the owner's knowledge of the dangerous condition is one of law. Here as pointed out the evidence affirmatively shows knowledge on the part of the university of the promiscuous use of BB guns on the premises, and it was doubtless a question of fact as to whether the promiscuous use thereof under the conditions shown by the evidence constituted a dangerous condition against which the university negligently failed to protect its invitees.

[7] Defendants contend that even assuming they were negligent, there was no evidence showing that any of the alleged acts of negligence was the proximate cause of plaintiff's injury. In this regard they argue that plaintiff's injury was due entirely to an intervening cause—the wilful and malicious act of the third party producing the injury—and that no amount of adequate policing could have prevented the casualty. The answer to this contention is that there is no evidence showing any wilful or malicious act. To so infer would be to indulge in mere guess and speculation; and since on motion for nonsuit and on an appeal from a judgment of nonsuit all reasonable inferences must be drawn in plaintiff's favor, it would be violative of plaintiff's rights here to infer that the act was wilful or malicious. The present case is essentially different from Reithardt v. Board of Education, 43 Cal.App.2d 629, 111 P.2d 440, relied on by defendants. That was a case of an isolated act, and as therein held, no danger was present except in such an instance as occurred, the willful and deliberate act of another student. Here

evidence was produced showing that there existed on defendants' premises a continuous and promiscuous use of BB guns and rifles by trespassing boys, and one of the officers testified that he realized that this created a dangerous condition. Moreover, in the Reithardt case, it was conceded that the particular act causing the injury was wilful and deliberate.

[8] Then again, as to the question of proximate cause, where it is claimed that an intervening cause has broken the chain of causation, it has been repeatedly held that such a question is one of fact for the jury. The general rule is stated in Springer v. Sodestrom, 54 Cal.App.2d 704, 129 P.2d 499, 502, as follows: "* * * the question whether or not an intervening act of negligence breaks the chain of causation so as to make the original negligence a remote cause rather than a proximate cause of an injury, is always a question of fact to be decided by the jury. Pastene v. Adams, 49 Cal. 87; Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L.R.A.,N.S., 559, 139 Am.St.Rep. 134; Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825; Royal Indemnity Co. v. Midland Counties Public Ser. Corp., 42 Cal.App. 628, 183 P. 960; Polloni v. Ryland, 28 Cal.App. 51, 151 P. 296; Rae v. California Equipment Co., 12 Cal.2d 563, 86 P.2d 352; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044; Fennessey v. Pacific Gas & Electric Co., 20 Cal.2d 141, 124 P.2d 51." A considerable portion of the last cited case is quoted in the Springer case, to the same effect.

Many other authorities could be cited on this point, among which is Rovegno v. San Jose K. of C. Hall Ass'n, 108 Cal.App. 591, 291 P. 848, 850. There plaintiff's son was drowned in a swimming pool. The only negligence alleged was the failure of the defendants to provide a life guard. The defendants urged that even if such a guard had been present there was no showing that the boy's life would have been saved. The trial court, as in the present case, granted a nonsuit, and the appellate court reversed the judgment, stating that: "Just what would have happened had a life guard been present is, of course, not capable of direct proof. It is largely a matter of speculation or of inference. Even so, it has been held that the question is one for the jury and not for the court." Later on the court stated: "From the foregoing considerations we feel justified in holding that it was for the jury, rather than the trial court, to pass on the question of proximate cause and to determine whether the arrangements made by respondents were reasonably adapted to the end of protecting the lives of the association's members and guests and were such as ordinary prudent persons, situated as respondents were, would have made." See also Lindsey v. De Vaux, 50 Cal.App.2d 445, 123 P.2d 144, where the Rovegno case is cited and quoted from with approval as the basis of the decision there on the question of proximate cause.

Such was the situation here. Just what would have happened if more police had been on duty that day, or if a police officer had been assigned to patrol the road which the students were to use leaving the barbecue, where it was well known boys were often present with BB guns, was a matter of inference, and was not susceptible of direct proof. The real question in the case was whether under the circumstances there was adequate and reasonable police protection on the grounds or at the place of the shooting, and this was an issue for the determination of the jury as a matter of fact, and not for the court as a matter of law. To hold otherwise would amount to a determination that defendants' acts and conduct constituted the exercise of reasonable care as a matter of law, and in our opinion the evidence does not justify such a determination.

The remarks made by the trial court in granting the nonsuit indicate that its refusal to allow the case to be submitted to the determination of the jury was based largely upon the conclusion that because of differentiating facts, a clear distinction was to be drawn between the present case and those cited to the court by the plaintiff; and on this appeal both parties have cited numerous cases, many from foreign jurisdictions, in support of the respective contentions made by them concerning the main issue as to whether the university exercised reasonable care in maintaining its premises in a safe condition for those it had invited to come upon them. Since, however, the determination of an issue of that kind depends upon the peculiar facts and circumstances surrounding each individual case, it cannot be said that any of the cases cited by either party, nor for that matter any of the passages quoted by defendants from the Restatement of the Law of Torts, are here controlling. Furthermore it must be remembered that the province of the trial court in ruling on the motion for nonsuit, and this court on appeal, was and is to determine only whether the evidence adduced at the trial, taken as true, was sufficient to present a debatable question as to whether the university had exercised reasonable care in maintaining its premises in a safe condition for those it had invited to come upon it. If it was, then plaintiff was entitled to have that issue submitted to the determination of the jury. In this connection it may be stated that in only two of the cases cited by defendants did the trial court refuse to allow that question to be submitted to the jury. Both were cases from foreign jurisdictions; and there is no similarity of facts between those cases and the present one. The others involved appeals from judgments based on verdicts, or rulings on demurrer. For the foregoing reasons we have not deemed it necessary to enter upon a detailed discussion of the numerous cases thus cited.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; SHENK, EDMONDS, and TRAYNOR, JJ., dissenting.

63 Cal.App.2d 817

WARE v. HELLER et al.

Civ. 13901.

District Court of Appeal, Second District, Division 3, California.

April 18, 1944.

Hearing Denied June 15, 1944.

1. Pleading 🔑129(5)

In action for deficiency judgment, allegations of complaint relating to execution of notes and trust deed and terms of payment and default were admitted by defendants' failure to deny them.

2. Mortgages 🔑330

In action in 1941 to recover deficiency judgment after sale in 1936 under trust deed securing note executed in 1931, 1933 statute limiting recovery to difference between unpaid balance and value of property at time of sale was inapplicable. Code Civ.Proc. § 580a.

3. Courts 🔑97(6)

Question of legislature's intention to make statute retroactive is not a federal question, but is one of statutory interpretation, on which state courts' decisions are controlling.

4. Mortgages 🔑330

Provisions of statute limiting recovery, in actions for deficiency judgment, to difference between unpaid balance and value of property at time of sale, as under trust deed, are not retrospective because not intended to be by legislature. Code Civ.Proc. § 580a.

5. Statutes 🔑261

A "retrospective law" is one that relates back to previous transaction and gives it some legal effect different from that which it had under law when it occurred.

A "restrospective law" has also been described as one which affects rights or obligations, transactions and conditions which are performed or exist prior to the adoption of the statute. The terms "retrospective" and "retroactive" are interchangeable.

See Words and Phrases, Permanent Edition, for all other definitions of "Retroactive", "Retrospective" and "Retrospective Law".

6. Statutes 🔑263

Statutes will be construed to operate prospectively unless legislative intent to contrary is clearly expressed.

7. Mortgages 🔑375

In action for deficiency judgment, no pleading was necessary to enable defendants to make contention that statute limiting recovery to difference between unpaid balance and value of property at time of sale under trust deed was applicable. Code Civ.Proc. § 580a.

8. Appeal and error 🔑870(5)

Where plaintiff demurred generally to separate affirmative defenses in action for deficiency judgment after sale under trust deed, rulings sustaining demurrers without leave to amend were before court for review on defendants' appeal from summary judgment for plaintiff.

9. Limitation of actions 🔑25(10)

As regards applicability of the four year limitation statute, action for deficiency judgment after foreclosure of trust deed was "founded on instrument in writing" although deficiency recoverable may not be ascertainable until security has been exhausted and therefore it is not competent until that time to bring action to recover it. Code Civ.Proc. § 337, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Founded on an Instrument in Writing".

10. Limitation of actions ⊂⇒6(3)

Action in 1941 for deficiency judgment after sale in 1936 under trust deed executed in 1931 was governed by 1933 statutes limiting time for bringing such actions to three months after sale. Code Civ.Proc. § 337, subd. 1; § 580a.

11. Limitation of actions ⊂⇒6(1)

A statutory provision dealing with period within which action may be brought, if it does not so reduce time as to constitute deprivation of opportunity to enforce pre-existing rights, is not "retroactive" since it does not affect a right or obligation of the pre-existing contract.

12. Limitation of actions ⊂⇒6(1)

Procedural changes, such as changes in limitation statutes, operate on existing causes of action and defenses, and hence it is a misnomer to designate them as having "retrospective effect".

See Words and Phrases, Permanent Edition, for all other definitions of "Retrospective Effect".

13. Pleading ⊂⇒214(3)

In action for deficiency judgment after sale under trust deed, allegations of special defense that defendants filed no petition for postponement of sale under moratory statutes are to be accepted as true as against general demurrer. St.1935, p. 1215, § 22; St.1937, p. 467, § 22.

14. Mortgages ⊂⇒375

That defendants who executed trust deed in 1931 filed no petition to postpone sale thereunder in 1936, over eight months after moratory statute became effective, and failed to take advantage of other opportunities offered by moratory statutes, did not prevent plaintiff in action for deficiency judgment from taking advantage of statutory time extensions. St.1935, p. 1214, § 19; St.1937, p. 466, § 19; St.1939, p. 1051, § 19; St.1941, p. 270, § 20.

15. Mortgages ⊂⇒375

If period within which action for deficiency judgment after sale under trust deed could be brought expired in 1938, it was not extended by moratory statutes. Code Civ.Proc. § 337, subd. 1; St.1935, p. 1214, § 19; St.1937, p. 466, § 19; St.1939, p. 1051, § 19; St.1941, p. 270, § 20.

16. Limitation of actions ⊂⇒25(10)

Four-year limitation on actions on obligation founded on written instrument no longer applies to actions for deficiency judgment after sale under trust deed, in view of 1933 proviso to effect that time for such actions shall not extend beyond three months after sale. Code Civ.Proc. § 337, subd. 1.

17. Mortgages ⊂⇒375

Where defendants in action for deficiency judgment after sale in March, 1936, under trust deed relied on agreement that provisions of statutes requiring such actions to be brought within 3 months after sale should be extended for 90 days after September 5, 1936, effect thereof was to extend time to sue, but it did not constitute new statute of limitations, and since action would have been barred after December 4, 1936, time to sue was extended by 1935 and later moratory statutes. Code Civ.Proc. § 337, subd. 1; St.1935, p. 1214, § 19; St.1937, p. 466, § 19; St.1939, p. 1051, § 19; St.1941, p. 270, § 20.

18. Judgment ⊂⇒186

Plaintiff's motion that amended answer be stricken and summary judgment entered for plaintiff constituted an attack on answer as it then stood and propriety of granting of motion must be tested on understanding that answer included separate defense to which general demurrer was pending. Code Civ.Proc. § 437c.

19. Mortgages ⊂⇒375

Defendants in action for deficiency judgment after sale under trust deed had burden of proving affirmative defense that plaintiff had agreed not to bring such an action unless commenced within 90 days after September 5, 1936.

20. Judgment ⊂⇒185
Limitation of actions ⊂⇒14

Defendants in action for deficiency judgment after sale under trust deed were entitled on plaintiff's motion for summary judgment, to take advantage of plaintiff's affidavit setting up written agreement that provisions of 3 months' limitation statute should be extended for 90 days after September 5, 1936, but such agreement did not sustain defense that no such action would be brought unless commenced within 90 days after September 5, 1936. Code Civ. Proc. § 337, subd. 1.

◆

Appeal from Superior Court, Los Angeles County; A. P. Bray, Judge.

Action by Alice V. Ware against Anna Heller and another to recover a deficiency judgment after sale under a trust deed. From a summary judgment for plaintiff, defendants appeal.

Affirmed.

Swaffield, Swaffield & Madden, of Long Beach, for appellants.

Harry G. Sadicoff, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

In this action to recover a deficiency judgment after a sale under a trust deed, the plaintiff sought and obtained a summary judgment, from which the defendants have appealed. A demurrer had been sustained, without leave to amend, to several affirmative defenses which set up statutes of limitations, and that ruling is one of the subjects to engage our attention. So also is defendants' contention that the judgment should have been limited, under the provisions of section 580a, Code of Civil Procedure, to the difference between the value of the property at the time of sale and the balance remaining unpaid on the obligation which had been secured by the trust deed. We have concluded that plaintiff's cause of action was not barred, and that the provisions of section 580a were inapplicable.

[1] According to the allegations of the complaint, admitted by defendants' failure to deny them, on August 27, 1931, the defendants executed a promissory note in plaintiff's favor (we may disregard the deceased, joint tenant, payee) and a trust deed to secure the same. The principal of the note, $20,000, was to be paid September 1, 1934, and $350 interest was due quarterly. Only a portion of the interest payment due June 1, 1934, was paid, and the next four quarterly payments of interest became delinquent. Nor was the principal paid. Steps were then taken, whose regularity is not questioned, leading up to a sale of the trust property on March 5, 1936, the plaintiff bidding in the property for $15,000.00.

[2] No contention is made that the amount of the judgment, $7,458.95, is incorrect, provided the provisions of section 580a, limiting the amount of recovery to the difference between the unpaid balance and the value of the property at the time of sale, are not applicable to the case. It has been repeatedly held by the appellate courts of this state that the section does not apply in a case such as this where the note sued upon antedates the section. The case of Birkhofer v. Krumm, 1938, 27 Cal.App.2d 513, 81 P.2d 609, gathers together most if not all the cases decided up to its appearance, and it, in turn, is cited in most if not all of those determined since its publication. In the main, the decisions have been based on the conclusion that the section could not be given effect because of the constitutional prohibitions against the impairment of contracts. The question mark, placed after this conclusion by Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co., 1937, 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552, 108 A.L.R. 886, to which reference was made in Birkhofer v. Krumm, supra, 27 Cal.App.2d 513, 533, et seq., 81 P.2d 609, Bank of America v. Burg Bros., 1939, 31 Cal.App.2d 352, 354, 88 P.2d 196, and Drapeau v. Smith, 1939, 34 Cal.App.2d 84, 93 P.2d 157, has been underscored by the more recent case of Gelfert v. National City Bank, 1941, 313 U.S. 221, 61 S.Ct. 898, 85 L.Ed. 1299, 133 A.L.R. 1467, and the defendants make the contention that in view of the position taken by the federal Supreme Court the appellate courts of this state should abandon their position and recognize that there is no constitutional limitation upon the power of the legislature to make section 580a apply to notes executed before its effective date.

[3-5] We are not passing judgment upon defendants' contention, for even if they should be found right in their position, it would not determine that section 580a applied to this case. In spite of the fact that the two points are frequently confused into one, the question of the constitutionality of retroactive legislation and the question of the intention of the legislature to make a statute retroactive are distinct questions. The latter question is not a federal one, but one of interpretation of a state statute, on which the decisions of the state courts are controlling.

So it is that those cases which hold that the legislature revealed no intention of making section 580a retroactive, and therefore it has no application to actions on notes which are dated prior to 1933, retain their authority, whatever may be said of the controlling authority of the Gelfert case on the constitutional question. The following cases agree that the value-at-sale provisions of section 580a have no retrospective effect because it was not the legislature's intention that they should have. Bank of America v. Burg Bros., supra, 31 Cal.App.2d 352, 354, 88 P.2d 196; Craemer v. Norton Realty Co., 1939, 33 Cal.App.2d 340, 341, 91 P.2d 644; Drapeau v. Smith, supra, 34 Cal.App.2d 84, 86, 93 P.2d 157; Pacific States Sav. & Loan v. Painter, 1940, 37 Cal.App.2d 645, 647, 99 P.2d 1103. And see Bechtel v. Nelson, 1935, 10 Cal.App.2d 66, 68, 51 P.2d 99.

We agree with the conclusion of these cases. To hold that section 580a, which was enacted in 1933, applied to this action, brought on a note executed in 1931, would be to give it a retroactive or retrospective operation. Quoting the first part of the definition of "retrospective laws," given in 16 C.J.S., Constitutional Law, § 414, p. 856, we find: "A retrospective law is one that relates back to a previous transaction and gives it some different legal effect from that which it had under the law when it occurred." The case of Medical Finance Ass'n v. Wood, 1936, 20 Cal.App.2d Supp. 749, 63 P.2d 1219, furnishes a good example of what is meant by "retroactive" or "retrospective" operation. The court was there dealing with the question whether an amendment to the exemption statute applied to an execution levied under a judgment which had been entered before the amendment. We quote this enlightening comment (20 Cal.App.2d Supp. at page 751, 63 P.2d at page 1220): "The statute here contains no expression of an intent to operate on existing rights. It says nothing on the subject. Until it took effect the plaintiff, and any other person in like position, had a right to satisfy his demand by levy on any automobile his debtor might own. Application of this statute to his case would limit that right and take away a part of it. Hence the rule above stated prevents its application to his claim here in suit." "A retrospective law," the court stated in American States W. S. Co. v. Johnson, 1939, 31 Cal.App.2d 606, 613, 88 P.2d 770, 774, "is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. The terms 'retrospective' and 'retroactive' are interchangeable. [Citing cases.]"

[6] This principle is well established: "It is settled that every statute will be construed to operate prospectively unless the legislative intent to the contrary is clearly expressed." Jones v. Union Oil Co., 1933, 218 Cal. 775, 777, 25 P.2d 5, 6. There is no "intent to the contrary" expressed with respect to section 580a. It was added to the Code of Civil Procedure by an act (Stats.1933, p. 1669) which also added other sections to the codes and amended still others, "all relating" as the title of the act stated "to the hypothecation of real property and to obligations secured thereby." One of the new sections, 580c of the Code of Civil Procedure, makes specific reference to "existing deeds of trust," and one of the amended sections, section 2924 of the Civil Code, refers to mortgages "created after July 27, 1917." The intention of the legislature to make these two sections affect instruments already executed is expressed. No expression of an intention to make section 580a apply to existing trust deeds is found either in its terms or elsewhere.

[7, 8] It took no pleading to enable the defendants to raise the question we have been considering; had they been correct in their contention respecting it, there would have been found to be a fatal defect inherent in plaintiff's case. The remaining points pressed by the defendants we find presented as separate affirmative defenses in their amended answer. To five of these separate defenses general demurrers were sustained without leave to amend, and these rulings are before us for review on this appeal from the judgment. Cumming v. Auriemma, 1935, 7 Cal.App.2d 208, 210, 46 P.2d 209. Defendants' contentions are: that plaintiff's action was barred, (1) by subdivision 1 of section 337, Code of Civil Procedure; (2) by section 580a of the same code; (3) by section 343 of the same code; (4) by agreement of the parties; and finally, that the moratory statutes, on which plaintiff must rely, afford her no relief. This last point has two bases. First of all, defendants argue, the moratory statutes of 1935 and 1937, without which the chain, on which plaintiff's case hangs, would be broken, are not applicable to her case for the reason that they, the defendants, never availed them-

selves of the privileges afforded by those statutes. Moreover, defendants' argument continues, irrespective of any other statute, the period within which plaintiff might commence her action was limited by those provisions of subdivision 1 of section 337 which existed after as well as prior to the 1933 addition to the section, so that it expired September 1, 1938, and no moratory statute extended the time of an action which became barred on that date.

[9] Preliminary to a discussion of these questions we should note that, as stated in Bakersfield, etc., Co. v. McAlpine, etc., Co., 1938, 26 Cal.App.2d 444, 450, 79 P.2d 410, 413: "An action to recover a deficiency judgment is manifestly 'founded' upon the instrument secured by the * * * deed of trust * * * whereby the security is given, although the amount of the deficiency that the holder is entitled to recover may not be susceptible of ascertainment until the security has been exhausted; and therefore it is not competent until that time to bring an action to recover it." See also Everts v. Newhouse Inc., Ltd., 1938, 28 Cal.App.2d 407, 409, 82 P.2d 703, and statement of Supreme Court in denial of hearing in Security First Nat. Bank v. Sapkin, 1937, 19 Cal. App.2d 224, 227, 64 P.2d 1097, 66 P.2d 656.

[10] But for extensions granted by the succession of statutory moratoria, this action, commenced October 24, 1941, would undoubtedly be barred. Subdivision 1 of section 337 has since its enactment prescribed a four year period for actions "upon any contract, obligation or liability founded upon an instrument in writing." In 1933 a proviso was added to the subdivision to the effect that the time within which an action for a deficiency judgment might be brought "shall not extend beyond three months after the time of sale" under a trust deed. Section 343, being applicable only to actions for relief "not hereinbefore provided for," has no place in our picture. Section 580a, enacted in 1933, contained this sentence, referring to an action for a deficiency judgment: "Any such action must be brought within three months of the time of sale under such deed of trust or mortgage." By virtue of these two provisions of 1933 legislation, the time within which plaintiff was free to bring this action ended June 5, 1936, but for the moratory statutes.

Do these 1933, three months, statutes of limitations apply to this action, brought on a 1931 note? This question presents itself in view of our conclusion that the fair-market-value provisions of section 580a are inapplicable, because given no retroactive effect. The question takes on a more serious aspect when we find that the three months statutes, which became effective August 21, 1933, have been held not to bar an action for a deficiency judgment in an instance where the sale had taken place in June, 1933, leaving more than a month's time for bringing the action, and that the basis for the holding was that the statutes had not been given a retroactive effect. Security First Nat. Bank v. Sapkin, supra, 19 Cal.App.2d 224, 64 P.2d 1097, 66 P.2d 656; Christina v. Hightower, 1937, 22 Cal.App.2d 339, 70 P.2d 988. However, we find that without much discussion of principle and in only one instance a consideration of the possible objection that the sections (337 and 580a) were not intended to be retroactive, it has repeatedly been held that they are the statutes of limitations applicable to actions for deficiency judgments brought on notes made earlier than August 21, 1933, but where the sales took place after that date. Reynolds v. Jensen, 1936, 14 Cal.App.2d 558, 58 P.2d 687; Petit v. Blenkiron, 1936, 16 Cal.App.2d 751, 755, 61 P.2d 527; Palo Alto Mut. B. & L. Ass'n v. Cook, 1936, 17 Cal.App.2d 193, 194, 61 P.2d 499; Griffin v. Porter, 1942, 54 Cal.App.2d 254, 256, 128 P.2d 820. See also: Bakersfield, etc., Co. v. McAlpine, etc., Co., supra, 26 Cal.App. 2d 444, 446, 79 P.2d 410; and San Francisco Bank v. St. Clair, 1941, 47 Cal.App. 2d 194, 202, 117 P.2d 703.

[11, 12] There is no inconsistency in holding that the fair-market-value provisions of section 580a are not applicable to an action brought on a 1931 note, and in holding that the section's three months' statute of limitations is applicable. Provisions such as those first referred to, which would place a limitation upon the amount that the holder of a note may receive, fall within the definition of retrospective statutes; they would affect a right which existed before the statute was passed. But a provision dealing with the period within which an action may be brought, so long as it does not reduce the time to such an extent that it amounts to a deprivation of an opportunity to enforce a pre-existing right, is not "retroactive," because it does not affect a right or obligation of the pre-existing contract. As stated in Morris v. Pacific Electric Ry. Co., 1935, 2 Cal.2d 764,

768, 43 P.2d 276, 277, "[procedural changes] operate on existing causes of action and defenses, and it is a misnomer to designate them as having retrospective effect." The courts which decided Bakersfield, etc., Co. v. McAlpine, etc., Co., supra, 26 Cal. App.2d 444, 446, 451, 79 P.2d 410 and Griffin v. Porter, supra, 54 Cal.App.2d 254, 256, 128 P.2d 820, found nothing inconsistent in the two holdings, for each case approves both of them.

We have devoted some little attention to the question just discussed for the reason that, paradoxically, if the three months statutes govern, plaintiff's action is not barred; but if they do not govern it is barred. This is so because a succession of moratory statutes pick up plaintiff's cause of action and carry it safely past all bars, if the three months period would, but for the moratoria, outlaw it. But if the limitation statute is four years, no moratory statute granted plaintiff an extension. We have concluded, as already indicated, that the statute of limitations applicable to plaintiff's action is the three months statutes of sections 337 and 580a.

Four moratory statutes are of interest. Effective June 21, 1935, Chapter 348, page 1208, Statutes of 1935, provided, in section 19: "Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by * * * deed of trust * * * would expire by virtue of section 337 of the Code of Civil Procedure, or by virtue of * * * any other provision of law, during the period commencing with the effective date of this act and ending on February 1, 1937, such time is hereby extended so as not to expire until the first day of July, 1937." The sale involved in the present action having taken place March 5, 1936, the time for bringing this action was thus extended to July 1, 1937. In 1937 another moratorium (Stats.1937, p. 466) extended plaintiff's time, for Section 19, of Chapter 167, provided that "Whenever the time within which an action [such as ours] may be commenced * * * would expire" between May 5, 1937 and October 1, 1937, "such time is hereby extended so as not to expire" until July 1, 1939. By like provisions (Stats.1939, p. 1051), actions against which any statute would run between April 24 (or 25), 1939 and July 1, 1941, had their time extended until October 1, 1941. The time within which plaintiff could bring her action was further extended by section 20, Chapter 204, page 1270, Statutes of 1941, until October 1, 1943.

[13, 14] As we have already seen, the defendants take the position that these moratory statutes do not save plaintiff's action from the bar of the statute. Their first contention is that because they, the defendants, failed to take advantage of certain opportunities offered by the statutes, therefore the plaintiff may not take advantage of the extensions it provided. The allegations of one of the special defenses, to be accepted as true for the purposes of the demurrer, are to the effect that the defendants never filed a petition praying for a postponement of the sale of their property, nor a petition seeking to set the sale aside, as they were authorized to do in the statutes of 1935 and 1937 to which we have referred. Relying upon this sentence appearing in section 22 of each statute: "The failure on the part of any trustor * * * to file a petition within the times specified in this act, shall be deemed a waiver of the benefit of the provisions of this act," the defendants argue that they received no benefits under the statutes; therefore the plaintiff suffered no detriment because of them; hence the plaintiff may not avail herself of the extended periods in which to bring an action which they provide. We are aware of no comment upon this particular sentence in the opinions of the appellate courts of this state, but defendants' argument has been, satisfactorily, answered. In Rust v. Hill, 1941, 17 Cal.2d 517, 110 P.2d 657, and Goldenberg v. Wilner, 1941, 18 Cal.2d 399, 115 P.2d 820, it was held that moratory statutes which took effect too late for the debtors to obtain postponements of the sales of their property, that is, after the sales had taken place, were not intended and did not operate to extend the time within which actions for deficiency judgments might be brought, the court stating in Rust v. Hill (17 Cal.2d at page 520, 110 P.2d at page 658): "the creditor is not entitled to an extension of the time for bringing an action for a deficiency where the debtor has had no opportunity to invoke the beneficial provisions of the act for the reason that the power of sale was exercised before the act became effective." Defendants' property, it will be remembered, was not sold until March 5, 1936, over eight months after Chapter 348 of the Statutes of 1935 became effective. This case, therefore,

falls within the reasoning and under the authority of Harris v. Fitting, 1937, 9 Cal. 2d 117, 121, 69 P.2d 833; Bakersfield, etc., Co. v. McAlpine, etc., Co., supra, 26 Cal. App.2d 444, 449, 79 P.2d 410; O'Meara v. De Lamater, 1942, 52 Cal.App.2d 665, 668, 126 P.2d 671; and Schmidt v. Klipfel, 1943, 59 Cal.App.2d 197, 138 P.2d 740, and the benefits of the moratory statutes are extended to the plaintiff although the defendants took no active steps to avail themselves of their advantages.

[15, 16] The line of defense next taken by the defendants has one sound premise; no moratory statute extended the period within which an action could be brought if the period was one expiring in the year 1938. If the general provisions of subdivision 1, section 337, Code of Civil Procedure, apply to this case, and were the only ones to apply, the time within which plaintiff could have commenced the action expired September 1, 1938. However, as the general provisions of the subdivision which place a four year limitation upon "an action upon any contract, obligation or liability founded upon an instrument in writing," are followed by the proviso that actions for deficiency judgments must be brought within three months of the date of sale, we are led to the conclusion that the four year statute no longer applies to the special class of actions for which the three months limit is prescribed. See Read v. Mills Building Company, 1940, 39 Cal. App.2d 140, 143, 102 P.2d 542. What is said in Christina v. McLoughlin, 1937, 18 Cal.App.2d 410, 412, 63 P.2d 1174, about the four year statute barring the action should be read in the light of the argument there made that the three months statute was unconstitutional. Two conclusions were expressed: first, that the three months statute was not unconstitutional; second, if it was, the action was barred by the four year statute. The defendants also rely upon this quotation from Glashoff v. Glashoff, 1943, 57 Cal.App.2d 108, 113, 134 P.2d 316, 320: "In Rust v. Hill, supra, the creditor had sold the property in April, 1935, before the effective date of the act in June, 1935, and therefore the date of expiration was gauged by the date of sale, and not by the maturity of the obligation." We do not quite understand the purport of the "therefore," but the significance of the rest of the sentence is plain. Plaintiff having sought a deficiency judgment after the sale of trust property, the period within which the action could be commenced was three months from the date of sale, not four years from the maturity of the note.

But even if both the three months and the four year statutes are applicable, so that whichever falls first is a bar, nevertheless this action was commenced within an authorized period. Plaintiff had but one cause of action. The period within which she could bring suit upon it would, but for the moratory statutes of 1935 and 1937, have expired first on June 5, 1936, and then on July 1, 1937. As a result of the moratory acts, however, the period was extended so as not to expire until July 1, 1939. Therefore, it did not expire in 1938, and the failure of any moratory statute to save causes gasping their last in that year is of no moment in this case.

[17] The defendants put up two further defenses in the nature of a bar to plaintiff's action. The first appears in another affirmative defense to which a demurrer was sustained without leave to amend. Here the defendants alleged that by a writing, dated April 11, 1936, the plaintiff and the defendants agreed "that the provisions of the 1933 amendment to Section 337 of the Code of Civil Procedure should be extended for a period of ninety days from and after the 5th day of September, 1936," and they continued with their conclusion that as a result plaintiff's cause of action expired December 4, 1936. The effect of the agreement, of course, was similar to that of the moratory statutes; it extended the period within which the action could be brought, but did not constitute a new statute of limitations. Watts v. Currie, 1940, 38 Cal.App.2d 615, 618, 101 P.2d 764. So far as the parties had agreed, therefore, the action would have been subject to attack under the three months statutes any time after December 4, 1936, but for the 1935 and subsequent statutes. In view of those statutes they are immune from attack, for periods expiring in December of 1936 were picked up and extended.

[18] This leaves a separate defense, to which a general demurrer was interposed but not sustained, the second separate defense. In it the defendants made this claim: "That by an instrument in writing, dated April 11, 1936, upon which said instrument these defendants rely, plaintiff, for a valuable consideration, agreed with defendants that no action for a deficiency judgment against defendants would be sought, unless the same was commenced

within ninety (90) days after September 5, 1936." A subsequent sentence in this second defense was ordered stricken at the same time that the demurrers were sustained to the other defenses (which ruling is not under fire), but the demurrer to this defense was not ruled upon. Some four months later the plaintiff made, and the court granted, a motion under section 437c, Code of Civil Procedure, that the amended answer be stricken and a judgment entered for $7,458.95, and some incidentals not in question, in plaintiff's favor. The fact that at the time the motion was made and granted the demurrer to the second defense was pending, constituted no irregularity of which complaint may be made. The motion for a summary judgment constituted an attack upon the answer as it then stood, and the order is to be tested upon the understanding that the second defense was a part of the answer. The pendency of an attack by way of a demurrer did not serve to isolate the defense so that by some magic it was not a part of the total defense which the defendants were interposing to plaintiff's suit.

[19, 20] The second defense was an affirmative one, the burden of proving it upon the defendants. In their affidavit countering plaintiff's motion for a summary judgment, the defendants made no attempt to reveal any written agreement. They were, however, doubtless entitled to take advantage of plaintiff's affidavit setting up a writing bearing the date of April 11, 1936. But, contrary to the allegations of the second defense, and of defendants' argument on appeal, the writing produced by the plaintiff has no such terms, or effect, as that which defendants would ascribe to it. Reliance is placed upon these words in the writing: "It is expressly agreed that the provision of Section 337 of the Code of Civil Procedure of the State of California, shall be extended for a period of ninety days from and after the 5th day of September, 1936." Then the provision referred to is identified as being that which limits the bringing of an action for a deficiency judgment to a period not extending beyond three months from the date of sale. The effect of this agreement was to extend, not limit, the time within which the plaintiff might sue for the balance due her. Why the parties felt it necessary to extend plaintiff's time to sue, in view of the extension afforded by the moratorium act of 1935, is not apparent, but the absence of a known reason does not serve to write into their agreement a term which they did not insert, so as to make of it an agreement limiting the period provided by a statute not referred to, rather than extending the period beyond that of a statute particularly identified.

Inasmuch as plaintiff's cause of action was not limited by the provisions of section 580a, Code of Civil Procedure, and the moratory statutes extended her time to sue, no reason appears to reverse the summary judgment; it is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

64 Cal.App.2d 207

TREAT v. OGDEN.

Civ. 12533.

District Court of Appeal, First District, Division 1, California.

May 1, 1944.

Rehearing Denied May 31, 1944.

Hearing Denied June 29, 1944.

1. Costs 🔑254(6)

In action for accounting in partnership dissolution under remittitur providing that each party should be allowed his costs on appeal taken by other party, plaintiff was entitled to recover only half and not entire amount he paid for reporter's transcript, where parties agreed that they would present their respective appeals in a single transcript. Code Civ.Proc. § 953a.

2. Costs 🔑254(1)

Money paid to reporter by either party for portions of transcript obtained by them prior to judgment of trial court was not recoverable as costs on appeal.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by A. J. Treat against Robert Clarence Ogden for an accounting in a partnership dissolution. Both parties appealed from a judgment of the trial court and judgment was affirmed with remittitur that each party recover his costs on the appeal taken by the other party. From an order denying defendant's motion to tax plaintiff's costs on appeal, defendant appeals.

Order reversed in part and affirmed in part in accordance with opinion.

Robert Clarence Ogden, of San Francisco, in pro. per.

Thomas C. Nelson, of San Francisco (Meurice Swim, of San Francisco, of counsel), for respondent.

KNIGHT, Justice.

The defendant appeals from an order denying his motion to tax plaintiff's costs on appeal. The motion was heard and determined on affidavits, and the appeal is presented on a bill of exceptions.

The action was for an accounting on dissolution of a partnership. Both parties were dissatisfied with the judgment and appealed. The judgment was affirmed (Treat v. Ogden, 56 Cal.App.2d 70, 132 P.2d 493) and the remittitur provided that plaintiff recover his costs on the appeal taken by defendant, and that the latter recover his costs on the appeal taken by plaintiff. It does not appear from the record whether the defendant filed any cost bill; but in due course plaintiff filed his bill which contained three items; and defendant's motion to tax was directed against all three. However, on this appeal no complaint is made as to the second and third items.

The first item is as follows: "Copy of Clerk's Transcript containing 124 pages and Reporter's Transcript containing 1081 pages, a total of 1205 pages containing an estimated 3012.5 folios at 10c per folio......$301.25."

The facts relating to the preparation of the transcripts are these: On April 7, 1941, defendant gave notice of appeal from certain portions of the judgment, and on the same day filed a proposed bill of exceptions. On April 11th plaintiff gave notice of appeal from the whole judgment and requested the preparation of a reporter's transcript in accordance with the provisions of section 953a of the Code of Civil Procedure. Prior to the entry of judgment the parties had obtained and paid for transcripts of much of the evidence. At the time plaintiff ordered his transcript for his appeal he paid the reporter $300 on account, and the latter agreed that in making up the transcript he would use the portions theretofore obtained and paid for by plaintiff. Later it was ascertained that the cost of the completed transcript would be much more than had been estimated; it was also learned that the larger portion of the record as already transcribed was in the possession of the defendant; therefore, after considerable negotiations with defendant, the parties agreed that they would present their respective appeals in a single transcript. Thereupon defendant abandoned his bill of exceptions and in accordance with the agreement he turned over to the reporter those portions of the transcript then in his possession, and paid the reporter $120 as his share of the cost of the completed transcript; also before the transcript was completed plaintiff paid the reporter an additional $20; so that the total sum paid to the reporter by both parties after judgment was $440, of which plaintiff paid $320 and the defendant $120; and as shown by the uncontradicted affidavit filed by the reporter, this total sum of $440 covered the cost of preparing the original of the reporter's transcript, the clerk's transcript, and one copy of each, all of which, so the reporter's affidavit states, were "supplied to the plaintiff."

[1] It is defendant's contention that the sum of $320 thus paid by plaintiff was in furtherance of plaintiff's own appeal, which he lost, and that consequently no portion thereof is recoverable from defendant; whereas it seems to be plaintiff's contention that the entire sum of $320 was paid by him as a necessary expense in resisting the appeal taken by defendant. Neither contention is tenable, for it is apparent that if plaintiff's position were to be sustained, it would mean that defendant would be compelled to pay the entire cost of preparation of the transcript for plaintiff's appeal, which plaintiff lost; whereas if defendant's position were to be sustained, it would mean that plaintiff would recover nothing as costs in resisting defendant's appeal. Since, therefore, each party paid said sums of money for the dual purpose of furthering his own appeal and resisting the appeal of the other, the most that either would be entitled to recover as costs from the other would be one-half of the amount he paid the reporter; which in plaintiff's case would be $160. The allowance of $301.25 for the first item should be reduced accordingly.

[2] Whatever sums of money may have been paid to the reporter by either party for the portions of the transcripts obtained by them prior to judgment are not recoverable as costs on appeal. Turner v. East Side Canal & Irr. Co., 177 Cal. 570, 171 P. 299; Countryman v. California Trona Co., 39 Cal.App. 753, 180 P. 22.

In accordance with the conclusions above stated, it is ordered that the first item of plaintiff's cost bill be allowed for $160, and that in all other respects the order denying the motion to tax costs be affirmed. It is further ordered that on this appeal each party pay his own costs.

PETERS, P. J., and WARD, J., concur.

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64 Cal.App.2d 279

MONGERSON v. WILLIAMS.

Civ. 3137.

District Court of Appeal, Fourth District, California.

May 8, 1944.

Rehearing Denied June 5, 1944.

Hearing Denied July 6, 1944.

1. Execution 🔑73

Denying a motion for execution after lapse of five years on ground that plaintiff still had a lien on debtor's property at time of procuring previous execution was not justified, where debtor had previously transferred his property and no record lien was acquired by the second filing of transcript of judgment. Code Civ. Proc. § 685.

2. Execution 🔑73

To obtain leave to enforce judgment after lapse of five years, judgment creditor must show that he has exercised due diligence in attempting to locate property upon which execution may be levied, and, even if this is shown, the court may deny him relief if debtor shows circumstances occurred subsequent to the five year period upon which, in the exercise of a sound discretion, the court is justified in concluding that creditor is not entitled to collect his judgment. Code Civ.Proc. § 685.

3. Execution 🔑73

Court's discretion as to granting leave to enforce judgment after five years is not an arbitrary one, but is guided by fixed legal principles and is intended to subserve ends of substantial justice. Code Civ.Proc. § 685.

4. Execution 🔑73

Where amount of judgment was not finally determined until after expiration of five-year period due to an appeal and proceedings to establish a partial satisfaction and after the five-year period the judgment debtor had transferred all his property, no lack of diligence on part of judgment creditor to enforce judgment was shown so as to justify denial of leave to enforce judgment after five-year period. Code Civ.Proc. § 685.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by W. R. Mongerson against Thomas C. Williams, wherein plaintiff recovered judgment. From an order denying a motion for the issuance of an execution after lapse of five years from entry of judgment, plaintiff appeals.

Reversed with directions.

Samuel Taylor, of Los Angeles, and Alfred Siemon, of Bakersfield, for appellant.

Mack, Werdel & Bianco, of Bakersfield, and D. Bianco, of San Francisco, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion for the issuance of an execution after the lapse of five years from the entry of the judgment.

A judgment for $2333.57 in favor of plaintiff and against defendant was entered on February 3, 1932. On appeal that judgment was increased to $3683.57. Mongerson v. Williams, 136 Cal.App. 569, 29 P.2d 303. The remittitur was issued on April 5, 1934. A transcript of the judgment was recorded on March 5, 1932, and another transcript of the amended judgment was recorded following the receipt of the remittitur. A small amount was paid on the judgment which is not material here.

Before the judgment became final, and on March 7, 1934, the defendant transferred all his property, including several parcels of real estate, to his two sisters by a conveyance which was recorded. On the same day that the remittitur was filed the defendant filed a notice of motion for a partial satisfaction of the judgment, claiming that the plaintiff had received $1350 from certain insurance. That motion was taken under submission by Judge Owen on April 28, 1934, but was never decided by him. While it was still under submission, and on August 10, 1938, the plaintiff gave notice of a motion for an order for the issuance of an execution. On September 6, 1938, the defendant gave a second notice of motion for a partial satisfaction of the judgment, based upon the same claim as the first motion. Judge Owen having died these last mentioned two motions were heard by Judge Bradshaw on September 19, 1938, and an order was entered denying the defendant's motion for a partial satisfaction of the judgment and granting the plaintiff's motion for the issuance of an execution. An execution was issued and later returned unsatisfied.

On July 10, 1943, supplemental proceedings were initiated. On August 30, 1943, plaintiff filed notice of another motion for an order directing the issuance of an execution. Affidavits were filed by both parties and after a hearing the court entered an order denying the motion, the court stating that the plaintiff had not used diligence in collecting the judgment in that he "still had a lien on the property at the time he procured an execution in 1938." This appeal followed.

[1] It seems clear that the reason assigned by the trial judge for denying this motion, that the plaintiff still had a lien on the property when he procured an execution in 1938, is not a valid one. The judgment was entered on February 2, 1932, and the lien thereof would expire on February 2, 1937. No record lien was acquired by the second filing of the transcript of the judgment, after the coming down of the remittitur in 1934, since the defendant had previously transferred all of his property. Moreover the transfer of the property in the absence of evidence of fraud being available to the plaintiff, had rather effectively destroyed the value of any such lien to the plaintiff. The question remains, however, whether the order in question may be sustained on any other grounds.

In Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205, 206, in considering the 1933 amendment of section 685 of the Code of Civil Procedure, the court said:

> "It is clear that the principal object of the new enactment was to place upon a creditor seeking to enforce a judgment more than five years after its entry, the burden of showing why he was not able to satisfy his claim within the statutory period during which he is entitled to an execution as a matter of right. * * * and in view of the legislative and judicial history of section 685, its present provisions should be construed as authorizing the court to give a creditor an execution only if, during the five years following entry of judgment, he exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. And even though the creditor may have satisfied the court that he has proceeded with due diligence to enforce his judgment under section 681, the court may still deny him its process if the debtor shows circumstances occurring subsequent to the five-year period upon which, in the exercise of a sound discretion, it should conclude that he is not now entitled to collect his judgment."

The court then pointed out that in that case the creditor had made every reasonable effort within the five-year period to collect his judgment, that the debtor had effectively prevented him from doing so and that when the judgment debtor had next acquired property in his own name it was so heavily encumbered that nothing could have been realized upon it by the levy of the execution.

[2, 3] It is thus established that it is now encumbent upon a judgment creditor to show that he has exercised due diligence during the five years following the entry of judgment in attempting to locate property upon which execution may be levied, and that even if this is shown to the satisfaction of the court, the court may deny him relief if the debtor shows circumstances occurring subsequently to the five-year period upon which, in the exercise of its sound discretion, the court is justified in concluding that the creditor is not entitled to collect his judgment. It is well settled that this discretion is not a capricious nor arbitrary one but is one guided and controlled in its exercise by fixed legal principles, and intended to sub-

serve and not to impede or defeat the ends of substantial justice. McClelland v. Shaw, 23 Cal.App.2d 107, 72 P.2d 225; McNabb v. McNabb, 47 Cal.App.2d 623, 118 P.2d 869. In speaking of the matter of the diligence required, the court said, in Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210, 214: "The precise question for determination, therefore, is whether the record shows that, had the judgment creditor exercised reasonable diligence in the investigation of the appellant's assets, he would have discovered property subject to execution."

[4] Applying these rules to the instant case we find no facts in the record before us justifying a conclusion that the plaintiff failed to exercise due diligence during the five-year period, or, as a matter of fact, after that period had expired. Nor are any subsequent developments shown which justify the conclusion that the defendant has in any way been led to change his position or that the plaintiff should no longer be entitled to collect his judgment.

In issuing the execution in September, 1938, the court determined that the plaintiff had not been negligent in this regard up to that time. Not only was this judicially determined, but the facts would warrant no other conclusion. It was more than two years before the judgment became final, and the plaintiff could hardly have been expected to have taken out execution during that time when the amount of the judgment was still in question. On the filing of the remittitur the defendant started proceedings in which he claimed that the judgment had been partially satisfied to the extent of $1350. That matter was not determined until after the five-year period had elapsed. Until it was determined and the dispute as to the amount was settled, any execution which might have been issued would probably have been recalled. Before the judgment became final the defendant had transferred all of his property to other persons. The plaintiff's affidavits further show that he was unable to realize anything on the execution issued in 1938; that between the date of the original judgment and the starting of the supplementary proceedings in August, 1938, his attorney searched the records twice a year to see if any property then stood in the defendant's name; that since March 7, 1934, there has been no property standing of record in the name of the defendant; that the plaintiff learned of the transfers made by the defendant in 1934; that plaintiff and his attorney knew of no facts by which they could hope to prove that these transfers were fraudulent; that they were informed that this property was unsalable and had only a nominal value; that the taxes on the property had been allowed to go delinquent for many years; that the defendant stated and represented to them that he was entirely without assets and unable to pay the judgment; that this condition existed until shortly before this last proceeding was started, at which time the plaintiff and his attorney secured information which convinces them that it is possible to now show and establish the fact that the defendant is the owner of large and extensive properties now standing in the names of his sisters, and that an execution is desired for the purpose of levying on such properties in an attempt to collect the judgment.

In his affidavit the defendant admits that he transferred these properties and contends that he transferred them for value, but states that the plaintiff might have levied upon them at any time had he so desired. He also sets forth that the properties were at all times of a value in excess of the judgment and the amount of any unpaid taxes. He further sets forth that the judgment was originally given for an amount greater than his debt to the plaintiff, which issue was adjudicated against him when the judgment was entered.

While there is a conflict as to the value of these properties during the intervening years this is not very material here. There is no conflict on any fact relative to the real issue as to whether the plaintiff did everything he should have done to enforce collection of this judgment, and no facts appear which in any way indicate that defendant should not now pay the judgment or that it would be inequitable to compel him to do so. It appears that a just debt has not been paid; that the defendant has kept his property concealed in order to defeat this judgment; that the plaintiff has made every reasonable attempt to find something upon which to levy; and that he was unable to do so until just before the proceeding here in question was started. Under these circumstances, and under the well established rules above referred to, we think it was an abuse of discretion for the trial court to deny the motion and to refuse to issue the execution.

The order appealed from is reversed with directions to grant the plaintiff's motion.

MARKS and GRIFFIN, JJ., concur.

64 Cal.App.2d 92

BOGHOSIAN v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

No. 12612.

District Court of Appeal, First District, Division 1, California.

April 26, 1944.

1. Justices of the peace 🔑164(2)

In justice's court action, defendant was entitled to take appeal on questions of both law and fact from order denying his motion, heard on conflicting affidavits, to vacate default judgment on grounds of mistake, inadvertence, surprise and excusable neglect, and to have subject matter of appeal tried anew in superior court without filing statement of case. Code Civ.Proc. §§ 473, 974–977.

2. Justices of the peace 🔑164(2)

Where clerk of justice's court, on appeal from justice's order denying defendant's motion to vacate default judgment, transmitted to and filed in superior court all papers required by statute to be sent thereto with statement of case on appeal on questions of law only, superior court had jurisdiction of appeal, even if it was taken on questions of law alone and no statement of case was settled and transmitted to superior court. Code Civ.Proc. §§ 974–977.

◆

Certiorari to Superior Court, Alameda County; Leon E. Gray, Judge.

Special proceeding by H. Boghosian for a writ of certiorari to annul an order of the Superior Court in and for the County of Alameda, denying petitioner's motion to dismiss an appeal by Al Scott from a justice court's default judgment in an action by petitioner on a note.

Order affirmed.

Milo Ayer and Marvin Sherwin, both of Oakland, for petitioner.

Joseph W. Bernal, of Berkeley, and James R. Agee, of Oakland, for respondent Al Scott.

KNIGHT, Justice.

The superior court denied petitioner's motion to dismiss a justice's court appeal, and thereupon proceeded to hear and determine anew the subject matter of the appeal. Petitioner now seeks through this proceeding in certiorari to have annulled the order so denying his motion to dismiss and all proceedings had subsequent thereto. The jurisdictional issue involved relates to the question of the legal sufficiency of the record upon which the appeal was heard and determined.

The following are the material facts: In July, 1942, petitioner brought an action in the justice's court against Al Scott to recover the principal and interest claimed to be due on a promissory note dated February 4, 1930, and payable 45 days after date. Scott failed to appear or answer, and in August, 1942, a default judgment was entered against him. In November, 1942, he moved to vacate the judgment upon the ground that he had not been served with summons; the motion was heard on conflicting affidavits, and on December 30, 1942 was denied. Thereafter he presented a second motion to vacate the judgment. It was made pursuant to the provisions of section 473 of the Code of Civil Procedure on the grounds of mistake, inadvertence, surprise and excusable neglect; and attached to the notice of motion was a proposed answer which Scott asked leave to file. This motion also was heard on conflicting affidavits, and on March 3, 1943, was denied. Scott gave notice of appeal from the order of December 30, 1942, and from the order of March 3, 1943. The notice stated: "This appeal * * * is taken on questions of both law and fact." No statement of the case was presented to the justice for settlement, but in due course and on April 9, 1943, the clerk of the justice's court transmitted to and filed in the superior court the complete file in the action, which included all of the papers required by section 977 of the Code of Civil Procedure to be transmitted to the superior court on an appeal taken either on questions of law alone or of law and fact. Thereafter and on October 14, 1943, petitioner moved the superior court to dismiss the appeal. Among the grounds urged therefor were that the appeal from the order of December 30, 1942, was not taken within the time prescribed by law; and that in the absence of any statement of the case prepared and settled in conformity with sections 975 and 977 of the Code of Civil Procedure the superior court was without jurisdiction to consider or determine the appeal from either order. The superior court granted the motion insofar as it related to the order of December 30, 1942; but it denied the motion insofar as it was directed against the order of March 3, 1943, "on the ground that the appeal is one on questions of law and fact and no statement of the case, as provided by section 975 of the Code of Civil Procedure, is necessary." The court then upon the record before it proceeded to hear and determine anew Scott's motion to be relieved from his default. As the result of the hearing it was ordered that the motion be granted; that Scott be permitted to file his answer to the complaint, and the clerk of the court was "ordered and directed to re-transmit the papers on file in this proceeding to the Justice's Court of the City of Berkeley for a trial of the case upon the issues raised by the Complaint and Answer."

[1] The position taken by the petitioner in substance is this: that the order from which the appeal was taken was made in a proceeding involving the exercise of a discretionary power vested in the justice's court, and that therefore, regardless of the statement in the notice of appeal that the appeal was taken on questions of both law and fact, the appeal necessarily was taken on a question of law alone; and that being so, that a statement of the case was necessary in order to give the reviewing court jurisdiction to hear and determine the appeal.

It is our opinion that in view of the present Code sections governing justice's court appeals petitioner's position is not sustainable. Section 974 of the Code of Civil Procedure provides for an appeal from a judgment rendered in the justice's court and prescribes that it shall be taken by filing and serving notice of appeal, stating whether the appeal is taken on questions of law or fact or both. In 1937 section 975 was amended so as to allow an appeal to be taken from any special order made after judgment, and as so amended the section further provides that such an appeal may be taken "in the manner provided in the preceding section," that is, by filing and serving a notice of appeal, stating whether the appeal is taken on questions of law or fact or both; and in this connection it has been held that a motion to set aside a default judgment involves a decision on questions of both law and fact. Roehl v. Texas Co., 107 Cal.App. 708, 291 P. 262. Also in 1937 section 976 was amended to read as follows: "When a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made, but the action or hearing on the order made after judgment must be tried or heard anew in the superior court." The clause "or hearing on the order made after judgment" was inserted by the 1937 amendment. Therefore in the present case it would seem clear that not only was Scott entitled to take an appeal from the order of March 3, 1943, on questions of both law and fact, but that having done so no statement of the case was necessary; that he was entitled to have the subject matter of the appeal tried anew in the superior court.

In support of his position petitioner relies principally on the case of Miller v. Superior Court, 55 Cal.App.2d 126, 130 P.2d 138, wherein the District Court of Appeal sustained an order made by the superior court granting a motion to dismiss an appeal taken from an order made by the justice's court denying a motion to set aside a default judgment. An analysis of that case shows, however, that the precise point here involved was not there urged or considered. The appeal "was asserted to be taken on questions of both law and fact" and a purported statement of the case was filed in the superior court; but there was no evidence showing that such statement was filed with or settled by the justice, or that it was ever served on the adverse party. As ground for dismissal of the appeal it was contended that the appeal from the order denying the motion to set aside the default, being an order made after judgment, must be on questions of law alone, and that appellant did not properly prosecute his appeal since no statement of the case was served or filed as required by section 975 of the Code of Civil Procedure. The motion was granted; and when the matter came before the District Court of Appeal on certiorari the position taken by the petitioner was, as stated by the District Court of Appeal, "that the complete record of all of the proceedings in the justice's court was before the superior court, that no evidence was taken in the justice's court, *that the appeal was an appeal upon a question of law only,* and that a statement of the case therefore was not necessary and was surplusage because the error complained of by appellant appeared in the papers sent up." (Italics added.) Therefore the District Court of Appeal, treating the appeal as one taken on a question of law alone, proceeded to determine whether the papers and documents transmitted to and filed in the superior court, in the absence of a statement of the case, constituted a record legally sufficient to present the appeal; and it was held that the papers and documents so transmitted did not meet the legal requirements of section 977 of the Code of Civil Procedure as amended in 1941; that therefore the superior court did not have jurisdiction to entertain the appeal. So far as the decision in that case reveals, it was never there contended, either in the superior court or in the District Court of Appeal, that under the 1937 amendment to section 976 no statement of the case is necessary where the appeal is taken on questions of both law and fact from an order made after judgment.

[2] In the present case, however, the result would be the same even though the appeal were to be treated as one taken on questions of law alone, for the reason that all of the papers and documents required by section 977 of the Code of Civil Procedure to be transmitted to or filed with the superior court along with a statement of the case on an appeal on questions of law alone were so transmitted and filed. Therefore, under the doctrine of the following cases the superior court was not without jurisdiction to hear and determine the appeal, even though no statement of the case was settled and transmitted to the superior court. Butler v. Superior Court, 3 Cal.App.2d 508, 39 P.2d 860; Rauer's Law, etc., Co. v. Superior Court, 26 Cal.App. 289, 152 P. 957; Himovitz v. Justice's Court, 77 Cal.App. 95, 246 P. 82, 263 P. 384; Peacock v. Superior Court, 163 Cal. 701, 126 P. 976.

For the reasons stated, the order of the superior court denying the motion to dismiss and all proceedings had and orders made subsequent thereto are affirmed.

PETERS, P. J., and WARD, J., concur.

PEOPLE v. FOX.[*]

Cr. 3750.

District Court of Appeal, Second District,
Division 2. California.
April 25, 1944.

As Corrected May 1, 1944.

Rehearing Denied May 2, 1944.
Hearing Granted May 25, 1944.

1. Larceny ⇨65

Evidence supported conviction of grand theft.

2. Larceny ⇨41

In grand larceny prosecution, state was required to prove only that theft was committed by defendant alone or was result of an agreement by defendant with another party.

3. Larceny ⇨64(7)

When stolen property is found in accused's possession shortly after its theft, only slight evidence is required to connect accused with the crime.

4. Larceny ⇨64(6)

Possession of recently stolen property with an unsatisfactory explanation as to how it was effected will warrant a conviction of theft.

5. Larceny ⇨27

Where one had knowledge that a third party was about to commit a theft and later met thief with the booty and assisted him in making his escape, he was an accomplice of the thief and guilty as a principal.

6. Larceny ⇨1

A transaction comprising successive acts of taking, induced by a single felonious impulse operated upon by a single intermittent force, constitutes a continuous act of larceny.

7. Criminal law ⇨519(4, 9)

Fact that a confession is made to a police officer while accused is under arrest, in or out of prison, or is drawn out by his questions, does not necessarily render confessions involuntary.

8. Constitutional law ⇨257

The deprivation of one's right to "due process of law" is not an impediment to fair administration of justice unless acts alleged to constitute violation have so terrified accused or otherwise so frozen his intellectual processes as to impair exercise of his reason or his will, resulting in a subversive influence upon judicial investigation. U.S.C.A.Const. Amend. 14.

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[*] Subsequent opinion 153 P.2d 729.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

9. Constitutional law ⟹263

Detention of defendant for 48 hours for questioning by police officer before taking him before committing magistrate did not violate defendant's right of "due process of law", where defendant was an experienced business man who had been previously convicted of receiving stolen property, and defendant was not abused by officers during questioning. Pen.Code, §§ 145, 825, 828, 834, 836, 849, 859, 4000, 4005, 4022; U.S.C.A.Const. Amend. 14.

10. Criminal law ⟹532(2)

Where investigating officer is called to testify as to incriminatory statements or confessions of defendant, trial court should in exercise of its discretion determine in first instance whether defendant's statements were free and voluntary, and in making such determination a liberal measure of discretion is allowed.

11. Criminal law ⟹1120(8)

A reviewing court is in no position to determine that error was committed in admitting defendant's statements to police unless such error appears as a matter of law from record presented.

12. Criminal law ⟹409, 538(3)

A voluntary incriminatory admission or confession of guilt is one of strongest evidences possible against an accused.

13. Criminal law ⟹517(1)

Where it appeared that defendant was not mistreated during his detention for questioning by police officers and that no promises of reward were made to him and that there were no threats, testimony of officers as to statements made by defendants to them was properly received. U.S.C.A.Const. Amend. 14.

14. Criminal law ⟹814(16)

Refusal of defendant's requested instruction that before jury could consider any alleged confession as evidence against him they must believe that such alleged confession was freely and voluntarily made, and not the result of inducement, coercion, intimidation, threats, violence, promises, or duress exercised by any officer of the law, was not error, where no evidence was presented upon which such an instruction could be predicated. U.S.C.A.Const. Amend. 14.

15. Criminal law ⟹1173(2)

Failure to give defendant's requested instruction that jury could disregard defendant's statements to police officers if defendant had been deprived of sleep to extent that "he was not in that state of mind where his statements were free and voluntary" did not result in a miscarriage of justice, in view of generous proof with respect to questioning of defendant by officers. U.S.C.A.Const. Amend. 14.

16. Criminal law ⟹1173(2)

Omission, from instruction on necessity for corroboration of an accomplice's testimony, of the statements that "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof," was not prejudicial to defendant, in view of abundant corroborating evidence. U.S.C.A.Const. Amend. 14.

17. Criminal law ⟹775(3)

Defendant's requested alibi instruction that time of offense was required to be established by the people beyond a reasonable doubt was properly refused as not stating the law. Pen.Code, §§ 1096, 1096a.

18. Criminal law ⟹789(4)

An instruction directing jury to acquit defendant if evidence on subject of alibi, considered with all other evidence was sufficient to raise reasonable doubt as to his guilt, was sufficient.

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Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Abe Fox was convicted of grand theft, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant was indicted for two felonies: Receiving stolen property and grand theft. He was acquitted of the former and convicted of the latter. On this appeal he makes four assignments in support of his contention that he was illegally convicted.

The Evidence Is Sufficient.

He maintains that the evidence does not support a conviction of grand theft. He undertakes to show that the testimony of all of the prosecution witnesses establishes that some person other than appellant stole the property from the possession of The System Freight Service which maintained a terminal of its freight distribution business on Mateo Street, between Bay and Sacramento Streets in Los Angeles.

The circumstances surrounding the asportation of the property commence with the afternoon of January 11, 1943. About 5:30 o'clock one Looft, an employee of The System, arrived at the terminal with a truck load of 100 cases of cigarettes, cases of cigars, and other articles. Having parked the truck unlocked according to custom on the south side of Bay Street, slightly west of Mateo and next to the building of The System, he proceeded to the unloading docks where he deposited the bills of lading of his cargo in the appropriate pigeon hole. He then visited a nearby lunch counter on Sacramento Street. While there at about 6:50 o'clock he saw the truck with its load traveling westerly on Sacramento Street, believed by Looft at that time to be in charge of one of The System's "truck spotters." Shortly thereafter Looft returned to the unloading docks and worked until 7:30 p. m., at which time all trucks had been unloaded except the one which Looft had parked on Bay Street. Search followed but the truck was not found. Looft had given no one permission to remove it. After it had been parked on Bay Street the dock foreman saw the loaded truck where Looft had parked it. Witness Reismer identified Looft's truck as it went west on Sacramento Street about dusk and he observed that the driver was neither Looft nor appellant. The truck was found on the following day about two miles from the office of The System. Subsequently, the police recovered the merchandise which had been on the truck, with the exception of three cases of cigars and 76 cases of cigarettes

One Alex Gorberg was arrested by police on suspicion of having received the stolen merchandise. While he was under detention at the Newton Street police station about eight o'clock in the evening of February 6, 1943, appellant visited the station with counsel he had employed to effect Gorberg's release. Although that prisoner was released, Officer Varela took appellant into the detective bureau where appellant was subjected to a series of questionings relative to his knowledge of the stolen merchandise which then reposed in the garage on East First Street under lease by Fox and which had been removed from the Rosenthal garage at 401 South Boyle, near the Fox residence.

Inasmuch as appellant contends (1) that the only evidence connecting him with the theft is the testimony of the officers who engaged him in the conversations following his initial detention and (2) that the statements then made were due to violations of his right of due process of law, we here present seriatim the substance of appellant's incriminatory admissions.

(1) The first conference was at the Newton Street Station. In answer to the question as to appellant's knowledge of the tobacco in his garage he stated that he knew nothing. After the officers had reassured him of their knowledge of his removal of the tobacco from the garage at his residence to the garage at his store, he at first denied possession of means of access to his own garage. But as soon as Fox was told that the officers had visited his place and found the garage locked and were sure his finger prints were on the boxes, he stated that he had helped Gorberg move the merchandise into his First Street garage from the place on Boyle Avenue. After Fox told the officers of the delicate condition of his wife, they advised him that it would be necessary to have a police matron go along to search his home for the key. He then volunteered to accompany the officers and himself enter his home and get the key. It was then arranged by Captain Chilson for one officer to accompany Fox into his home. Appellant was then asked to explain his denial of knowledge of the tobacco in his garage. He replied that he saw no reason why he should make any statement as to the ownership of the merchandise. At that juncture Officer Doane led Fox through Captain Chilson's office where Gorberg sat. On leaving that room Fox said: "I have changed my mind; I don't admit anything. I don't know where any garage is; and I don't know anything

about the tobacco." As the officers and Fox were about to enter an automobile the Captain told him again that the tobacco was in the East First Street garage and that Gorberg had told the whole story. Appellant's reply was: "If Gorberg has told you the story, I will take you and get you the key."

(2) The party then drove to the Fox home at 401 South Boyle. Accompanied by Officer Doane defendant passed through the living quarters, reassured his wife, took from a little compartment seven keys, and stated that one of them would unlock the door of the rear building at 2026 East First Street. On arriving there Fox identified the key, the door was opened and he pointed, saying, "There is the merchandise." It will be observed that within less than three hours by civil and courteous questioning the officers had obtained statements from Fox to the effect that he had assisted Gorberg in transporting the stolen cargo to the East First Street address from his premises on Boyle Avenue and that the key to the building where the tobacco was stored was in his home. During the same period defendant entered his home, obtained the key, led the officers into the repository and pointed out the stolen goods. The foregoing admissions were made and acts done after Fox was apprised of Gorberg's confession of his own guilt in receiving a part of the proceeds of the sale of the larger portion of the cargo and of his purchase of a case of the cigarettes.

(3) On the return of the party to the City Hall about midnight Fox and Gorberg were brought together. The latter then stated that Fox had told him that he had a large quantity of cigarettes and would sell them at $50 a case; that he employed one Newman to arrange the terms of sale; that Fox procured the truck; that Fox assisted him in loading the cigarettes; that he made the delivery to the purchaser in three trips from the garage behind appellant's store; that he received $3,500 in paper money from Newman; that he delivered the money, less $140 taken by Newman for his commission; that Fox then asked Sam Rabin to lock it in his safe; that on the following day he delivered appellant another $1,150 paid by the purchaser, and was paid $232 for his commission.

(4) In a conference at three o'clock Sunday morning after Officer Doane informed Fox of having followed his automobile on a Sunday night, Fox gave utterance to a fantastic story which was intended by him as a denial of participation in the asportation of the merchandise. He said that two days before the truck disappeared he had a telephone call from his banker to ascertain whether Fox could handle a large cargo of cigarettes; that he thought no more of it until twenty minutes before the load was taken when he told his informant where to take the load; that he went to the place designated and at once recognized a man wearing an overcoat as the one who had brought the truck; that after the stranger disappeared, he, Fox, drove the truck to his home and stored the merchandise in his own garage; that the theft was a set-up job of the truck company; that a "two-time loser" had driven the truck from its location on Bay Street. He concluded that conference with the statement, "You would be surprised how little I really made out of this deal."

From a reading of the transcript it appears that every utterance of Fox was given with much eagerness, if not enthusiasm. There is no evidence of ennui or depression from loss of sleep. Not a complaint escaped his lips. The conference was marked by the same civilities and urbanity that attends a discussion of intimate friends. Fox displayed neither impatience nor evidence of discomfort. He was neither cowed by the insignia of the police nor distressed by the absence of friends. He neither indicated a preference for the presence of his counsel nor uttered any declaration which might be deemed a confession of his participation in the larceny of the nicotine cargo. But his explanation of the manner of his gaining possession of the stolen goods, taken in connection with the testimony of Gorberg and Rabin, was such as to warrant a conviction.

(5) Following the conference of the early Sunday morning the officers should have promptly taken their prisoner before a magistrate for appropriate proceeding. Their subsequent conduct towards the accused had nothing to commend their judgment as brave and dispassionate officers. From the close of that conference until the release of appellant the officers behaved like novices, evidently motivated by the theory that Fox was concealing the guilt of important personages in a vast criminal enterprise. The subsequent questioning failed to elicit from him a confession but,

on the contrary, only his persistent denials of connection with the theft.

After the three officers had given in evidence their conversations with Fox, Gorberg, then under indictment for having received a part of the stolen property, repeated on the witness stand substantially all he had told the officers with all of the details of the sale at $50 a case, of the loading of the cigarettes with Fox' assistance, of his delivery of the three loads to a wholesale tobacco company and of the collection and division of the money. The witness Rabin testified that on January 16, 1943 (five days after the theft), at his machine shop and at the request of Fox, he received a paper bag containing some 30 bundles of paper money for safe keeping; that five days later he handed the money to Gorberg or appellant, both being present; that on prior occasions he had received for safe keeping bundles of money from Fox, but not from Gorberg. Proof was made that the value of the cigarettes was not less than $60.06 per case.

Inasmuch as the sufficiency of the evidence is to be determined from that offered by the prosecution, it is unnecessary to quote or review all the testimony of appellant. He contradicted the substantial portions of the testimony of Gorberg as well as that of the officers, and specifically denied that he had made any of the statements imputed to him which under all the circumstances might very reasonably have been considered as admissions of his participation in the driving of the truck from Bay Street to his home, the place of unloading. He testified that he had patronized Gorberg for three years but had never suspected the latter of possessing stolen property; that Gorberg had told him that he had purchased merchandise from a party who was going into the army; that he had suggested to Gorberg that the latter use for storage a garage in the rear of his store at $2.50 for a month; that the garage at the First Street address belonged to one Feinberg; that he had never assisted Gorberg to load the stolen merchandise on a truck, but had told the officers it belonged to Gorberg; that he had neither received nor paid any money on account of the transaction except the month's rental paid by Gorberg for the garage. He denied that he had told the officers anything about a banker and that he even knew a banker.

[1] The corpus delicti was established beyond all doubt. People v. Locurto, 97 Cal.App. 185, 191, 275 P. 462; People v. Siderius, 29 Cal.App.2d 361, 84 P.2d 545. Looft, the driver for The System, gave no one permission to take the truck or its cargo. The only witness to its removal from Bay Street saw that Looft was not in the driver's seat as the truck rolled away. When the truck was discovered it was some two miles from its parked location; the merchandise was gone. The sole question remaining is whether the evidence justifies a finding that appellant was connected with the commission of the crime. Believing the testimony of the officers, as presumptively the jury did, the incriminatory statements made to them by Fox could have left no doubt of his guilt. People v. Black, 111 Cal.App. 90, 96, 295 P. 87; People v. Madsen, 93 Cal.App. 711, 714, 270 P. 237; People v. King, 30 Cal.App.2d 185, 195, 85 P.2d 928; People v. Meyers, 7 Cal.App.2d 351, 354, 355, 46 P.2d 282.

For reasons hereinafter mentioned appellant challenges the statements as legal proof. But if we eliminate from consideration all statements made to the officers, the circumstances otherwise proved are sufficient to support the judgment. (1) Promptly following the theft he told Gorberg that besides some cigars he had 96 cases of cigarettes; that he would accept $50 a case for them and pay $4 a case to Gorberg. Within five days after the theft Gorberg assisted appellant in loading the cigarettes onto Steinberg's truck for delivery to a tobacco company which had purchased them. He left $3,360 of the money at Rabin's at the suggestion of Fox and was paid directly $1,150 as the final payment on the purchase price. After the sale and removal of the cigarettes Fox sold Gorberg a case of cigars. They drove in Gorberg's car to the Fox home garage, the door of which appellant unlocked, took out the case containing 50 boxes of cigars and delivered them to Gorberg. (2) On the evening of his apprehension appellant accompanied the officers to his home, produced the key to his garage, and pointed out the residue of the loot. Feinberg, owner of that garage, had permitted Fox to use it as a store room for over a year. (3) Defendant contradicted in its entirety the testimony as well as the extrajudicial statements of Gorberg. And (4) he testified that at his early conferences with the officers he denied the truth of Gorberg's story.

[2-6] If the testimony of Gorberg were excluded on the ground that he was an accomplice, there still remains such a mesh of circumstances as completely to entangle Fox. Either alone or in concert with another he accomplished the larceny. People v. Ward, 105 Cal. 652, 660, 39 P. 33; In re Stanley, 90 Cal.App. 132, 134, 265 P. 561; People v. Horton, 7 Cal.App. 34, 36, 93 P. 382. It was necessary only that the state prove that the theft was committed by Fox alone or was the result of an agreement by Fox with another party who at first drove the truck away from Bay Street. People v. Palmer, 92 Cal. App. 323, 327, 268 P. 417. If Fox encouraged, or assisted in, the actual asportation he is guilty as an accomplice. People v. Herman, 49 Cal.App. 592, 595, 193 P. 868. When stolen property is found in the possession of the accused shortly after its theft, only slight evidence is required to connect him with the crime. People v. Russell, 120 Cal.App. 622, 625, 8 P.2d 209; People v. Morris, 124 Cal.App. 402, 404, 12 P.2d 679. Possession with an unsatisfactory explanation as to how it was effected will warrant a conviction of theft. People v. White, 35 Cal.App.2d 61, 68, 94 P.2d 617; People v. Russell, supra. If an explanation is attempted by the accused, it is for the jury to judge of its truth. People v. McClain, 115 Cal.App. 505, 508, 1 P.2d 1085. Where one had knowledge that a third party was about to commit a theft and later met the thief with the booty and assisted him in making his escape, he was an accomplice of the thief and guilty as a principal. People v. Ratten, 39 Cal. App.2d 267, 270, 102 P.2d 1097. His actual presence at the scene of the taking is not necessary. If he conspired with the thief for the latter actually to take the property from the dominion of its owner, he is an accomplice. People v. Del Cerro, 9 Cal.App. 764, 767, 100 P. 887. In the case at bar Fox did not as an alien to the theft receive the stolen merchandise. He alone or he and his agent together stole it. Brown v. State of Oklahoma, 7 Okl. Cr. 678, 126 P. 263, 265. Fox alone drove the cargo to its place of concealment. Fox alone promptly sold the major portion of it and kept the money. Fox, and he only, was found in possession of the residue. The explanation of these circumstances was anything but satisfactory. Viewing them in the light of appellant's act of driving the truck from a point on a public street which he declined to indentify, of the storage of the merchandise in his own garage on the day of the theft, of his sale of the cigarettes to the wholesale tobacco company at a price 16⅔ per cent below market, his denial of his own former statements and his contradictions of adversary witnesses on all material proof, we find no error in the judgment for lack of evidentiary support. A transaction comprising successive acts of taking, induced by a single felonious impulse operated upon by a single unintermittent force, constitutes a continuous act of larceny. People v. Dillon, 1 Cal.App.2d 224, 229, 36 P.2d 416.

Rights of Due Process Not Violated.

Appellant contends that his rights of due process of law were violated in that he was not promptly taken before a committing magistrate after he had been arrested; that he was detained by the officers in the police station where he was questioned for the greater portion of the time during his 48 hours detention; that while he was taken from one police station to another and subjected to continuous questioning by the police he had neither friends nor counsel, and at all times he was grievously concerned for his wife who was then in a delicate condition. In support of this contention appellant cites a number of decisions by the United States Supreme Court which reversed convictions because the rights of due process had been spurned. Anderson v. United States, 318 U.S. 350, 63 S.Ct. 599, 87 L.Ed. 829; McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819; Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575; Chambers v. Florida, 309 U. S. 227, 60 S.Ct. 472, 84 L.Ed. 716; Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; White v. Texas, 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342; Lomax v. Texas, 312 U.S. 674, 675, 61 S.Ct. 739, 85 L.Ed. 1115; Gros v. United States, 9 Cir., 136 F.2d 878; People v. Dye, 119 Cal.App. 262, 6 P.2d 313; People v. Quan Gim Gow, 23 Cal.App. 507, 138 P. 918; Ziang Sung Wan v. U. S., 266 U.S. 1, 45 S.Ct. 1, 69 L.Ed. 131; People v. Rogers, 22 Cal.2d 787, 141 P.2d 722; Lisenba v. State of California, 314 U.S. 219, 62 S. Ct. 280, 86 L.Ed. 166; People v. Bram, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568; Twining v. State of N. J., 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97; Sections 145, 825, 828, 834, 836, 849, 859, 4000, 4005, 4022, Penal Code. The authorities cited do not support appellant's contention. In most of the cited cases the petitioner or appellant sought the reversal of a conviction of an extremely ignorant if not youthful person under circumstances where public indignation had been aroused by the crime; or the accused had been subjected by the arresting officers to harsh, third-degree methods; or had been removed from one county to another, deprived of sleep, friends or counsel, and so treated as to defeat even stronger resistance. The most recent of these decisions (McNabb, Anderson and Gros) were based in large measure upon "flagrant" refusal of arresting officers to observe an act of Congress requiring a marshal promptly to take the accused before the nearest commissioner.

[7] It is true that the Penal Code (Sec. 849) of this state requires that upon his arrest a prisoner be taken before the nearest committing magistrate. But section 825 clearly contemplates some delay for the benefit of investigators by allowing two work days before presenting the accused to the magistrate. Section 836 authorizes an arrest without a warrant when the officer has reasonable cause for believing that the arrestee has committed a felony. Surely the language used in neither section contemplates that the officer should close his labors merely upon arriving at a "belief" that his prisoner committed the crime. The entire structure of law enforcement machinery contemplates the reasonable activity of those human agencies who are in a large degree guardians of the security of life and property. It is incumbent upon them to ferret out crimes and bring criminals to justice. While they may not effect confessions by those accused by such treatment as breaks the will of a prisoner, the public welfare requires such officers to exercise a reasonable diligence to collect available evidence from all who appear to have knowledge of the crime. While such diligence may jar the sensibilities of the elite and disarrange the plans of the suspected, yet inquiry must proceed if social order be maintained and wrongs be righted by judicial functioning. The statutory requirements for the safety and humane treatment of suspects or prisoners were not intended as narcotic ministrations for the constabulary or the police. Their purpose is to preserve the liberty of the citizen whose duty should impel him to divulge his full knowledge of a crime. The fact that a confession is made to a police officer while the accused is under arrest, in or out of prison, or is drawn out by his questions, *does not necessarily render the confession involuntary.* Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568.

[8] Moreover, the deprivation of one's right to due process of law is not an impediment to the fair administration of justice unless the acts alleged to constitute the violation have so terrified the accused or otherwise so frozen his intellectual processes as to impair the exercise of his reason or his will, resulting in a subversive influence upon the judicial investigation. A violation of the right of due process is not involved in a criminal trial unless such violation pollutes the stream of justice. McNabb v. United States, supra. Whether a failure on the part of police strictly to observe the canons of due process has so influenced a trial as to corrupt the final judgment must be determined in each case from its own facts. The reasons for the jealousy with which the courts have guarded the rights of due process of accused persons is best demonstrated in just such cases as those cited by appellant. In each of them a confession to the police was gained by breaking down the will of the accused by third-degree methods of an aggravated character. Quan was an ignorant Chinese surrounded by a group of insistent police of whom he was afraid. Dye was kept secretly in an outlying jail and intermittently questioned for seven days. The Twining case pertains only to the legal effect of a defendant's failure to testify in response to incriminatory statements made to witnesses. The Chambers case involved a number of ignorant negroes accused of an "atrocious" murder that enraged a community. They were rushed from one county to another, told that the movements were to "escape a mob" [309 U.S. 227, 60 S.Ct. 474, 84 L.Ed. 716], held secretly for seven days and questioned continuously until confessions had been obtained. In White v. Texas [310 U.S. 530, 60 S.Ct. 1033, 84 L.Ed. 1342], the accused was "an illiterate farm hand," arrested in the cotton field. For several successive nights he was taken from jail "up in the woods," whipped, threatened not to divulge his treatment, kept away from lawyer and friends and was intimidated at the final questioning by the presence of rangers about two o'clock in the morning. In the case of Ziang the accused was a native of China, having come to New York

as a student. Although suffering from a chronic stomach trouble, he was taken to a hotel in Washington and there kept for a week. He was subjected for seven days to continuous quizzing while he was ill and "in such pain that he would have confessed to a capital offense to gain relief." The McNabb boy was an ignorant mountaineer moonshiner; had not passed beyond the fourth grade; was without criminal experience and had never traveled beyond the McNabb settlement. Rogers was a gifted musician accused of patricide. His resistance for two weeks to the confinement and the severe punishment, applied to force his confession, was more than might have been expected from one of his kind. He was assured of release within three months after conviction. "He 'felt that confessing was the only possible way [to save his] life from an unjust execution.'" 22 Cal.2d at page 802, 141 P.2d at page 729. The rule adhered to in those cases cannot be appropriately applied to a strongminded, experienced, business man reared and educated in a big city, and especially to one who had dealt with the police and had been convicted of receiving stolen property. Such had been the experience of appellant who exhibited no fear when questioned by the officers. He was neither youthful, ignorant, nor ill. He knew his rights and asserted them at will. He never "confessed" to the theft, but vigorously denied it to the last.

[9] Neither was he abused by the officers. At the time of his detention he was known to have in his possession a part of the loot of a bold theft. The investigation proceeded without show of force or malevolence. The officers appear to have acted solely with the view of identifying the thief. It was their duty to recover the merchandise and to ascertain what knowledge Fox had of the crime. In prosecuting their labors they were not obliged to rest with a voluntary denial of guilt. Having been reassured by one who had confessedly received a part of the booty, it was their duty to pry into his conscience with reasonable diligence. The argument that an admission against interest or a confession made to an investigating officer cannot be used against an accused is unsound. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262. Arresting officers must be allowed some latitude in investigating felonies, otherwise the public will often be subjected to the brutal rule of skilled criminals who ply their vocation in metropolitan areas. The principle embodied in the 14th Amendment must be preserved as a cherished fortress of freedom, but unless its abuse attains to such extent as to inject into the proof of a crime evidence gained by violating the rights of the accused, the courts are not required to reject evidence gained by extrajudicial inquiry. The mere detention by the arresting officer of an accused without promptly taking him before a committing magistrate may be an offense on the part of the officer, but it does not by any means warrant the rejection of evidence gained from the prisoner by fair treatment. The conduct of a criminal trial under modern conditions cannot be confined within mechanical rules. Each step in the proceeding demands the exercise of "a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling on preliminary questions of fact." Nardone v. United States, 308 U.S. 338, 342, 60 S.Ct. 266, 268, 84 L.Ed. 307. The success of criminal prosecutions and the achievement of substantial justice must depend to a large extent upon the learning, good sense and courage of the trial judge. Id. The courts are not concerned with the practices of the police except in so far as they may be asked to use evidence thereby obtained against the will of the accused. McNabb v. United States, supra. No enlightened court will allow a conviction upon evidence secured under the circumstances disclosed by the decisions cited by appellant. The facts of this case remove it from the class of those condemned for violations of procedural rights under the 14th Amendment.

Testimony of Officers Properly Received.

[10, 11] The third assignment is that in overruling objections to the statements made by Fox to the officers, as they quizzed him while under detention, the court committed prejudicial error. Appellant was at no time mistreated. No promises of reward were made to him; no threats, no menace; no unkindness on the part of the officers. To the inquiries of officers it is the duty of a citizen, if innocent, to disclose his knowledge of any crime. When an investigating officer is called to testify as to the incriminatory statements or confessions of a prisoner it is then the duty of the trial court in the exercise of its discretion to determine in the first instance whether the statements made by the prisoner were free and voluntary. In making such determination a liberal measure

of discretion must be allowed. People v. Lehew, 209 Cal. 336, 287 P. 337. "The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible to formulate a rule that will comprehend all cases." People v. Siemsen, 153 Cal. 387, 95 P. 863, 866; Hopt v. Utah, 110 U.S. 574, 583, 4 S.Ct. 202, 207, 28 L.Ed. 262. The mere fact that a confession is made to an arresting officer by the accused while under arrest does not render it involuntary. The discretion of the trial judge in admitting it "must be controlled by all of the attendant circumstances." Hopt v. Utah, supra. A reviewing court is in no position to determine that error was committed in admitting the statements of an accused to the police "unless such error appears as a matter of law from the record presented." People v. Lisenba, 14 Cal.2d 403, 421, 94 P.2d 569, 578.

[12] On the trial of a party accused of a felony courts should be motivated by a zeal for justice rather than by a passion for mercy or revenge. While it is elemental that testimony of detectives and officers must be scrutinized, it is also fundamental that a voluntary incriminatory admission or confession of guilt is one of the strongest evidences possible against a prisoner. The record here discloses that appellant was bold and self-assertive throughout his detention. His admission that he had the stolen property then locked in his garage was made only after he had learned that his accomplice had accurately advised the police of appellant's possession of the booty. He did not ask for his friends; at no time did he request the officers to call in his counsel. In the Lisenba case, supra, the defendant contended that his rights of due process had been violated by the arresting officers (1) by their failure to take him promptly before a magistrate; (2) by not incarcerating him in jail (Secs. 849, 1597, Penal Code); (3) by detaining him incommunicado in a private home for 48 hours where he was subjected to incessant questioning by the officers in successive shifts; (4) by depriving him of rest and sleep during such detention. In the course of the interview one of the officers slapped his face. The court observed that the treatment of which Lisenba complained failed of its objective; that he did not confess until after his accomplice had been arrested and told the story to the officers. His insistence that he suffered from the pain and memory of beatings and vocative abuse assertedly administered to him did not render his confession inadmissible. The judicial inquiry into the crime of Lisenba was not poisoned by the extrajudicial behavior of the investigating officers, although the conduct of the latter was disapproved of by the court.

[13] The behavior of the officers there was akin to the conduct of the police who arrested appellant, except for the fact that Fox was in all interviews with the officers treated with urbanity and respect. The only unkindness to him was his detention and questioning after three o'clock of the Sunday morning after he had divulged all the information he chose to impart. The record is such as to warrant the trial judge in believing that the admissions of Fox were due to his sudden knowledge that Gorberg had divulged the true story of his own participation with Fox in the concealment, sale and delivery of the stolen merchandise and in sharing in the proceeds of the sale. The conduct of the officers under the circumstances presents a practical problem in crime detection. People v. Lisenba, 14 Cal.2d at page 422, 94 P.2d 569. The manner in which the cargo of tobacco was removed from the very purlieus of the house of its possessors; its speedy concealment in a remote quarter of the city; its removal to a more distant storeroom; its immediate sale and delivery to the purchaser by engaging the services of some agents like Gorberg for pay and others like Rabin without pay—these facts demonstrate the practical necessity of officers' running down substantial clues to crimes which occur in metropolitan centers if there is to be any security for the rights of ownership of property. It is unavoidable that the guilty and those who would protect them should at times suffer some inconvenience at the hands of investigating officers. But proof of such occurrences does not necessarily establish judicial error in the trial of the accused on the merits.

No Error in Rejecting Proposed Instructions.

[14, 15] Pursuing further his contention that his rights of due process were violated, appellant asserts that the rejection of certain of his proposed instructions violated the requirements of the 14th Amendment. He complains of the failure of the court to give to the jury several instructions setting forth the rules under which confessions or statements made to police

officers by one accused of crime may be considered by the jury. There was no occasion for instructing the jury that before they could consider any alleged confession of the defendant as evidence against him they "must believe that such alleged confession was freely and voluntarily made, and was not the result of inducement, coercion, intimidation, threats, violence, promises or duress exercised by any officer of the law, or any other person, upon the defendant." No evidence was presented to the court upon which such an instruction could be predicated. The court should have given another requested instruction telling the jury that they could disregard appellant's statements to the police officers if appellant had been deprived of sleep to the extent that "he was not in that state of mind where his statements were free and voluntary." However, the jury was fully aware of the length of time that appellant had been questioned by the officers and were able to determine whether he had capacity to make and understand the statements alleged to have been made to the officers. Because of the generous proof with respect to the questioning of appellant by the officers we are satisfied that no prejudice was suffered by appellant which resulted in a miscarriage of justice.

[16] Appellant also complains of the failure of the court to give to the jury a requested instruction on the subject of the necessity for corroboration of the testimony of an accomplice. The court gave to the jury the following instruction: "The court instructs the jury that conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence tending to connect the defendant with the commission of the offense. Such corroborative evidence need not tend to establish the precise facts testified to by the accomplice. It is sufficient if such corroborative evidence standing alone tends to connect the defendant with the commission of the crime charged. The testimony of an accomplice may be corroborated by the confession or admission of the defendant." This instruction was correct. People v. Siderius, 29 Cal.App.2d 361, 373, 84 P.2d 545. However, appellant complains of the omission therefrom of the statement that "the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." While the court might well have included the offered matter, yet in view of the abundant corroborating evidence hereinbefore recited, it is clear that appellant could have suffered no prejudice by the omission of the requested sentence.

[17, 18] Finally, appellant contends that he was prejudiced by the court's refusal to read his proposed instruction with reference to his alibi, to the effect that the time of the offense must be established by the People beyond a reasonable doubt. Such would have been error. It is the guilt of the defendant that must be established. People v. West, 34 Cal.App.2d 55, 59, 60, 93 P.2d 153; People v. Clapp, —— Cal.App.2d ——, 143 P.2d 985; People v. Shimonaka, 16 Cal.App. 117, 125, 116 P. 327; Sections 1096, 1096a, Penal Code. The instruction directing the jury to acquit the defendant if the evidence on the subject of the alibi considered with all the other evidence was sufficient to raise a reasonable doubt as to his guilt was sufficient. People v. Shannon, 28 Cal.App.2d 677, 681, 83 P.2d 302; People v. Addington, 43 Cal.App.2d 591, 594, 111 P.2d 356; People v. McNeese, 40 Cal.App.2d 97, 101, 104 P.2d 370.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

ANTHONY et al. v. HOBBIE.
Civ. 6907.

District Court of Appeal, Third District, California.
April 26, 1944.

Hearing Granted June 22, 1944.

1. Death 🔑58(1)

Where testimony, exclusive of testimony of a defendant called by plaintiff under statute, adduced by a plaintiff showed contributory negligence on part of decedent, there was no room for presumption that the decedent took ordinary care of his own concern. Code Civ.Proc. § 2055.

2. Automobiles 🔑242(8), 245(72)

Evidence disclosing that at time deceased was struck by defendant's automobile, deceased, in middle of night, was standing in defendant's lane of traffic, dispelled presumption of due care on part of deceased, and justified directed verdict for defendant, in death action.

3. Witnesses ⚷397

Where a witness is impeached by proof of inconsistent statements, the effect is merely to discredit witness and any testimony given by him at the trial, and the former statements are incompetent for any other purpose.

4. Appeal and error ⚷1047(3)

Where only testimony given by plaintiffs' witness was that she had no recollection of events on night of accident and, in an effort to impeach her on ground that plaintiffs were taken by surprise, witness was asked if she had not made certain answers at coroner's inquest and witness answered that she did not remember giving those answers, plaintiffs were not injured by action of trial court in striking out matter which was read from transcript of testimony taken before coroner's jury.

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Death action by Sadie Anthony and another against Don G. Hobbie. Judgment for defendant, and plaintiffs appeal.

Affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellants.

Rich & Weis and Richard H. Fuidge, all of Marysville, for respondent.

ADAMS, Presiding Justice.

This action was prosecuted by the surviving wife and sole surviving daughter of H. L. Anthony, to recover damages for the death of said H. L. Anthony which was alleged to have been caused by the negligence of defendant, Don G. Hobbie. Defendant denied negligence on his part and pleaded contributory negligence on the part of decedent which proximately contributed to his death.

The cause was tried by the court sitting with a jury. In support of their complaint plaintiffs produced several witnesses including defendant who was called under the provisions of section 2055 of the Code of Civil Procedure. The defendant, who was a Chevrolet dealer in Oroville, testified that in the late afternoon of January 30, 1941, he went to Sacramento from his home in Oroville, driving a 1941 Chevrolet sedan. About eleven o'clock that evening he left Sacramento on his way home. At a point north of Wheatland he ran out of gas, and was driven to Marysville by a passing motorist. There defendant arranged to have gasoline brought to his car, and then returned to it. Shortly thereafter F. W. Muller arrived with gasoline. Defendant proceeded north on Highway 99E, at a speed of approximately 50 miles per hour. As he approached the point where the accident happened he observed a car parked at a peculiar angle in a side road, with its headlights pointing in a northeasterly direction. The next thing he knew he struck the deceased, who, he said, was right in the middle of the road in front of him. He stated that when he was 75 or 100 feet from him, he saw Anthony, who was then standing about three feet on the west side of the white line of the highway, with his arms in the air facing the east and leaning; that it looked like he was falling forward, either trying to get out of the way or deliberately falling in front of the car, and that at the point of impact he was approximately three feet on the east side of the white line; that he was struck by defendant's left front fender and his body came up over the fender and hit the door of the car, then rolled across the highway on the west side to the edge of the pavement. That he, defendant, applied his brakes, swerved his car slightly and brought it to a stop at a distance said to have been 217 feet from the point of impact. His left front fender and headlight were damaged, his left tire was blown out, and there was a dent in the panel of the left front door. It was stated by defendant that his car, brakes and headlights were in good condition, that the highway was dry; that the night was chilly and the sky overcast, and that in some low places on the highway there was low fog, but that at the place of the accident the visibility was good.

Mr. Muller was then called by plaintiffs, and testified that after delivering gasoline to Mr. Hobbie's car he followed it; that about a quarter of a mile from the place where the accident occurred there was a swale where it was foggy; that he followed defendant's car for three or four miles; that he was about 75 yards behind it, and traveling 50 miles per hour; that he wasn't gaining on Hobbie, and Hobbie wasn't gaining on him; that there was no traffic before the accident happened; that he saw an object flying across the highway which he detected to be a man's body; that he stopped by the side of it; that Hobbie's car seemed to swerve and pulled off to the right; that when he got out of his car a woman (Miss Hansen) was there, screaming; that he took her in his car to Marysville; that she was muddy from head to foot; that he took her to the hospital, then went back to the scene of the accident with a tow truck; that on his return he asked Hobbie how the accident happened and the answer was that it happened so quick he didn't know what happened; that he saw tire marks in the road caused by the tire that blew out; that he took Mr. Hobbie in his truck and towed his car to Marysville. On cross-examination he said that Hobbie was driving on the right side of the road at the time of the accident; that he did not see deceased until after the accident; that at the time he saw Miss Hansen she was hysterical, and he thought she was intoxicated; that she couldn't walk very well.

H. L. Williams, state traffic officer, was next called by plaintiffs. He testified that the paved portion of the highway at the scene of the accident was 21 feet wide; that he found a broken eyeglass, a shoe and broken glass about five feet in from the east edge of the pavement; that he found marks from a wheel or tire starting south about ten feet from where the glass and shoe were found, and about two feet east of the center line; that the marks extended 206 feet; that the body of decedent was about 40 feet from the point of beginning of these marks, and about five feet west of the west edge of the pavement; that he noticed a Chevrolet coupe mired down in a side road, facing northeasterly. This witness also stated that he asked defendant what happened and the latter stated that he was traveling north at about 50 miles per hour when all at once he observed this man in front of his car, that he applied his brakes about the time he hit the man and then drove off to the side of the road and stopped and went over to the body; that a woman appeared on the scene who was very hysterical, and that when he observed the man it was too late to keep from hitting him.

The only other witness called by plaintiffs to testify to anything connected with the accident was a Miss Hansen, who was the woman referred to by Mr. Muller and defendant who had appeared at the scene of the accident. She testified that she knew decedent, that she could remember coming toward Marysville on her way home to Oroville where she was living; but as to all other matters connected with the accident she stated that she had no recollection; that she did not remember her car being bogged down in the mud; that she did not remember seeing Mr. Anthony get out of the car and try to stop a car to help her out of the ditch; that she did not know that anything of that kind happened; that she remembered that there was a coroner's inquest after the accident, and that she then testified but was in a hysterical condition. At this point counsel for plaintiffs sought to impeach this witness on the ground that her testimony had taken him by surprise. He then asked the witness if she had not testified at the inquest that she was traveling in a car with Mr. Anthony on January 31st, and that she then witnessed an accident; that they got stuck and he got out to get assistance, etc. The witness answered that she did not remember giving those answers. To all other questions regarding whether she had given certain answers to questions put to her at the inquest, she answered that she did not recall them. She was asked if, when she was served with a subpoena to testify in this case, she had not stated that if she came to court she wouldn't testify to anything to help Mrs. Anthony—that she didn't like them. She answered that she had not so stated, but had said that if she had to go to court and testify, her testimony would not do any good—that she could not remember any statements. She said that she had no recollection as to what happened the morning of the accident. On cross-examination she again stated that she had no recollection of any of the events of the day or night—and on redirect she said she did not remember a thing, that she didn't recall the case.

Defendant's counsel moved to strike out all of the testimony of this witness relating to impeachment concerning the reading to her of questions put to her and her answers at the inquest. This request was granted as to the testimony at the coroner's inquest, and the jury were instructed to disregard all the questions and answers given by the witness at the inquest.

At the close of plaintiffs' testimony defendant's counsel made a motion for a nonsuit, which was denied. He then called two witnesses in an effort to show that the stomach of decedent after the accident contained a small amount of alcohol, but their testimony is not important on this appeal. Defendant's counsel then read to the jury the testimony of Miss Jean Wilson which with the consent of plaintiffs' counsel had been introduced by him on behalf of defendant prior to the introduction of any testimony for plaintiffs. This witness testified that on the night of the accident she was driving north on Highway 99E; that after she passed the Sierra View Memorial Park (which was near the scene of the accident) she saw a man standing in the middle of the highway not over a foot from the white line, "in a very leaning condition, with his hand waving in the air"; that he was on the right side of the road; that he was in between one or two of the fog pockets on the highway; that if she had not been going at a slow rate of speed she would have hit him, but she went around him clear over on the left side going north; that there was a car following her and she turned up her mirror to keep the headlights from shining in her face, and as she did so saw this man; that he was facing the direction from which she was coming; that before she saw him she saw three cars parked off to the east; that one of them was about where the man was hit and was backed up into a ditch with the lights shining on the highway, and further down there were two more cars back of where she saw the man in the highway; that she had arrived at this spot between 1:30 and 2 o'clock; that her car was running badly and she had to travel in second gear and was going about 20 miles per hour; that she did not see the man in the road until she drove up to him; that he was not in a fog bank; that she left him standing in the center of the highway.

Defendant's counsel introduced in evidence Ordinance 106 of Yuba County with reference to anyone's being on the public highway in Yuba County in an intoxicated condition, and then rested. On rebuttal plaintiffs called a pathologist who testified that the amount of alcohol in decedent's stomach would give no idea as to the amount that might be in the brain, and that it wouldn't be important in itself, as far as intoxication was concerned.

At the conclusion of the rebuttal testimony defendant's counsel made a motion for a directed verdict. The court took it under advisement, but subsequently granted the motion, saying: "It is pretty well settled that where the evidence of the plaintiff himself is such as to show what actually took place, the conditions and so forth, at the time of the accident, that if that evidence is irreconcilable or inconsistent with the presumption in question, to-wit: the presumption that the deceased used due care for his own safety, then the presumption disappears, providing of course, that is shown by the testimony of the witnesses produced on behalf of the person relying on the presumption. Now that being the settled rule as the Court understands it, I think we have here a clear case that shows what happened and shows it by the plaintiffs' witnesses. I think the Court can say the evidence shows without question, negligence on the part of the deceased. As far as saying negligence as a matter of law, and that being established by plaintiffs' evidence, the testimony of the witness Muller and the witness Williams, there is no room for the presumption. The presumption goes out. Therefore the facts and circumstances shown here, I can see no alternative but to grant the motion." The jury were instructed accordingly and a verdict for defendant was returned.

It is contended on this appeal that the trial court committed reversible error in directing a verdict for defendant and also in granting defendant's motion to strike with respect to the testimony of Miss Hansen. In support of the first of these contentions appellant argues that the presumption that deceased exercised ordinary care for his own safety while on the highway was evidence in behalf of plaintiffs, that there was no testimony offered by plaintiffs' witnesses Muller and Williams inconsistent with this presumption, "that deceased could not be chargeable with contributory negligence as a matter of law, because the presumption of due care is in itself evidence, and there was no positive or direct testimony as part of plaintiffs' case indicating or proving what the deceased did or did not do before he was struck and killed by defendant's automobile, to the extent that under any conceivable theory, the presumption of due care was out of the case"; and that the question of contributory negligence on the part of the deceased which in anywise or in the slightest degree contributed to his death was one of fact for the jury and not the court to decide. In support of this contention appellants cite Smellie v.

Southern Pac. Co., 212 Cal. 540, 299 P. 529; Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884; Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269; Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Downing v. Southern Pac. Co., 15 Cal.App.2d 246, 59 P.2d 578; Ellison v. Lang Transportation Co., 12 Cal. 2d 355, 84 P.2d 510; Kelly v. Fretz, 19 Cal. App.2d 356, 65 P.2d 914; Ramsey v. Pasini, 108 Cal.App. 527, 291 P. 884; Roselle v. Beach, 51 Cal.App.2d 579, 125 P.2d 77; Speck v. Sarver, 20 Cal.2d 585, 128 P. 2d 16; Noble v. Key System, Ltd., 10 Cal. App.2d 132, 51 P.2d 887; Gorman v. Sacramento County, 92 Cal.App. 656, 268 P. 1083; Dull v. Atchison, T. & S. F. R. Co., 27 Cal.App.2d 473, 81 P.2d 158; Duehren v. Stewart, 39 Cal.App.2d 201, 102 P.2d 784; Kelley v. City and County of San Francisco, 58 Cal.App.2d 872, 137 P.2d 719; Geisler v. Rugh, 19 Cal.App.2d 738, 66 P.2d 671; and Cook v. Los Angeles R. Corp., 13 Cal.2d 591, 91 P.2d 118.

Respondent, on the other hand, argues that under the authority of the very cases relied upon by appellant, the presumption of due care on the part of deceased was dispelled; that, disregarding the testimony of defendant, the testimony of Muller and Officer Williams produced by plaintiffs shows that deceased was directly in defendant's traffic lane when he was struck, a place where he had no right to be, and that the testimony of these witnesses dispelled the presumption, since it was wholly irreconcilable with the presumption sought to be invoked.

[1] From the cases cited and relied upon by appellant the rule seems to be well established that where testimony—exclusive of the testimony of a defendant called under section 2055 of the Code of Civil Procedure—adduced by a plaintiff shows contributory negligence on the part of a decedent there is no room for the presumption that such decedent took ordinary care of his own concerns. The question before us is, therefore, whether in this case plaintiffs produced testimony, exclusive of the testimony of defendant, which dispelled the presumption, and, therefore, left no conflict necessarily determinable by the jury. Mr. Muller's testimony shows that on the night of the accident, after defendant started on his way north, he followed defendant's car for three or four miles, being about 75 yards behind it; that he heard a noise that seemed like a thud, and saw an object flying across the highway which he detected was a man's body; that when he looked across the road this man's body was lying there; that defendant was on the right side of the highway when the witness saw him strike the man whose body flew across the highway; that he did not see deceased before he was struck. Mr. Williams, the state traffic officer, testified that at the scene of the accident he found a broken eyeglass, a shoe and broken glass from a headlight, about five feet in from the east edge of the pavement, and there was also some foreign substance on the pavement at that spot; that he also noted marks on the highway which he said might have been made by the flat left hand tire of defendant's car, which marks began 2.7 feet east of the center line of the highway. He stated, also, that defendant told him that he was traveling north and all at once he observed Anthony in front of his car, that he applied his brakes about the time he hit him, then drove off to the side of the road and stopped, and that when he observed the man it was too late to keep from hitting him.

[2] This testimony compels the conclusion that at the time he was struck by defendant's car Anthony, in the middle of the night, was standing in defendant's lane of traffic, obviously a place of danger. We agree with the conclusion of the trial court that this evidence dispelled the presumption of due care on the part of decedent. In Mar Shee v. Maryland Assurance Corporation, supra, testimony which was held sufficient to dispel the presumption that the shooting of decedent was accidental and not criminal was testimony that decedent was shot twice. The court said that this led inevitably to the conclusion that the person who did the shooting intended to shoot either the decedent or some other person for whom he mistook decedent, and that the presumption of innocence was thus dispelled. In Dull v. Atchison, T. & S. F. R. Co., 27 Cal.App.2d 473, 477, 478, 81 P.2d 158, 161, the court said:

"From the facts as they are contained in the record, it appears that the deceased approached an open railroad crossing with a clear view of the tracks in both directions from a point sixty feet away from the crossing; that as she approached the railroad tracks she slowed down to about two miles per hour, and then drove up a short incline and onto the tracks, where she was struck by the train. Driving an automobile which the appellant, who was the owner thereof, testified could be stopped within twelve or fourteen feet when going twenty miles per hour, and within about nine feet when going twelve or fifteen miles per hour, we find the deceased, according to the evidence, going twenty miles per hour when within five hundred feet of the crossing in question, and at a much slower speed for the last sixty feet, with an unobstructed view, still continuing to drive up to and upon the track in the face of the fast approaching train. With this picture, it would be idle to attempt to show ordinary care or prudence upon the part of the deceased. As a matter of fact, in order to justify the conduct of the unfortunate decedent, we would be first compelled to overrule every known California case involving accidents at railroad crossings. Appellant relies largely upon an indulgence of the presumption of ordinary care and diligence on the part of decedent from all the circumstances of the case and the natural instinct of self-preservation—and contends that because thereof the motion for a directed verdict should have been denied. However, this presumption arises only in the absence of direct proof of the facts. The circumstances of this case alone are sufficient to rebut the presumption claimed." In Mundy v. Marshall, 8 Cal.2d 294, 296, 65 P.2d 65, 66, it is stated: "There is only one reasonable conclusion to be drawn from the facts established by the testimony of the plaintiff's own witness. A pedestrian who crosses a well-lighted thoroughfare other than on a crosswalk, in a diagonal line and with his back partly turned to approaching traffic and is struck by a car approaching from the quarter from which traffic was to be expected is obviously not exercising the vigilance the law requires of him. Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A.L.R. 1493; Atkins v. Bouchet, 65 Cal.App. 94, 223 P. 87; Moss v. [H. R.] Boynton Co., 44 Cal.App. 474, 186 P. 631; Thompson v. White, 56 Cal.App. 173, 204 P. 561. The manner in which the decedent was crossing the street having been covered by the plaintiff's own evidence, there is no room for the operation of the presumption that he was exercising due care (Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709), and it cannot be relied upon to establish a conflict in the evidence."

In the instant case, the presumption of due care on the part of decedent having been dispelled, the trial court, on the evidence before it, properly directed a verdict for defendant.

[3, 4] As to appellant's contention that the trial court erred in striking out the testimony of plaintiffs' witness Inez Hansen, in view of our conclusion that the trial court properly directed a verdict for defendant this contention is unimportant. However, since the only testimony given by this witness was that she had no recollection of the events of the night of the accident, she testified to nothing that was either favorable or unfavorable to plaintiffs. And while, in an effort to impeach her on the ground that plaintiffs were taken by surprise, she was asked if she had not made certain statements at the coroner's inquest, had these statements been left in the record they would have availed nothing, for it is well established that when a witness is impeached by proof of inconsistent statements the effect is merely to discredit the witness and any testimony given by him at the trial. The former statements are incompetent for any other purpose. See Lopez v. Wisler, 58 Cal.App.2d 455, 462, 136 P.2d 816, and cases there cited. Plaintiffs were, therefore, not injured by the action of the trial court in striking out the matter which was read from the transcript of testimony taken before the coroner's jury.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

FIRST INDUSTRIAL LOAN CO. OF CALIFORNIA v. DAUGHERTY, Commissioner of Corporations.*

Civ. 14313.

District Court of Appeal, Second District, Division 2, California.

April 26, 1944.

Hearing Granted June 20, 1944.

1. Constitutional law 🔑56
Pawnbrokers and money lenders 🔑2

The provision of the Industrial Loan Act attempting to limit courts in their jurisdiction to review orders of Commissioner of Corporations is unconstitutional. Gen.Laws Supp.1941, Act 3603, § 11.

2. Constitutional law 🔑80(2)
Corporations 🔑394

The Commissioner of Corporations is an administrative officer and the legislature cannot grant him judicial power.

3. Constitutional law 🔑73

The courts have jurisdiction, without statutory power, to review administrative order and annul it or enjoin its enforcement.

4. Constitutional law 🔑56

The jurisdiction of the courts to review an administrative order cannot be limited or curtailed by the legislature.

5. Officers 🔑103

A person adversely affected by administrative order is not restricted on review thereof to record of hearing before board or officer, but is entitled to trial de novo, although not necessarily an unqualified or unlimited trial de novo, in court of law on questions of both law and fact.

6. Pawnbrokers and money lenders 🔑1

In suit to enjoin enforcement of order of Commissioner of Corporations for restoration of surplus of industrial loan company, superior court had jurisdiction of subject matter and of person of Commissioner. Gen.Laws Supp.1941, Act 3603, §§ 7, 11.

7. Pawnbrokers and money lenders 🔑1

In statutes regulating financial institutions, "surplus" does not mean the same as "reserve", "surplus" meaning a fund created to meet unforeseen contingencies and unusual losses, and "reserve" being computed on basis of liabilities to the public. St.1935, p. 537, § 981 et seq. as amended; p. 744, § 12371; Gen.Laws 1937, Act 652, §§ 20, 21, 68; Act 986, §§ 5.03, 10.03; Gen.Laws Supp.1941, Act 3603, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Reserve" and "Surplus".

8. Pawnbrokers and money lenders 🔑1

Where industrial loan company used its surplus, during depression, to pay losses and avoid impairment of capital, Industrial Loan Act did not authorize Commissioner of Corporations to order restoration of surplus, especially in view of Commissioner's acquiescence for 10 years and legislative revision of the act without inserting specific requirement for restoration of reduced surplus. Gen.Laws Supp.1941, Act 3603, §§ 7, 10, 11.

9. Pleading 🔑214(1)

Allegations of complaint are deemed true on demurrer.

10. Statutes 🔑219

The contemporaneous construction of a statute by executive officers of the state extending over a long period of years is entitled to consideration.

11. Pawnbrokers and money lenders 🔑1

The authority of the Commissioner of Corporations to make rules under the Industrial Loan Act did not include authority to legislate, or to enact a rule declaring an act to be a crime that was not made such by law. Gen.Laws Supp. 1941, Act 3603, §§ 10, 22.

12. Constitutional law 🔑251

Due process of law demands that a standard of conduct and an ascertainable standard of guilt be laid down by statute.

13. Constitutional law 🔑70(1), 77

A court or an administrative officer may not insert into a statute what has been omitted nor omit what has been inserted. Code Civ.Proc. § 1858.

14. Statutes 🔑190

An unambiguous act must be construed as written.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Suit by the First Industrial Loan Company of California to enjoin Edwin M. Daugherty, as Commissioner of Corporations, from enforcing an order against plaintiff. From a judgment for plaintiff, defendant appeals.

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* Subsequent opinion 159 P.2d 921.

Affirmed.

Robert W. Kenny and Carl W. Wynkoop, both of San Francisco, for appellant.

O'Melveny & Myers, Paul Fussell, and Pierce Works, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment permanently restraining defendant from enforcing an order it had made September 25, 1942, requiring plaintiff to restore a portion of its surplus which had been used for the payment of losses, defendant appeals.

At the time of the granting of the preliminary injunction, which was later made permanent, The Honorable Emmet H. Wilson, who presided at the trial, filed with the clerk of the superior court a memorandum opinion in which he clearly set forth the pertinent facts, the issues, the principles of law involved, and the reasons for the judgment. We are in accord with the views therein expressed, and we adopt the opinion of Judge Wilson as and for the opinion of this court. It is as follows:

"By this action plaintiff seeks the review and annulment of an order made by defendant and an injunction restraining the enforcement of said order. Defendant has demurred generally to the complaint and also on the ground that the court has no jurisdiction of the subject matter or of the defendant in his official capacity.

"Plaintiff was organized under the Industrial Loan Act originally adopted in 1917 and revised in 1941. (Stats.1917, ch. 522, p. 658; Stats.1941, ch. 1187, p. 2945, Deering's General Laws, 1941 Supp. [Act 3603] p. 1992.)

"The order sought to be reviewed requires plaintiff 'to restore and maintain the surplus required to be carried under Section 7 of the Industrial Loan Act and to be maintained under Section 4 of Chapter 5 of the Rules and Regulations of the Commissioner of Corporations relating to industrial loan companies.'

"The complaint alleges that plaintiff was organized in 1917 pursuant to the statute above mentioned. From time to time since the date of its incorporation it has declared and paid dividends out of its net profits to its shareholders. Each time before any dividend was declared not less than 10 per cent of the net proceeds of plaintiff for the preceding half year, or for such period as was covered by the dividend, was carried to its surplus, as required by section 7 of the Industrial Loan Act. During the years 1932 to 1935, inclusive, by reason of the prevailing economic conditions, plaintiff charged off, in accordance with standard accounting practices, bad debts, doubtful accounts, and losses incurred by plaintiff in the ordinary course of its business. Such charging off first exhausted its reserves for losses and undivided profits and thereafter caused a reduction of its surplus to an amount substantially lower than the aggregate amounts which from time to time prior thereto had been carried to surplus. If plaintiff's surplus had not been so employed to offset said losses an impairment of its capital would have resulted. No dividends were declared by plaintiff between October 5, 1932, and December 9, 1936. Since the latter date six dividends have been declared. In each case 10 per cent of current profits were carried to surplus, as required by said section of the statute, before the declaration of a dividend. All of the foregoing facts were known to defendant Commissioner at or shortly after the dates on which they respectively occurred, and with such knowledge he issued, during the period from 1932 to and including April 1, 1941, fifteen permits or supplemental permits, or amendments thereto, authorizing plaintiff to issue and sell its securities to the public. Prior to November 1, 1941, defendant did not require plaintiff either to maintain or to restore its surplus to an amount equal to the aggregate of all sums theretofore carried by plaintiff to its surplus, and no rule or regulation of defendant required that any industrial loan company so maintain or restore its surplus. Following the revision of the Industrial Loan Act in 1941 defendant revised his rules and regulations relating to industrial loan companies. Section 4 of Chapter 5 of the Industrial Loan Act Rules and Regulations, which became effective November 1, 1941, reads as follows: 'An industrial loan company shall maintain the statutory surplus required by Section 7 of the Industrial Loan Act and shall not use any portion of said statutory surplus to offset bad debts, doubtful accounts or for other special reserve accounts.' In July, 1942, defendant issued the order above mentioned requiring defendant to restore and maintain its surplus, coupled with an order directing plaintiff to show cause why said order should not be observed. At the hearing there was presented and considered by defendant an agreed statement of facts, together with other evidence presented by both plaintiff and defendant, such additional evidence supplementing but not contradicting or restricting the agreed statement of facts, after which defendant signed and filed his findings of fact, conclusions, and order making final his original order of July, 1942.

"The complaint further alleges that it was not contended by defendant at said hearing that plaintiff was conducting its business in an unsafe or injurious manner, or that plaintiff's capital was impaired or reduced below the amount required by law, or that plaintiff had in any manner violated or failed to comply with the provisions of its articles of incorporation, or with any law of this state, except that it was asserted by defendant, and denied by plaintiff, that Section 7 of the Industrial Loan Act required the maintenance or restoration of surplus by industrial loan companies in the aggregate and in substance as purportedly required by said Section 4 of Chapter 5 of the Rules and Regulations hereinbefore quoted.

"1. *Jurisdiction.* The Industrial Loan Act expressly vests the court with jurisdiction to review an order of the Commissioner of Corporations such as the one here in issue. Section 11 of the act, after authorizing the Commissioner to make an order requiring a company organized under the act to perform or to discontinue certain acts, provides: 'Such company shall have 10 days after any such order is made final in which suit may be commenced to restrain enforcement of such order and unless such action be so commenced and enforcement of such order be enjoined within 10 days by the court in which such suit is brought, then such company shall comply with such order.' Section 23 provides that 'Every order, decision, license or other official act of the commissioner shall be subject to review in accordance with law.' The section further provides that the court, upon such review, 'shall receive and consider any pertinent evidence which was introduced in the formal hearing before the commissioner, * * * but shall be limited to a consideration and determination of the question whether there has been an abuse of discretion on the part of the commissioner in making such order, decision, finding, requirement, or rule.'

[1-5] "This provision adds to the executive prerogative by attempting to limit the courts in their jurisdiction to review the orders of the commissioner. The legislature is without power so to demarcate the judicial power. The constitutional division of governmental functions and the limitations and restraint placed on each branch of the government prevents accretion to the executive power at the expense of the legislative and judicial branches unless the latter inertly allow their historical authority to be absorbed by the executive. Without independent judicial review executive justice will be uncertain and incomplete. Defendant does not possess and the legislature cannot, in the absence of constitutional authority, grant him judicial power or functions. He is an administrative officer exercising discretionary administrative functions. (Schwab-Wilson Machine Corp. v. Daugherty, 15 Cal.App.2d 701 [59 P.2d 1057].) It needs no statutory declaration to vest the court with jurisdiction, and such jurisdiction cannot be limited or curtailed by legislative fiat, to review an order of an administrative officer or board, and, if the order be in excess of the power of such officer or board, to annul the same and to enjoin its enforcement. (Brock v. Superior Court, 11 Cal.2d 682 [81 P.2d 931]; Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 586 [55 P.2d 495].) A person adversely affected by an order of an administrative board or officer is not restricted, upon review thereof, to the record of the hearing before such board or officer, but is entitled to a trial de novo in a court of law on questions of both law and fact (Laisne v. State Board of Optometry, 19 Cal.2d 831 [123 P.2d 457]), although the same need not necessarily be an unqualified or unlimited trial de novo. (Dare v. Board of Medical Examiners [21 Cal.2d 790, 136 P.2d 304].)

[6] "Having jurisdiction of the subject matter and jurisdiction to review and annul the order, the court must necessarily have jurisdiction of the person who created the subject matter—the officer that made the order—and to enforce a writ of mandate or injunction, or both, against him.

"2. *General Demurrer.* Section 7 of the Statute reads as follows: 'The directors of every corporation, under the provisions of this act, may at certain times and in such manner as its by-laws prescribe, declare and pay dividends to the stockholders of such corporation, of so much of the net profits of the corporation as may be appropriated for that purpose under its by-laws, but before any such dividend is declared, not less than 10 per cent of the net profits of such corporation for the preceding half year, or for such period as is covered by the dividend, shall be carried to its surplus until such surplus shall equal the amount of the paid-up capital stock.' Section 11 provides among other things: 'If it shall appear to the Commissioner of Corporations that any company hereunder has violated or failed to comply with the provisions of its articles of incorporation, or any law of this State, or whenever it shall appear from the report of any company hereunder, or the commissioner shall have reason to conclude, that the capital of any company hereunder is impaired or reduced below the amount required by law, he may, by an order under his hand and official seal, addressed to such company, direct such company to discontinue such violation and to comply with the law, or to make good the deficiency or impairment of capital alleged by him to exist within 60 days after the date of such requisition; or

"'If it shall appear to the commissioner that such company is conducting business in an unsafe or injurious manner, he may, in like manner, direct the discontinuance of any such unsafe or injurious practices.'

"The order in issue here, directing plaintiff to restore and maintain its surplus, is claimed by defendant to have been made pursuant to section 4 of chapter 5 of his rules above quoted requiring industrial loan companies to maintain the 'statutory' surplus 'required by section 7' of the act and prohibiting the use of such statutory surplus to offset bad debts or doubtful accounts. Defendant's power to make rules rests on section 10 of the act which provides that 'The commissioner shall have the power to establish such rules and regulations as may be reasonable or necessary to carry out the purposes and provisions of this act.'

"The authority of defendant to make and enforce rules lies within and does not extend beyond the statute and the validity of the rule in question pursuant to which he has purported to act depends on whether the statute requires or its purposes contemplate that the surplus must be maintained constantly without impairment by charges for losses.

"Section 11 of the statute enumerates the derelictions of an industrial loan company that the commissioner may order to be corrected or discontinued: (a) violation of its articles of incorporation; (b) violation of any law of this state; (c) impairment or reduction of *capital* below the amount required by law; (d) conducting its business in an unsafe or injurious manner. It was not charged by defendant that plaintiff had violated its articles of incorporation or any law, nor that its capital had been impaired, neither was it charged that plaintiff was doing business in an unsafe or injurious manner. There is no question as to plaintiff's solvency. The offense claimed to have been committed by plaintiff was that it had impaired its *surplus* by charging losses against it. There is no claim that plaintiff had failed to comply with any provision of the statute, unless it be that section 7 impliedly required that a surplus, once established, must remain unimpaired.

"Defendant argues that because there is no language in section 7 or in any other portion of the statute expressly permitting the use of the surplus, any such use is contrary to law, that the restoration of any used portion is not governed by the provisions for its creation, and that therefore any used portion must be immediately restored as required by the commissioner's rule above mentioned. Plaintiff asserts that there is nothing in the statute forbidding the use of the surplus and claims the right to use it under such conditions as existed when it was employed to absorb bad debts and other losses. Thus two opposing queries arise: Why should the law require a surplus to be created if it may be impaired by charging bad debts against it? On the other hand, why should there be a surplus if it cannot be used in the stress of circumstances to carry a company through the rough weather of a depression? The answers are to be found in the definition of the term 'surplus.'

"A surplus is a fund created 'to meet unforeseen contingencies and unusual losses.' (First National Bank v. Moon, 102 Kan. 334 [170 P. 33, 35 L.R.A.1918C, 986].) It 'represents permanent surplus or a liability that is carried permanently on the books and is rarely ever decreased * * * except by necessity, in case of a loss to the bank.' (Chicago Title & Trust Co.

v. Central Trust Co., 312 Ill. 396 [144 N.E. 165, 172].) The primary purpose of a surplus 'is the accumulation of a sum against which bad debts may be charged so that at all times the capital may be kept unimpaired.' (Pullen v. Corporation Comm., 152 N.C. 548 [68 S.E. 155, 161].) If a banking corporation should divide all its profits and accumulate no surplus, any business loss or deficiency must be made good or proceedings may be instituted against it and it would be subject to the hazard of a receivership and termination of its corporate existence. (Mulcahy v. Hibernia S. & L. Society, 144 Cal. 219 [77 P. 910].)

"By reason of economic conditions it became necessary for plaintiff, in accordance with standard accounting practice, to charge off bad debts, doubtful accounts, and general business losses. These were charged to reserves for losses and to undivided profits until they were exhausted. In making further similar charges plaintiff then had the choice of reducing its surplus or impairing its capital. Impairment of its capital would have furnished a ground for the taking over of plaintiff and its assets by defendant. (Industrial Loan Act, sec. 11.) Liquidation of the company and loss to its investors were avoided by the reduction of the surplus to the extent necessary to absorb losses.

[7] "In statutes regulating financial institutions 'surplus' does not mean the same as 'reserve.' Reserves are computed on the basis of liabilities to the public. The reserve of an insurance company is based on the total liability of the company to its policy-holders. If the reserve is not maintained the company is insolvent (Insurance Code, § 981, et seq. [St.1935, p. 537, as amended]) and the insurance commissioner may take possession of its books and property. (Sec. 1011 [St.1937 p. 2563].) A bank must maintain a reserve proportionate to its deposits and if impaired the superintendent of banks may impose the penalty provided in the statute. (Bank Act, secs. 20 and 68, [Deering's Gen.Laws 1937, Act 652].) A building and loan association is required to maintain an investment certificate reserve in a specified proportion to its investment certificate liability, and if it fails so to do it is prohibited from paying dividends or distributing profits until the reserve shall have been restored. (Building and Loan Act, sec. 5.03, [Deering's Gen.Laws 1937 Act 986]).

"Insurance companies, banks, and building and loan associations are required to maintain a surplus for certain purposes in addition to their reserves. If an insurance company's surplus 'is impaired by reason of loss' the amount of impairment shall be restored 'in the manner provided for its accumulation.' (Insurance Code, sec. 12371.) Losses sustained by a bank in excess of its undivided profits may be charged to and paid from surplus, in which event the surplus shall be restored in the manner of its creation. (Bank Act, § 21.) Likewise if a reserve of a building and loan association shall be impaired, 'it shall thereafter be restored in like manner' to its accumulation. (Building & Loan Act, sec. 10.03.)

"Defendant seems to treat the surplus, when created as provided in section 7 of the Industrial Loan Act, as a reserve as the same is defined and required by the Insurance Code and the Bank and Building and Loan Acts. This theory has no foundation in the Industrial Loan Act. This statute does not require the establishment or maintenance of any reserve whatsoever. The surplus prescribed is not based on liabilities, as in the case of the other classes of corporations mentioned, but is established and replenished only when dividends are declared and is accumulated by setting aside not less than 10 per cent of the net profits for the respective dividend periods without reference to the amount of liabilities. If no dividend is declared no surplus need be created.

[8-10] "The statute does not require that the surplus remain at all times unimpaired, and I find nothing in its purposes that so contemplate. The allegations of the complaint are deemed to be true on demurrer. The charges for losses were made against the surplus during the four year period from 1932 to 1935, and no dividends were declared during that period, nor until December, 1936. Since the latter date six dividends have been declared, 10 per cent of the current profits having been credited to surplus with each dividend. Notwithstanding that all of said facts were known to defendant at or about the dates when they occurred, he issued 15 permits or supplemental permits, or amendments thereto, during the period from 1932

to April, 1941, authorizing plaintiff to issue and sell its securities to the public. Defendant did not, prior to November, 1941, require plaintiff to restore its surplus to its former amount. Having knowledge of the reduction of plaintiff's surplus over a period of four years, defendant, without requiring its restoration, acquiesced in and permitted the issuance of plaintiff's securities for a period of ten years from 1932 to the end of 1941. During said period the administrative construction of the statute was the same as that now contended for by plaintiff. The contemporaneous construction of a statute by executive officers of the state extending over a long period of years is entitled to consideration. (Riley v. Thompson, 193 Cal. 773 [227 P. 772].) In 1941 the legislature revised the entire statute. (Stats.1941, ch. 1187, p. 2945.) The quoted portion of section 11 in the revision is the same as the original statute. By not making a specific requirement in the revised act for the restoration of a reduced surplus the legislature in effect concurred in defendant's previous construction. (People v. Southern Pacific Co., 209 Cal. 578, 595 [290 P. 25].)

[11, 12] "The act in question is a penal statute, it being a misdemeanor to violate or to participate in the violation of any of its provisions. (Industrial Loan Act, sec. 22.) If defendant's present contention be sustained plaintiff committed a criminal act when it reduced its surplus and another when it failed to restore the same immediately, although the act does not forbid reduction nor require immediate restoration. The only offense charged against plaintiff is that it did not comply with defendant's rule. The statutory authority to establish rules does not empower defendant to legislate nor to enact a rule declaring an act to be a crime that is not made such by law. Due process of law demands that a standard of conduct and an ascertainable standard of guilt be laid down by statute. (Cline v. Frink, 274 U.S. 445 [47 S.Ct. 681] 71 L.Ed. 1146.)

[13, 14] "It is not within the province of the court to insert into a statute what has been omitted nor to omit what has been inserted. (Code Civ.Proc. sec. 1858; In re Haines, 68 Cal.App. 522 [229 P. 984]; [In re] Estate of Barnett, 97 Cal.App. 138 [275 P. 453]; Pacific Coast, etc., Bank v. Roberts, 16 Cal.2d 800. [108 P.2d 439].) An administrative officer has no more power in this regard than the court. Such an officer has no discretion but to follow the law. There being no ambiguity in the act it must be construed as it is written. If the law does not prohibit the use of surplus to absorb losses the commissioner cannot do so. Defendant's position that he has power to make a rule that amounts to legislation on a matter which the legislature failed to cover is untenable. It is in excess of his jurisdiction to enlarge the terms of the statute under the guise of regulation, nor may he impose conditions more onerous than are prescribed by law. (Boone v. Kingsbury, 206 Cal. 148 [273 P. 797].)

"The statutes regulating banks, building and loan associations, and insurance companies had been adopted and had been amended and revised many times prior to the revision of the Industrial Loan Act in 1941. The legislature, with knowledge of the requirements of said statutes, failed to place similar provisions in the latter act. But an industrial loan company cannot declare and pay a dividend without carrying to surplus 10 per cent of the net profits for the dividend period. By reason of this provision surpluses will be restored even in the absence of express requirements therefor similar to those in the other three statutes mentioned. The unauthorized order of defendant requiring an industrial loan company to restore the impaired surplus immediately, if enforced, would place such a company in a much less favorable financial position than the legislature has placed its competitors in the money lending field which may restore their impaired surpluses not immediately but in the same manner as they were created."

The judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 14272.

District Court of Appeal, Second District, Division 3, California.

April 19, 1944.

Rehearing Granted May 17, 1944.

1. Wills 🔑319

The jurisdiction of superior court to admit a will to probate is dependent upon publication or posting of notice of hearing on petition to probate will and not upon mailing of such notice to heirs and devisees. Probate Code, §§ 301, 326–328.

2. Wills 🔑319

Where Los Angeles county was concededly proper county in which to administer estate, publication of notice of time and place of hearing on petition for probate of will gave court jurisdiction over parties notwithstanding that such notice was not mailed to certain legatees who resided in enemy occupied territory. Probate Code, §§ 301, 326–328; Trading With the Enemy Act § 3, 50 U.S.C.A.Appendix, § 3.

3. Wills 🔑319

The mailing to heirs and legatees of notice of time and place of hearing on petition for probate of will as required by statute is only a matter of convenience and good administration and is not jurisdictional. Probate Code, §§ 301, 326–328.

4. Wills 🔑319

The statute providing for mailing to testator's heirs and legatees of notice of time and place of hearing on petition for probate of will, although expressed in mandatory terms is directory only. Probate Code, § 328.

5. Wills 🔑319

The failure of proponent of will to comply with Code requirements as to contents of petition for probate of will and as to mailing of notice of time and place of hearing on petition would justify refusal of court to proceed until such requirements are complied with. Probate Code, §§ 326, 328.

6. Wills 🔑319

The failure to give notice by mail to testator's heirs and legatees of time and place of hearing on petition for probate of will does not render void, and therefore subject to collateral attack, order admitting will to probate. Probate Code, § 328.

7. Wills 🔑423

Titles to realty in private ownership derived from proceedings in probate are not less secure because jurisdiction in probate rests upon constructive service of notice of such proceeding.

8. War 🔑10(2)

The fact that, under Trading With the Enemy Act, communication with two Russian heirs who were in enemy occupied territory was prohibited, did not prevent court from obtaining jurisdiction to admit will to probate by means of constructive service of notice of time and place of hearing on petition. Probate Code, §§ 326–328; Trading With the Enemy Act § 3, 50 U.S.C.A.Appendix, § 3.

9. Wills 🔑203, 270

Probate proceedings are purely in rem and, as pertains to rules governing constructive service, are to be distinguished from other actions or proceedings in rem, the usual purpose of which is adverse to parties to be reached by service.

10. Evidence 🔑5(2)

It is a matter of general knowledge that, in vast field of probate administration, estates are usually settled in a routine manner without actual contest or adversary proceedings of any nature.

11. Process 🔑69
Wills 🔑270

"Constructive service" is not equivalent to personal service, but is a substitute for it, and is an indispensable expedient, especially in probate, and its effectiveness cannot be defeated because in rare cases it cannot result in actual notice to some of those to whom notice is addressed.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Service".

12. Wills 🔑270

Wide latitude must be allowed Legislature in providing for notice of probate proceeding.

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* Subsequent opinion 150 P.2d 241.

13. Wills 🔑427

The admission of a will to probate is only first step in administration proceeding, and establishes prima facie validity of will, but no more than that, unless there has been a contest before probate.

14. Courts 🔑198

Superior court, sitting in probate, having acquired jurisdiction of estate originally, has power to proceed with administration to its conclusion.

15. Executors and administrators 🔑1

Generally, in the administration of an estate under strict supervision of court, no action can be taken which results to disadvantage of anyone interested in estate except that it be ordered or approved by court.

16. Wills 🔑270

In determining whether Probate Code provisions for constructive service are reasonable and consistent with natural justice, it must be presumed that Legislature regarded advantages of initiating probate proceedings by means of constructive service as sufficient to outweigh occasional disadvantages occurring in isolated cases. Probate Code, §§ 326–328.

17. Executors and administrators 🔑20(4)
Wills 🔑270

Constructive service of notice of a proceeding for appointment of an administrator or admission of will to probate is binding upon all persons, equally upon those who do not receive actual notice as upon those who do. Probate Code, §§ 326–328.

18. Mandamus 🔑31

Where superior court had jurisdiction of administration of an estate, mandamus would lie to compel court to pass upon petition for confirmation of sale of realty.

◆

Original proceeding in mandamus by the Farmers & Merchants National Bank of Los Angeles, executor of the estate of Jacob Kahan, deceased, against the Superior Court of the State of California in and for the County of Los Angeles, and the Honorable William R. McKay, judge thereof, to compel respondents to proceed with the administration of decedent's estate.

Writ granted.

Bodkin, Breslin & Luddy and George M. Breslin, all of Los Angeles, for petitioner.

Charles H. Carr, U. S. Atty., of Los Angeles, A. Matt. Werner, Gen. Counsel to Alien Property Custodian, and George A. McNulty, Chief, Alien Property Unit, both of Washington, D. C., and J. A. Fridinger, Atty., Alien Property Unit, of Arlington, Va., for Leo T. Crowley, Alien Property Custodian, as amicus curiae, in support of petition.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondents.

SHINN, Justice.

This is a proceeding in mandate brought by the executor of the estate of Jacob Kahan, deceased, against the Superior Court of Los Angeles County and a judge thereof sitting in probate, seeking a writ directing the court to proceed with the administration of said estate. The will of decedent was admitted to probate the 27th day of November, 1942, and the usual proceedings were had thereafter until the court was asked to confirm a sale of real estate. The court refused to proceed with the hearing or to take further steps in the administration, for the reason that the judge of the probate department where the proceeding is pending was and is of the opinion that the court acted without jurisdiction of the parties in ordering the will admitted to probate, and that the order and all subsequent proceedings are void. The contention is that the proceedings are void because at the time the petition was filed two of the heirs, who are also beneficiaries under the will, resided in Ukrania, Russia, in territory then occupied by the German army; it was unlawful under the Trading With the Enemy Act, 50 U.S.C.A.Appendix, § 3, to communicate with these heirs by wire or by mail, and that they were not notified of the proceedings as required by law. Sections 327 and 328, Probate Code, read as follows:

"§ 327. When the petition is filed, the clerk of the court shall set the same for hearing by the court upon some day, not less than ten nor more than thirty days thereafter, and shall give notice of the time and place of hearing by publishing the same in a newspaper published in the county; if there is none, then by three written or printed notices, posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there shall be at least ten days from the first to the last day of publication, both first and last days being included. If the notice is by posting, it must be given at least ten days before the hearing.

"§ 328. At least ten days before the hearing, copies of the notice must be personally served upon the heirs of the testator and the devisees and legatees named in the will and all persons named as executors who are not petitioning, or mailed, postage prepaid, from a postoffice within this state, addressed to them at their respective places of residence, if known to the petitioner, if not, at the county seat of the county where the proceedings are pending."

Notice of the hearing on probate of the will was duly published. On November 9, 1942, copies of the printed notices were mailed to the heirs, devisees and legatees, at addresses stated in the petition, except that those of the Russian heirs were sent to them by registered mail in care of the Alien Property Custodian, Washington, D. C. On November 27, 1942, at the time of the hearing, proof was made by affidavit of publication and mailing, and there was filed on that day a letter from the Alien Property Custodian reading as follows: "Bodkin, Breslin & Luddy, 1225 Citizens National Bank Bldg., Los Angeles, Calif. Dear Sirs: Re: Estate of Jacob Kahn, dec'd. The Alien Property Custodian acknowledges receipt, by registered mail, of two published copies of Notice of Hearing of Petition for Probate of Will and Codicil of Jacob Kahan, deceased, the hearing being set for November 27, 1942. By General Order No. 5 the Custodian requires a report of any interest of a designated national in this estate. The report is to be made on Form APC–3, herewith enclosed, and the term 'designated national' is defined in General Order No. 5, set forth in full in the report form. As provided in General Order No. 6, the Custodian will, within sixty days, determine whether or not he will accept service of the notice. Very truly yours, (signed) Francis J. McNamara, Assistant to the Alien Property Custodian." (Under General Order No. 6 of the Alien Property Custodian, receipt by him by registered mail of process or notice will be deemed service only in case he files an appearance within 60 days.)

On the 6th day of October, 1943, the Alien Property Custodian filed his written appearance in the proceeding. It has been stipulated that this appearance may be deemed to have been filed at any date after the making and entry of the order admitting the will to probate. We should state here that we consider the mailing of notice to the Alien Property Custodian, his acknowledgment of the receipt of the notice, and his later appearance in the action as of no moment in our decision of the question of jurisdiction.

[1] Respondent court gives as its first reason for refusing to act that the mailing of notice is a jurisdictional step in the proceeding to prove a will; that no notice of the hearing was given to the Russian heirs by mail because the Alien Property Custodian did not, prior to the hearing, accept service of the notice which he had received by mail. And respondent goes further and says that in no event can the court acquire jurisdiction to probate a will if an heir, devisee or legatee is so situated at the time notice is published, or posted and mailed that it is impossible for him to receive actual notice or knowledge of the pendency of the proceeding. We do not agree with either of these contentions. A consideration of the nature of proceedings to administer upon the estates of decedents, the provisions of the Probate Code relating to the probate of wills, and the cases bearing upon the matter of notice has persuaded us that jurisdiction of the court to admit a will to probate does not depend upon the mailing of notice, but upon publication or posting of notice, as required by the code. We shall discuss later the nature of proceedings to administer upon the estates of decedents and, while what is to be said bears upon the present point, we shall examine first the code provisions.

Section 301 of the Probate Code specifies the county or counties in which administration of estates may be had, depending upon the place of residence and the leaving of estate in the county in which administration is sought.

Section 326 reads as follows: "A petition for the probate of the will must state: (1) The jurisdictional facts; (2) Whether the person named as executor consents to act or renounces his right to letters testamentary; (3) The names, ages and residences of the heirs, devisees and legatees of the decedent, so far as known to the petitioner; (4) The character and estimated value of the property of the estate; (5) The name of the person for whom letters testamentary are prayed. No defect of form or in the statement of jurisdictional facts actually existing shall make void the probate of a will."

[2] Concededly, Los Angeles County is the proper county in which to administer the instant estate. Publication of notice as required by section 327, supra, gave the court jurisdiction over the parties, unless mailing of notice, as required by section 328, was a jurisdictional step. We believe that it was not and that the decisions support our conclusion. Nicholson v. Leatham, 1915, 28 Cal.App. 597, 153 P. 965, 155 P. 98, was an action in equity to set aside an order admitting a will to probate upon the ground that the order was void for failure to take steps essential to the giving of notice to those entitled thereto under sections of the Code of Civil Procedure which are now found in the Probate Code. The court said (28 Cal.App. at pages 600, 601, 153 P. at page 967): "As to the first proposition, the contention of appellants is that the courts of this state do not acquire jurisdiction to make an order admitting a will to probate upon a petition in due form filed and hearing had thereon upon proof of publication of notice as required by section 1303 [of the] Code of Civil Procedure, from which petition is omitted the names and residences of the heirs of the testator, *if such names and residences be known to the petitioner,* and that, in the absence of a copy of the published notice being addressed to such *known resident* heirs, as provided in section 1303, supra, an order made upon such petition admitting a will to probate may be set aside and vacated in a court of equity regardless of lapse of time. In our opinion, the provisions of section 1300 [of the] Code of Civil Procedure (now section 326, Probate Code), as to what the petition for the probate of a will shall contain, other than subdivision 1 thereof requiring a statement of the jurisdictional facts, are, in so far as noncompliance therewith affects the jurisdiction of the court, directory." The reasons which the court gave for the quoted statement are omitted here in the interest of brevity. This holding was approved in Murray v. Superior Court, 1929, 207 Cal. 381, 278 P. 1033, in which it was said that the failure of the petitioner to state the names and addresses of legatees which were known to him would not deprive the court of jurisdiction to pass upon a petition for the probate of a will and objections thereto. And it was said that the power to proceed with the probate of a will attaches upon the production of the will and the filing of the petition pursuant to section 1300 of the Code of Civil Procedure and the publication of the notice provided for in section 1303 of that code. In Stiebel v. Roberts, 1941, 42 Cal.App.2d 434, 109 P.2d 22, where there had been a failure to mail notice to a co-executrix of a petition for a probate homestead, as required by section 1200 of the Probate Code, it was said that the failure to give notice by mail or to personally serve the co-executrix did not affect the jurisdiction of the probate court and that jurisdiction was acquired by the filing of the petition and the posting of notice as required by law. In Security-First Nat. Bk. v. Superior Court, 1934, 1 Cal.2d 749, 37 P.2d 69, it was held that the posting of notice of hearing of a petition to settle a trustee's account and the mailing of notice to one stated in the petition to be the beneficiary of the trust was sufficient to give the court jurisdiction to settle the account, even though the petition failed to state the true names and addresses of the beneficiaries of the trust, as required by section 1120 of the Probate Code, and this notwithstanding the requirement of section 1200, Probate Code, that notice of the hearing must be mailed to all beneficiaries at their addresses, if known, and if not known, at the county seat of the county where the proceedings are pending, or be personally served upon such persons. It is true that the court held that the judgment roll did not disclose that there had been a failure to give notice as required by law and that the order was therefore not subject to collateral attack, but the decision was to the further effect that the failure of the beneficiary to receive notice because of the trustee's failure to state his name and address in the petition, as required by section 1120, did not deprive the court of jurisdiction to settle the account.

[3-6] In view of the broad claims of respondent, to be hereinafter discussed, it seems appropriate that we state somewhat fully our reasons for holding that the applicable code sections call for the mailing

of notice only as a matter of convenience and good administration, and not as a step upon which the jurisdiction of the court to initiate administration proceedings depends. In the procedure of giving notice by mail, the first step is compliance with subdivision 3 of section 326. Unless the names and addresses are stated in the petition, no notices are to be mailed by the clerk. It is not required that the names and addresses be stated unless they are known to the petitioner. The petition may be and often is filed by a stranger. If he does not know the names and addresses of those entitled to notice, he is not required to make any effort to ascertain them. Upon the hearing of the petition the court may rely upon the statements of the petition giving the names and addresses of those entitled to notice or upon petitioner's statement that they are unknown. No special duty is imposed upon the court to require proof as to such names and addresses, and it is discretionary with the court to direct such an inquiry or to proceed without it. The most efficacious step looking toward the receipt by the interested parties of notice by mail is the giving of the necessary information to the clerk. The entire procedure for mailing may be nullified by reason of the want of information, indifference or willful omission of the petitioner, upon whom the clerk must depend. It is true that the requirement of section 328 for mailing of notice by the clerk is expressed in mandatory terms, but so is the requirement of section 301 for the statement in the petition of the names and addresses of the interested parties, which has been held to be directory only. It is consistent with the entire scheme of notice to regard the provisions of section 328 also as directory. The legislature has recognized the obvious distinctions between proceedings for the administration of estates and adversary proceedings in which jurisdiction may be acquired by substituted service of summons. And it is because of that distinction, no doubt, that in probate matters there is no requirement that inquiry be made by a petitioner for the discovery of names and addresses that are unknown to him as there is where the court is asked to authorize publication of summons. If it had been intended to limit the power of the court to proceed upon constructive service in probate matters to cases in which no more certain methods of giving notice were available, we would expect to find in the Probate Code exacting requirements for the ascertainment of the names and addresses of persons interested in the estate and for personal service of notice upon them if they were in the county or in the state. And if the intention had been to recognize notice by mail as a right to which interested persons were entitled before the court could proceed, jurisdiction would not have been allowed to rest upon the ignorance of the petitioner, his unwillingness to inform himself, or his willful omission, and there would have been no unnecessary discrimination between those whose names and addresses were stated by the petitioner and those whose names or addresses, or both, were, for some reason, not stated. Since there is no requirement for inquiry to learn names and addresses which are unknown to the petitioner, and since it has been held that the omission from the petition of names and addresses that are known to the petitioner does not deprive the court of jurisdiction, it necessarily follows that the whole procedure for the mailing of notice was intended to be directory only. This holding does not imply that the failure to comply with the requirements of sections 326 and 328 would not justify the refusal of the court to proceed until the sections had been complied with, nor that such failure might not be prejudicial to the rights of those who were entitled to, but were not given, notice by mail. The failure to give notice by mail does not render void the order admitting the will to probate and therefore subject to collateral attack.

[7-9] All of our titles to real property in private ownership have derived at one time or another from proceedings in probate, but are none the less secure because the jurisdiction in probate rests upon constructive service of notice. In re Estate of Davis, 1902, 136 Cal. 590, 69 P. 412; In re Estate of Davis, 1907, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105; Security-First Nat. Bk. v. Superior Court, supra, 1 Cal.2d 749, 37 P.2d 69. Respondent, while freely conceding this, makes the further contention that the court was powerless to obtain jurisdiction by means of constructive service of notice by publication, because the two Russian heirs were in territory then occupied by the armed forces of Germany and communication with persons in such territory was and is prohibited by the provisions of the Trading With the Enemy Act, supra. There is a divergence of authority as to whether the

court can acquire jurisdiction by constructive service in adversary proceedings of persons residing in enemy territory. The conflicting holdings are stated in an annotation in 137 A.L.R. 1365, et seq., where the cases are collected, but we deem it unnecessary to review them or the reasoning which the several courts have employed in reaching their conclusions. No case has been cited, and we have found none, holding that in the matter of the probate of a will, or initiation of other proceedings for administration upon the estate of a decedent, constructive service of notice of the proceeding is ineffectual as notice to interested parties residing in the territory of a nation at war with the United States or in territory occupied by the armed forces of such enemy. No case has come to our attention in which a claimant to an interest in an estate has been permitted to challenge, by collateral attack, an order or decree rendered after constructive service of notice of the proceeding, upon the ground that it would have been impossible for him to receive personal notice because he had been, during the effective period of the notice, in some inaccessible part of the world beyond the reach of ordinary means of communication. What we have to say upon the matter of constructive service should be understood as applying exclusively to proceedings in probate, which are purely in rem, but which, because they are generally in the interests of, rather than adverse to, the parties to be reached by service, are to be distinguished from other actions or proceedings in rem, the usual purpose of which is to foreclose or bar, or to obtain a decree adverse to, rights or interests held or asserted by those to whose notice the process is directed.

In Re Estate of Davis, supra, 136 Cal. 590, 69 P. 412, one who claimed to be an heir of the decedent filed a contest of a will after the expiration of the allotted period of one year following its admission to probate. She alleged that she had no notice or knowledge of the order admitting the will to probate until more than a year thereafter; that she was living in a foreign country and that the time between the first publication and mailing of notice and the time of the hearing was insufficient to give her notice, and she made the claim that the statute providing for constructive service was therefore unreasonable, that it denied her due process of law, and was void. In rejecting this contention, it was held that service of notice by publication or posting constituted due process, and the court stated (136 Cal. at page 596, 69 P. at page 414): "As before suggested, the proceeding as to the probate of a will is essentially one in rem, and, in the very nature of things, the state is allowed a wide latitude in determining the character of the constructive notice to be given to the world in a proceeding where it has absolute possession of the res. * * * Public policy demands that a will shall have a speedy probate, and the legislature, recognizing that fact, has given the heir, by express enactment, one year after that probate has been decreed, within which time he may attack the will. His rights are in no way concluded by the decree of probate. He has an entire year thereafter in which to attack the will, and he may attack it upon the same grounds and for the same reasons that he could attack it prior to its probate. Even the measure of evidence demanded of him for a successful attack is no different in the two cases. It is thus apparent that, in such a case as the one presented here, due process of law was in no degree denied [Laura Tracy] (plaintiff) upon the hearing." This holding was followed on a later appeal in the same matter. In re Estate of Davis, supra, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am.St.Rep. 105. Constructive service of notice in matters of probate has frequently been held to meet the requirements of due process of law. Security-First Nat. Bk. v. Superior Court, supra, 1 Cal.2d 749, 37 P.2d 69; Monk v. Morgan, 1920, 49 Cal.App. 154, 192 P. 1042; In re Estate of Aldrich, 1905, 147 Cal. 343, 81 P. 1011.

[10-15] We are concerned here only with the question of the jurisdiction of the court to admit the will to probate. As held in Re Estate of Davis, supra, publication or posting of notice of the hearing to prove the will constituted due process of law, even though the time allowed was too short to permit a nonresident to receive actual notice prior to the hearing. In giving further consideration to the matter, as it is presented to us, we should give some thought to the problems which confronted the legislature in the enactment of the laws which allow constructive service of notice. Proceedings in probate are for the benefit of all those who are entitled to share ultimately in the estate, whether as heirs, devisees or legatees. The shares of those who take by succession are subject to administration and all of the incidents

thereof; devisees and legatees take by virtue of the will and in either case their several titles are confirmed by decree of distribution. All of them have the right to have the administration commenced and carried on expeditiously and the court and those appointed as executors or administrators have a corresponding duty. It is a matter of general knowledge that in the vast field of probate administration estates are usually settled in a routine manner without actual contest or adversary proceedings of any nature. These are facts which were known to the legislators when our probate laws were enacted. The Probate Code is replete with provisions for constructive service of notice throughout the proceedings; in fact in that respect the requirements for notice may be said to be elaborate and in many instances purely formal and wholly unnecessary from the standpoint of the requirements of due process. Constructive service is not designed to be the equivalent of personal service but a substitute for it, and it is of course an indispensable expedient, especially in probate. Its effectiveness is not to be defeated because in rare cases it *cannot* result in actual notice to some of those to whom notice is addressed, any more than it could be defeated by the fact that in some cases or in many cases it *does not* succeed in bringing home actual notice. It is not, nor can it be, a perfect scheme for the giving of notice in all cases, but as stated in Re Estate of Davis, supra, wide latitude must be allowed the legislature in such matters. The provisions of our probate laws probably strike as fair a balance as is possible between the necessities for prompt and efficient administration, which is desirable in all cases, and the disadvantages which must occasionally be suffered by those who are sought to be reached by constructive service but who fail to receive actual notice of the pendency of the probate administration or of the steps being taken therein. The admission of a will to probate is only the first step in administration proceedings; it establishes prima facie the validity of the will, but no more than that, unless there has been a contest before probate. Proceedings to protect, enforce or bar the claims of creditors of the decedent and those who claim the residue of the estate, as by notice to creditors, proceedings to determine heirship, contests after probate, for distribution and for the obtaining of special orders before distribution are all provided for as incidents of the administration. Having acquired jurisdiction originally, the court has the power to proceed with the administration to its conclusion. The entire administration is under the strict supervision of the court, and it is generally true that no action can be taken which results to the disadvantage or prejudice of anyone interested in the estate except it be ordered or approved by the court.

[16, 17] In determining whether the Russian heirs are being deprived of some substantial right because of the claimed unreasonableness or oppressiveness of the law which would bring them within the jurisdiction of the court by constructive service of notice, it is important to note that chances are remote of there being adversary proceedings in the estates of decedents by which some claimed right might be lost through being undefended. That is to say, the situation of these heirs must be judged with relation to the situations of the great numbers of claimants who are brought before the court by constructive service. In determining whether the provisions for constructive service are reasonable and consistent with natural justice, it must be presumed that the legislature regarded the inestimable advantages of initiating probate proceedings by means of constructive service as sufficient to outweigh the occasional disadvantages or prejudices occurring in isolated cases. It is true that the admission of the will to probate started the time running within which the heirs could file a contest and that that time may have elapsed without their learning of the will or of their relative's death. The time allowed for contest is liberal and the position of these heirs can be no worse than that of any heir, resident or nonresident, who fails to receive actual notice of the proceedings until the time for contest has expired. If it should be conceded that it was impossible for the Russian heirs to receive actual notice of the proceedings, and if for that reason it should be held that constructive service of notice could not be made upon them and that all proceedings heretofore had in the matter of the estate are void, the next logical step would be to allow all claimants to challenge like proceedings because they had not had actual notice, which might be attributable to any one of innumerable causes. The legislature has not seen fit to provide for such exceptional cases, no doubt because it was found to be impossible to do so with-

out creating intolerable delay in probate administration, as well as serious uncertainty and instability in titles derived from probate proceedings. Constructive service of notice of a proceeding for the appointment of an administrator or the admission of a will to probate is binding upon all persons, equally upon those who do not receive actual notice as upon those who do. The facts of the present case present no exception either under statutory law or the decisions. The Russian heirs were legally before the court when the will was admitted to probate, and the order then made was valid.

[18] We are not called upon in the instant case to determine what procedure should be followed in adversary proceedings which may arise in the course of the administration. So far as we are advised, the order admitting the will to probate has become final and no contest of the will has been instituted. It is to be presumed that the Alien Property Custodian has received or will receive by mail all notices which otherwise would have gone directly to the heirs in Russia, including notice of the settlement of the final account of the executor and its petition for distribution of the estate. No question is presented in this proceeding as to the nature of the distribution to be made of the shares of the Russian heirs. No reason has been shown why respondent court should not proceed to act upon the pending petition for confirmation of sale of real estate. That is purely an administrative matter in which the court necessarily takes proper steps for the protection of the interests of all parties concerned, namely, to see that the price received is proportionate to the value of the property sold. The duty of passing upon a petition for confirmation of sale is one enjoined on the court by law and, for the reasons we have stated, a writ should issue directing the court to so proceed.

The conclusions we have stated furnish an answer to the contentions of respondent and it is unnecessary to consider other grounds relied upon by petitioner for issuance of the writ.

The writ is granted.

DESMOND, P. J., and PARKER WOOD, J., concur.

In re EASTER'S ESTATE.

CALIFORNIA TRUST CO. v. JONES et al.

JONES v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

L. A. 18527.

Supreme Court of California.

May 1, 1944.

Rehearing Denied May 29, 1944.

1. Executors and administrators ⚷315(6)

The effect of will creating trust is controlled by final decree of distribution of trust property, and such decree is conclusive as ascertainment and adjudication of terms of trust and rights of all parties claiming any interest in trust property under will.

2. Executors and administrators ⚷315(6)

A final decree of distribution of trust property after termination of testamentary trust supersedes will and prevails over any provision therein inconsistent with decree.

3. Executors and administrators ⚷315(5)

A distribution decree, providing that testamentary trust for testator's widow and children should terminate on widow's death and that all property then in trustee's hands should "vest" in testator's heirs at law, distributed to heirs only a contingent interest which did not vest until termination of trust by widow's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Vest".

4. Executors and administrators ⚷315(5)

A decree of distribution, as of trust property after termination of testamentary trust, normally speaks as of its own date, so that use of future tense therein ordinarily connotes future action, though future tense used in will, which takes effect at time of testator's death, may be properly construed as applying to such time.

TRAYNOR, J., dissenting.

In Bank.

Appeals from Superior Court, Los Angeles County; Charles C. Montgomery, Judge pro tem.

Proceeding by the Security-First National Bank of Los Angeles, as trustee under the will of Alfred Easter, deceased, for final accounting, instructions, and distribution of the trust property. From portions of a distribution decree, the California Trust Company and Paul W. Jones, respectively, as administrators with the wills annexed of the estates of Ephraim Easter and Catherine Easter, deceased, appeal.

Affirmed.

Prior opinion, Cal.App., 140 P.2d 186.

B. R. Ware, Raymond W. Stephens, and Stephens, Jones, Inch & La Fever, all of Los Angeles, for appellants.

Craig & Weller, Frank C. Weller, and Thomas S. Tobin, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

Pursuant to the will of Alfred Easter, certain property was distributed by the probate court in trust during the life of his wife. On the wife's death the trustee filed a final account and petitioned for instructions and for distribution. From portions of the resulting decree these appeals were taken, which are presented on a joint bill of exceptions.

The will, executed March 30, 1920, provided that the trustee should pay to the testator's wife, Catherine, $300 a month during the term of her natural life, and the balance of the net income was to be divided among his children by a former marriage as follows: one-third to his son, Ephraim, and two-thirds in equal shares to his three daughters, Kate B. Gherky, Elizabeth R. Marriott, and Martha B. Todd. The share of any child who might die was to be paid to his or her issue per stirpes, and if the son left a wife, but no issue, she was to be paid one-half of his share and the remainder was to be divided among the daughters. There was a spendthrift provision as to such income, and a provision that the trustee should allow the wife Catherine to live on certain property, or should provide another home for her rent-free. The trust was originally to terminate upon the death of the survivor of his wife and four children, and it was provided that "Upon the termination of this trust my said Trustee shall convey, deliver and pay over all the corpus of said trust fund then in its possession or under its control unto my heirs at law in accordance with the present statute of succession of the State of California." The will recited that the estate consisted largely of community property, but that the wife had agreed that the provisions of the will were for her best interests. The will provided that if she should elect to take a share of the community property all provisions for her benefit should lapse and the net income from the trust should go to the children. Endorsed on the will was an agreement by the wife to take under its terms and not to claim any part of the estate as her share of the community property.

By a codicil dated May 2, 1921, the testator provided that the trust should terminate upon the death of his wife Catherine and that on the death of his son Ephraim, leaving a widow but no issue, the whole of the net income from the trust, after payment of the $300 to the testator's wife, should be paid in equal shares to his three daughters and the son's widow. In a second codicil dated January 13, 1922, the testator devised certain real property to his wife and son, and directed that certain other real property should not be sold by the trustee during the lifetime of his wife.

When the testator died on February 2, 1923, his only heirs were his wife, Catherine, and his four children. The wife filed in the probate proceeding an election to take under the will and to waive "any claim which she might make or assert in or to any of the property of said estate by reason of any community interest or share that she may have or be entitled to therein." The decree of distribution, dated October 3, 1923, set forth directions for administering the trust and provided that "*Upon the death of the said Catherine Easter,* the trust hereinbefore referred to shall terminate and *all of the property* then in the hands of the trustee or in its possession or control, *shall go to and vest in* the heirs at law of the said Alfred Easter, deceased, in accordance with the statute of succession of the State of California in force in the month of March, 1920, and the trustee is directed to convey, deliver and pay over all the corpus of said trust funds then in its possession or under its control unto such heirs in accordance with the statute of succession of the State of California in force in the month of March, 1920." (Italics added.)

Prior to the death of the wife Catherine, on January 8, 1942, but after the testator's death, the daughter Kate B. Gherky died, leaving two daughters, Grace Winkler and Kathleen Broadridge. During the same period the son Ephraim died without issue, but left a widow who also died before the death of Catherine. When the trust terminated upon Catherine's death, the trustee instituted the present proceeding and the lower court ordered the corpus to be distributed one-third to each of the surviving daughters of the testator, Martha B. Todd and Elizabeth R. Marriott, and the one-third share of the deceased daughter to the two granddaughters, Grace Winkler and Kathleen Broadridge. Appeals from this portion of the decree were taken by the administrator with the will annexed of the estate of the son Ephraim, and by the administrator with the will annexed of the estate of the testator's wife Catherine.

The question for decision is whether the identity of the "heirs at law" (who were to take on termination of the trust) is to be determined as of the time of death of the testator or the time of termination of the trust. If the interests of the heirs vested at the time of termination of the trust rather than at the time of the testator's death, then the estates of the testator's wife and son would take nothing because of their prior deaths, and the decree must be affirmed.

The appellants contend that the devise of a remainder to "heirs" or to others determinable at the time of the testator's death passes a vested remainder as of that time in the absence of a contrary intention clearly expressed, and that there is no evidence in the record, either in the stipulated facts, the testamentary documents or the 1923 decree of distribution to sustain a finding that the testator intended to postpone the vesting and thus limit participation in the remainder interest to his blood relatives living at the termination of the trust. On the other hand, the respondents point to a number of provisions in the will and the 1923 decree as indicating an intention that the corpus of the trust should vest in the testator's children, or the lawful issue of any deceased child per stirpes, upon the termination of the trust.

[1, 2] It is settled, however, as conceded by the appellants, that the effect of a will is controlled by the decree of distribution when final. The decree is said to be "conclusive as an ascertainment and adjudication of the terms of the trust, and of the rights of all parties claiming any legal or equitable interest under the will. Goad v. Montgomery, 119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145; Williams v. Marx, 124 Cal. 22, 56 P. 603; More v. More, 133

Cal. 489, 65 P. 1044 [66 P. 76]. The decree supersedes the will and prevails 'over any provision therein which may be thought inconsistent with the decree.' Goad v. Montgomery, supra [119 Cal. 552, 51 P. 681, 63 Am.St.Rep. 145]." Keating v. Smith, 154 Cal. 186, 191, 97 P. 300, 302. In Luscomb v. Fintzelberg, 162 Cal. 433, 438, 123 P. 247, 250, the court stated: "It was equally within the jurisdiction of the court, and its duty, to determine * * * what other persons had legal or equitable rights to the distributable property of the estate, and the extent and nature of their interests. Having jurisdiction to determine these matters on distribution, when the decree does so determine them, although the determination may be incorrect, it is conclusive as to the rights of heirs, legatees, and devisees unless corrected on appeal. It is not subject to collateral attack or to be impeached by resort to the terms of the will. The rights of the parties must thereafter be determined by resort to the decree of distribution alone as a final and conclusive adjudication of the testamentary disposition which the deceased made of his property." See, also, Estate of Wallace, 11 Cal.2d 338, 79 P.2d 1094; Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508. This being so, the determination of this cause turns upon the proper construction of the decree of distribution.

[3] We find no uncertainty or ambiguity in the decree of distribution. It expressly provides that "Upon the death of the said Catherine Easter the trust * * * shall terminate and all of the property then in the hands of the trustee or in its possession or control, *shall go to and vest in* the heirs at law of the said Alfred Easter, deceased," in accordance with the 1920 statute of succession. (Italics added.) This portion of the decree was properly construed by the trial court herein to distribute a contingent interest only to the heirs, the contingency being their survivorship of the testator's wife upon whose death the trust terminated. In other words, the interest of the heirs was to vest only upon their surviving such termination of the trust. The decree of distribution, by providing that two things should occur "Upon the death of the said Catherine Easter," namely, 1. "the trust * * * shall terminate," and 2. "all the property then in the hands of the trustee * * * shall go to and vest in the heirs at law of said Alfred Easter, deceased," clearly indicates an intention that the interests of the heirs should vest at the time of the termination of the trust. Any other construction would ignore the normal and usual meaning of the words "shall go to and vest in the heirs at law."

[4] Appellants urge, however, that use of the future tense of verbs in devising or distributing a remainder interest does not militate against it vesting on the death of the testator, citing Estate of Wallace, 11 Cal.2d 338, 79 P.2d 1094; Estate of Dunphy, 147 Cal. 95, 81 P. 315; and Estate of Newman, 68 Cal.App. 420, 229 P. 898. These decisions are not controlling here. The Wallace case involved the meaning of "shall distribute" and the other cases dealt with the construction of wills. From their nature, wills are made to take effect at a future time, i. e., at the death of the testator, and hence it may be proper to construe the future tense when used in a will as applying to the time of the testator's death, and not to a still later time. A decree of distribution, on the other hand, normally speaks as of its own date, for it is usually an order for the present delivery of property, and the use of the future tense must ordinarily connote future action. In our opinion, such was the intention here.

The testator's widow claimed no rights in hostility to the will, but the administrator of her estate claimed that the remainder estate should be distributed as community and not as separate property. However, he concedes that the community question "may be ignored if this Court should sustain that part of the decree below holding that the widow and son took no part of the remainder interest as devisees under Mr. Easter's will or as distributees under the 1923 decree" of distribution. We therefore find it unnecessary to discuss the problems and contentions relating to the character of the property and the effect of the widow's election or waiver, if any, of her claims to such remainder interest.

Those portions of the decree appealed from directing distribution of the corpus of the trust property are affirmed.

SHENK, CURTIS, EDMONDS, CARTER and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

The majority opinion rests entirely on the decree of distribution. It holds that the decree is neither uncertain nor ambiguous and that its provision that the property, upon the termination of the trust, "shall go to and vest in the heirs at law" clearly indicates that the interests of the heirs were to vest at the time of the termination of the trust. The word "vest," however, has more than one meaning (see 44 Words & Phrases, Perm.Ed.1940, 191–194; 2 Simes, Law of Future Interests, § 347, p. 82; Leach, Cases on Future Interests, 2d Ed., 255), and it is not clear that the probate court used the word to mean vest in right rather than vest in possession. It is hardly conceivable that the court would have used such general language had it intended to pass on the question whether the gifts to the heirs vested in right upon the death of the testator or upon the termination of the trust.

There is a presumption in favor of the vesting of testamentary dispositions at death. Prob.Code, § 28, formerly Civ.Code, § 1341; Estate of Newman, 68 Cal.App. 420, 424, 229 P. 898; In re De Vries' Estate, 17 Cal.App. 184, 190, 119 P. 109), and "words expressive of future time are to be referred to the vesting in possession, if they reasonably can be, rather than to the vesting in right." Estate of Newman, supra, 68 Cal.App. at page 429, 229 P. at page 902; see 49 A.L.R. 186, 187; 127 A.L.R. 609, 610. The decree provides that the property "shall go to" the heirs. These are "clear words of direct devise" at the time of death (Estate of Wallace, 11 Cal.2d 338, 341, 79 P.2d 1094, 1095; Keating v. Smith, 154 Cal. 186, 97 P. 300) and their import is not altered by the accompanying word "vest" (In re De Vries' Estate, supra, 17 Cal.App. at pages 191, 192, 119 P. 109; Randall v. Bank of America, 48 Cal.App.2d 249, 119 P.2d 754), or by the provision that the trustees shall "convey, deliver and pay over" the trust fund. Estate of Wallace, supra; Estate of Newman, supra; see Restatement, Property, Future Interests, Parts 3 and 4, § 260.

In the light of the foregoing authorities it is clear that the decree is open to the construction that the court was referring to the vesting in possession of the interests of the heirs. Since it cannot be determined from the decree whether the interests of the heirs vested in right at the death of the testator or upon the termination of the trust, reference must be made to the will to ascertain the meaning of the decree. Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508.

The will provides: "This trust shall terminate upon the death of my said Wife Catherine," and "Upon the termination of this trust my said Trustee shall convey, deliver and pay over all the corpus of said trust fund then in its possession or under its control unto my heirs at law in accordance with the present statute of succession of the State of California." Under these provisions the heirs must be determined as of the death of the testator. "It is a general rule of testamentary construction, so universally recognized as to render unnecessary a full citation of the cases which support it that, in the absence of clear and unambiguous indications of a different intention to be derived from the context of the will, read in the light of the surrounding circumstances, the class described as testator's heirs, or such persons as would take his estate by the rules of law if he had died intestate, to whom a remainder is given by will, is to be ascertained at the death of the testator." Estate of Newman, 68 Cal.App. 420, 424, 229 P. 898, 900; Estate of Wallace, 11 Cal.2d 338, 79 P.2d 1094; Keating v. Smith, 154 Cal. 186, 97 P. 300; Estate of Ritzman, 186 Cal. 567, 199 P. 783; Estate of De Vries, 17 Cal.App. 184, 119 P. 109; Randall v. Bank of America, 48 Cal.App.2d 249, 119 P.2d 754; Estate of Glann, 177 Cal. 347, 170 P. 833; In re Rider's Estate, 199 Cal. 724, 251 P. 799; Rest., Property, Future Interests, Parts 3 and 4, §§ 260, 308; 33 L.R.A.,N.S., 2; Himmel v. Himmel, 294 Ill. 557, 128 N.E. 641, 13 A.L.R. 615; 49 A.L.R. 178; 127 A.L.R. 604 Such rules of construction are as essential as rules of construction for deeds or negotiable instruments. Without them counsel could not advise their clients with any reasonable certainty, for the meaning of a will could not be ascertained until it had been passed upon by a court of last resort. See Brown, Problems of Construction Arising In The Law of Property—Particularly In The Law of Future Interests, 79 Pa.L.Rev. 385, 389. When a testator resorts to the word "heirs" after having exhausted his specific wishes by the previous limitations, he states in effect that he is content thereafter to let the law take its course. Whall v. Converse, 146 Mass. 345, 348, 15 N.E. 660; Gilman v. Congregational Home Missionary Society, 276 Mass. 580, 177 N.E. 621; Matter of Bump's Will, 234 N.Y. 60, 136 N.E. 295. Under the law which favors the creation of vested rather than contingent remainders, the testator's "heirs at law" are the persons who answer that description at the time of the testator's death. Ibid.

Respondents contend that a different intention can be derived from the context of the will, read in the light of the surrounding circumstances. Particular reliance is placed on the fact that one of the testator's heirs was his wife, who was given a life interest in the same property. If the person to whom a life interest in the property has been given is the sole heir of the testator, there is some incongruity in also giving such a person all the interest under the limitation to "heirs." The circumstance of his being the sole heir tends to establish that the testator intended the heirs to be ascertained as of the death of the sole heir. Rest., Property, Future Interests, Parts 3 and 4, § 308, Comment k, p. 1715; Estate of Wilson, 184 Cal. 63, 64, 193 P. 581. When, however, the taker of a prior interest is one of several heirs at the testator's death "no constructional tendency is sufficiently definite to be capable of statement" (Rest., Property, Future Interests, Parts 3 and 4, Comment k, p. 1717), and there is nothing to warrant the court's departing from the usual meaning of the word "heirs." Estate of Newman, 68 Cal.App. 420, 229 P. 898. Such a departure would exclude, not simply a particular heir, but all the heirs of a testator who die before the particular heir, and would substitute others in their place. See Ferrier, Gifts to Heirs in California, 26 Cal.L.Rev. 413, 423.

Respondents invoke the rule set forth in Estate of Hartson, 218 Cal. 536, 540, 24 P.2d 171, 173, that "where the provisions of a will are capable of two interpretations, under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood of the testator is preferred." A gift to heirs, however, vests the property in those entitled to take under the statute of succession (Prob.Code, § 108, formerly Civ.Code, § 1334), and the provision in the will for the gift of the corpus to the testator's heirs "in accordance with the present statute of succession" contains no suggestion that the disposition of that corpus is limited to heirs who are "of the blood" of the testator. See Estate of Watts, 179 Cal. 20, 23, 175 P. 415. Other provisions of the will invoked by respondents are insufficient in my opinion to warrant a construction different from the usual meaning of the word "heirs." The provisions that the title to the home for Mrs. Easter should be vested in the trustee, and that the Catalina Court and Sixth Grammercy properties should not be sold during the life of Mrs. Easter, do not purport to qualify the gift over of the remainder interest. Neither do the provisions for the payment of income to Ephraim's widow during Mrs. Easter's lifetime, nor the references to the issue of deceased children, nor the references in the spendthrift provisions to income only.

Rehearing denied; TRAYNOR, J., dissenting.

24 Cal.2d 221

TABATA v. MURANE.

L. A. 18869.

Supreme Court of California.

May 1, 1944.

1. Appeal and error 🔑1064(2)
Trial 🔑191(2)

In action to establish a creditor's claim against an estate, where the basal controversy centered on question whether moneys advanced by plaintiff to decedent were loans or voluntary advances, instructing that if jury found that decedent received certain sums of money from plaintiff, or that such sums were paid to persons or banks on behalf of deceased, no express promise to repay such loans was necessary and they should find for plaintiff, was reversible error, as assuming the basic facts at issue.

2. Money paid 🔑1

There can be no recovery for the voluntary payment of a debt of a third party without request and with no promise of repayment.

3. Limitation of actions 🔑49(1)

In action to establish a claim against an estate, where jury could have found either that plaintiff furnished the moneys gratuitously or that the circumstances under which they were furnished implied a promise of deceased to repay, law would not imply the further agreement to postpone maturity on the obligations until debtor's death and running of statute of limitations could not be so deferred. Code Civ.Proc. § 337, subds. 1, 2; § 339, subd. 1.

4. Appeal and error 🔑1064(1)
Limitation of actions 🔑200(1)

In action to establish a claim against an estate, alleging a cause of action for money loaned and in the alternative for money had and received and upon an open book account, where basal controversy was whether moneys advanced to deceased were loans or voluntary advances, giving an instruction which did not state the circumstances under which pleas of limitation should be sustained, but in effect telling jury that the statutes would not commence to run until death of deceased, was prejudicially erroneous. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 337, subd. 1, 2; § 339, subd. 1; Probate Code, § 708.

5. Appeal and error 🔑216(3)

Where the only instruction on defense of the statute of limitations was prejudicially erroneous, defendant's failure to request specific instructions applicable to the circumstances did not preclude defendant from asserting that error was committed in giving the instruction. Code Civ.Proc. § 337, subd. 1, 2; § 339, subd. 1; Probate Code § 708.

6. Frauds, statute of 🔑54½

An alleged agreement between deceased and plaintiff, that loans made by plaintiff to deceased should be repaid after the death of deceased out of his estate, was invalid under statute of frauds as an agreement not to be performed during lifetime of promisor. Civ.Code, § 1624, subd. 6.

7. Executors and administrators 🔑227(6)

In action to establish a creditor's claim against an estate, where the claim filed against estate was based on a claim for money had and received, complaint alleging cause of action for money loaned and a cause of action upon open book account did not present a fatal variance, and if defendants desired further details a demand for more complete statement and proof should have been made. Probate Code, § 705.

8. Executors and administrators 🔑227(6)

A creditor's claim need not be drafted with the precision and completeness of a plea; the only requirement is that it state such facts as will apprise executor or administrator of the amount of the demand, and, if any uncertainty remains, it is incumbent upon executor to call for clarification. Probate Code, § 705.

9. Appeal and error 🔑110

An order denying motion for new trial is not appealable. Code Civ.Proc. § 963.

In Bank.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by George S. Tabata against Millard Murane, executor of the estate of Charles W. Zorn, deceased, to establish a creditor's claim against the estate. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, Cal.App., 141 P.2d 431.

Tudor Gairdner, of Los Angeles, for appellant.

Russell H. Pray and S. J. Nordorf, both of Long Beach, for respondent.

SCHAUER, Justice.

This action is on a creditor's claim. Defendant appeals from a judgment entered upon a verdict awarding to plaintiff and against defendant as executor of the last will and testament of Charles W. Zorn, deceased, the sum of $8,838.43, being a portion of the amount claimed by plaintiff to have been due and owing to him by Zorn at the date of the latter's death on May 16, 1941.

Among the various grounds urged by defendant as requiring a reversal of the judgment is error in instructing the jury. At least two of the given instructions contain errors which may well have been determinative of controlling issues in the case. One of such instructions is of the dangerous formula type. It invades the province of the jury by assuming factual determination favorable to the plaintiff of the most fundamental issue in the litigation. The other of such instructions makes the same factual assumption and then, in effect, authorizes the jury to find for the plaintiff, insofar as the statute of limitations is concerned, upon an untenable hypothesis, and in relation to the statute of frauds, upon an unenforceable contract.

[1, 2] Plaintiff and decedent apparently were the closest of friends and their transactions with each other were not con-

ducted on a strict business basis. The basal controversy of the litigation centers on the question as to whether monies advanced by the plaintiff to the decedent and for his account over a period of years were loans or voluntary advances. In other words, not only is the amount of the claim disputed but it is contended that no debt whatsoever ever existed as between plaintiff and the decedent. Notwithstanding such issue the following instruction was given: "If the jury believe from the evidence that the decedent Charles W. Zorn received certain sums of money from the plaintiff or that such sums of money were paid to persons or banks on his behalf, no express promise to repay such loans is necessary and if you further find from the evidence that said sums of money have not been repaid to the plaintiff then you will find for the plaintiff." This instruction invades the province of the jury by assuming the basic fact that the monies were advanced and paid as loans and in the circumstances of the case and the light of the other instructions approximates a directed verdict for the plaintiff. It omits entirely any qualification that the jury find that the monies were advanced or paid as loans, that the decedent promised to repay them, or that they were advanced or paid at the request of the decedent. There can be no recovery for the voluntary payment of a debt of a third party without request and with no promise of repayment. (McGee v. City of San Jose (1885), 68 Cal. 91, 94, 8 P. 641; Huddleston v. Washington (1902), 136 Cal. 514, 519, 69 P. 146; McGlew v. McDade (1905), 146 Cal. 553, 554, 80 P. 695; Stanley v. Westover (1928), 93 Cal.App. 97, 111, 269 P. 468; Pendergrass v. Axx (1931), 111 Cal.App. 478, 481, 295 P. 896.) It should also be noted that the above quoted instruction ignores completely the pleaded defense of the statute of limitations. The vices mentioned are not cured by other instructions and upon the entire record we are unable to hold that the same verdict would have been reached had such instruction not been given.

[3, 4] In the second of the above specifically mentioned instructions the court advised the jury that "if you find from the evidence and under the instructions from the court that the plaintiff in this case is entitled to recover, and if you further find from the evidence that by agreement between the deceased, Charles W. Zorn, and the plaintiff herein, either expressed or implied, that the deceased was to repay the plaintiff for these loans after his death out of his estate, then the plaintiff would be entitled to recover for the loans made during the period from January, 1935, to September, 1940, *as you may find from the evidence herein.*" (Italics added.) This instruction contains at least three errors: (1) It assumes that the transactions between plaintiff and decedent possessed the character of *loans;* (2) it states the law incorrectly and incompletely insofar as the statute of limitations is concerned; and (3) it at least impliedly authorized the jury to find for plaintiff upon a contract which, if proved, would be invalid under the statute of frauds (Civ.Code, § 1624, subd. 6).

The assumption of the character of the transactions is evident from the use of the words "for these loans." In order to make apparent the error relative to the statute of limitations it is necessary to state in more detail the issues raised by the pleadings. The complaint states three alternative causes of action, one for money loaned, one for money had and received, and one upon an open book account. The amendment to the answer pleads, among other things, subdivision 1 of section 339 of the Code of Civil Procedure (two years) in bar of certain items for which recovery is claimed in counts I (money loaned) and II (money had and received), and as to count III (open book account) pleads subdivisions 1 and 2 of section 337 of the Code of Civil Procedure (four years) in bar of "all claims thereunder arising or incurred prior to February 24, 1938." No instruction whatsoever was given by the court defining these statutory periods or the circumstances under which the pleas should be sustained. The case was submitted to the jury upon all three causes of action but only a single verdict was returned. This verdict may have been based on one, two, or all of the causes of action.

It apparently was the theory of the plaintiff, adopted by the trial court, that if the jury found that there was an agreement, *either express or implied,* between plaintiff and decedent that the monies advanced by plaintiff were to be repaid, *but only out of Mr. Zorn's estate after his death,* then the statute of limitations would not begin to run on any of the causes of action until Mr. Zorn's death. This theory, however, is untenable upon the record before us. There is no evidence showing an express contract for such deferred date of payment, and, assuming but not holding that such a provision could ever be inferred as a term of a contract implied in fact, the evidence before us fails to establish such agreement in this case. Upon the record before us the jury could have found either that the plaintiff furnished the monies in question gratuitously or that the circumstances under which they were furnished imposed an obligation and implied a promise on the part of the decedent to reimburse plaintiff. In the latter event, however, the obligation to repay would have arisen instanter upon advancement of the money by plaintiff. The law will not imply both the promise to repay and postponement of the maturity of such obligation until death of the debtor. The only obligation which the law imposes under such circumstances is a present one; the evidence fails to establish that the parties by agreement fixed a deferred one. The plaintiff, in order to avoid the normally applicable statute of limitations, cannot now inject into the common law action for money had and received the additional fiction that the obligation to repay the money did not mature until the death of the debtor.

Long v. Rumsey (1938), 12 Cal.2d 334, 344, 84 P.2d 146, 150, is a case in which the plaintiff, in an action to recover the reasonable value of services rendered to a decedent, sought to avoid the bar of the statute of limitations by reliance on an *express* contract which was unenforceable under the statute of frauds. We there declared: "If the breach of the supposed contract is relied on in order to avoid the bar of the statute of limitations, which would otherwise apply, the terms of the contract must be proved in order to establish that a breach has occurred. The law cannot imply the essential terms of the contract in order to determine whether or not it has been breached, and then imply a promise to pay at the later date merely because originally the services were not gratuitously rendered. The only promise implied by law is a promise to pay based upon the equitable doctrine that the promisor, having received the benefit, should pay its reasonable value. A promise to pay at some time to become fixed in the future must be based upon the agreement of the parties and not upon a rule of law. It follows that, in any event, it was incumbent upon this respondent to clearly and definitely prove an express contract to pay for certain services at a future time." Hence the instruction was erroneous in telling the jurors, in effect, that the statute of limitations was not a defense as to any of the causes of action or as to any parts of them insofar as "loans made during the period from January, 1935, to September, 1940," were concerned, if they found that there was an agreement, "either express or implied," between plaintiff and Mr. Zorn that the latter "was to repay the plaintiff for these loans after his death out of his estate." There was no pleading and no evidence that there was either an *express* contract or a contract in fact made by the parties embodying such a provision.

As previously mentioned, the case was submitted to the jury on all three causes of action, presumptively as to all the factual issues raised by the pleadings. Only one verdict was returned. We have no means of ascertaining whether that one verdict was based exclusively on count I, exclusively on count II, or exclusively on count III, or was related, in part or in whole, to more than one of such counts. Apparently some of the items going to make up the sum claimed were barred as to counts I and II by the statute pleaded, and, on the record before us, we cannot assume, for the purpose of avoiding the potential prejudice of the erroneous instruction, that the verdict was based exclusively upon count III and that the jurors found that all of the items included in their verdict were included in the book account. In fact, insofar as the defense of the statute of limitations is concerned, the jurors may have rested their verdict entirely on the assumption, as they could understand they were authorized to do by the instructions, that there was an agreement between plaintiff and decedent, implied merely as a fiction of the law, that the "loans" would be repaid only after decedent's death out of his estate. Such instruction, then, must be held to be prejudicially erroneous. (See O'Meara v. Swortfiguer (1923), 191 Cal. 12, 15, 214 P. 975.)

[5] The only instruction even touching on the subject of the statute of limitations which the defendant appears to have requested (and which the court refused to give) was, "You are instructed that Section 708 of the California Probate Code * * * provides in part as follows: 'No

claim which is barred by the Statute of Limitations shall be allowed or approved by the executor or administrator, or by the judge.'" Instructions specifically and fully defining the applicable periods and the circumstances upon which such law would be operative should have been requested by defendant and given by the court but inasmuch as the only instruction on the subject which was given was prejudicially erroneous, as hereinabove shown, the defendant is not precluded from asserting that error was thereby committed. The true rule is that stated for the District Court of Appeal, as to pertinently similar circumstances, by Mr. Justice Wood (Parker) in Colgrove v. Lompoc, etc., Club (1942), 51 Cal.App.2d 18, at page 24, 124 P.2d 128, 131: "If the law applicable to the facts of a case is stated correctly in a general charge to the jury, a party may not, in the absence of a request for a more specific or elaborate instruction, complain that a more specific or elaborate instruction should have been given. Townsend v. Butterfield, 1914, 168 Cal. 564, at 569, 143 P. 760; Ohran v. County of Yolo, 1940, 40 Cal.App.2d 298, at page 307, 104 P.2d 700; 24 Cal.Jur. 796.) In this case, however, the instructions as to the duty owing to a licensee injured by active negligence were erroneous, and plaintiff is not precluded from asserting that error was committed in instructions which were given, even though he did not request a proper instruction."

[6] The third related error noted in the instruction under discussion should already be apparent. Not only does the instruction err in respect to the statute of limitations but also it may well have been understood by the jurors to authorize recovery upon a contract which would be invalid under the statute of frauds. The instruction hypothesizes, apparently as perfectly valid, an "agreement between the deceased * * * and the plaintiff herein, either expressed or implied, that the deceased was to repay the plaintiff for these loans *after his death out of his estate.*" Section 1624 of the Civil Code provides that "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * * 6. An agreement which by its terms is not to be performed during the lifetime of the promisor * * *." Contracts which are invalid under the quoted law are unenforceable. (Hagan v. McNary (1915), 170 Cal. 141, 143, 144, 148 P. 937, L.R.A.1915E, 562; Smith v. Bliss (1941), 44 Cal.App.2d 171, 175, 112 P.2d 30.) There is no contention and no evidence that the decedent subscribed any note or memorandum evidencing the claimed agreement. No instruction defining or explaining the operation of the statute of frauds was given.

[7] Another asserted ground for reversal strongly urged by defendant is the contention that the creditor's claim filed by plaintiff does not support counts I and III of the complaint. As this question would probably otherwise arise again upon the new trial we dispose of it now. The claim filed reads as follows: "Estate of Charles W. Zorn, deceased, To George S. Tabata, Dr. Moneys held in trust, moneys had and received, 1934 to 1941, inclusive. 21,115.62." The charging allegations of the several counts of the complaint are as follows:

First count: "That within four (4) years last past * * * the plaintiff loaned and advanced to the decedent at various times during said period, at the special instance and request of said decedent, the sum of Twenty-one Thousand One Hundred Fifteen and 62/100 Dollars ($21,115.62), which the decedent promised to repay on demand."

Second count: "That within four (4) years last past * * * the decedent, Charles W. Zorn, received the sum of Twenty-one Thousand One Hundred Fifteen and 62/100 Dollars ($21,115.62) for the use and benefit of the plaintiff."

Third count: "That within four (4) years last past * * * the decedent, Charles W. Zorn, became indebted to the plaintiff on an open book account for a balance due for money lent to the decedent at his request, to wit, Twenty-one Thousand One Hundred Fifteen and 62/100 Dollars ($21,115.62), which the decedent promised to repay on demand."

Defendant concedes that the second cause thus alleged by plaintiff—that for money received—corresponds to the claim for "moneys had and received" which is set forth in the creditor's claim, but argues that the first and third causes of action—for money loaned and for a balance due on an open book account—are so widely divergent from the creditor's claim as to require a reversal of any judgment based thereon.

As a general proposition it is true that recovery cannot be had upon a cause of action which varies materially from that set forth in the written claim, and it must be conceded that there is a wide divergence in the authorities as to what constitutes a material variance in such cases. However, it appears that under the more recent decisions the variance present here is not fatal. The claim and each of the three causes of action alleged in the complaint are based upon the assertion that decedent when he died was indebted to plaintiff in the sum of $21,115.62, and the claim reasonably apprised defendant of the fact that plaintiff claimed that the decedent, at the time of his death, held money in trust for, or was indebted to, plaintiff in the sum of $21,115.62. If defendant wished further details to enable him better to determine the justice or accuracy of the claim or what, if any, portion thereof was barred by the statute of limitations, it was for him to demand a more complete statement and proof. The statute contemplates such procedure. (See Prob.Code, § 705; Syler v. Katzer (1938), 12 Cal.2d 348, 350, 84 P.2d 137, 119 A.L.R. 422; Reeves v. Vallow (1940), 16 Cal.2d 95, 98, 104 P.2d 1017.) In Davis v. Mitchell (1930), 108 Cal.App. 43, 50, 290 P. 887, it was held that there was "no sufficient variance between the cause of action alleging a book account, and the claim based upon the reasonable value of the services rendered, to defeat" the action of plaintiff there. And as stated by the court in Lundberg v. Katz (1941), 44 Cal.App.2d 38, 42, 111 P.2d 917, 918, in upholding a recovery upon quantum meruit although the claim asked compensation in an assertedly agreed sum, "if the cause of action is substantially based upon the claim, and the estate has not been placed in a position of disadvantage as by lack of opportunity without additional expense, to pay or compromise the claim, the action may be maintained. The strict rule * * * that a claimant may recover only when the cause of action specifically follows the claim, has been modified." (See, also, Warder v. Hutchison (1924), 69 Cal.App. 291, 231 P. 563; Colwell v. Gardner (1932), 126 Cal.App. 403, 405, 14 P.2d 825; Gardiner v. Burket (1935), 3 Cal.App.2d 666, 668, 40 P.2d 279.)

[8] In Syler v. Katzer (1938), supra, 12 Cal.2d 348, 84 P.2d 137, 119 A.L.R. 422, the question of requiring strict compliance between the claim and the pleading (or the theory of recovery) was debated by this court. Mr. Justice Edmonds, with whom Mr. Justice Seawell concurred, in a dissenting opinion declared that (12 Cal.2d at page 350, 84 P.2d at page 138, 119 A.L.R. 422): "The decision in this case sweeps aside rules long established * * *." [12 Cal.2d at page 352, 84 P.2d at page 139, 119 A.L.R. 422] "It has uniformly been held that the claim filed against an estate measures the right to the claimant's recovery. In other words, the claimant may not recover upon a cause of action not stated in the claim." The majority of the court held, however, as follows (12 Cal. 2d at page 350, 84 P.2d at page 137, 119 A.L.R. 422): "The contention is then, that the claim was insufficient in form, and reliance is placed on such cases as Etchas v. Orena, 127 Cal. 588, 60 P. 45, and Estate of Steuer, 77 Cal.App. 584, 247 P. 211. Without discussing these in detail, it may be said that there is no necessity that a creditor's claim be drafted with precision and completeness of a pleading. The only requirement is that it state such facts as will apprise the executor or administrator of the amount of the demand. * * * If any uncertainty remained, it was incumbent upon the executor to call for clarification * * *." The quoted statement from the majority opinion must now be recognized as defining the true rule. All statements and implications to the contrary in the decisions cited in Mr. Justice Edmonds' dissenting opinion, i. e., Etchas v. Orena (1900), 127 Cal. 588, 592, 593, 60 P. 45; Brooks v. Lawson (1902), 136 Cal. 10, 13, 68 P. 97; Morehouse v. Morehouse (1903), 140 Cal. 88, 94, 73 P. 738; Pearson v. Parsons (1916), 173 Cal. 336, 339, 159 P. 1173; Enscoe v. Fletcher, (1905), 1 Cal.App. 659, 661, 82 P. 1075; Giles v. Reed (1919), 44 Cal.App. 367, 369, 370, 186 P. 614; Estate of Steuer (1926), 77 Cal. App. 584, 586, 247 P. 211, and in Lichtenberg v. McGlynn (1894), 105 Cal. 45, 47, 38 P. 541, and McGrath v. Carroll (1895), 110 Cal. 79, 84, 42 P. 466 (the latter two cases being additional to those cited by Justice Edmonds) must be deemed to be, and are, overruled.

Other incidents of the trial, including the giving of certain instructions and various rulings on the admissibility of evidence, assigned as error by the defendant, may not occur in the challenged form on the new trial and hence are not now discussed.

[9] Defendant has also attempted to appeal from an order denying his motion for a new trial. Inasmuch as such order is not appealable (see Code Civ. Proc. § 963; Hill v. Fricke (1936), 5 Cal. 2d 320, 324, 54 P.2d 460), the attempted appeal therefrom is dismissed.

For the reasons above set forth the judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, Justice.

I concur in the judgment of reversal, but for the reasons upon which I based my dissent in Syler v. Katzer, 12 Cal.2d 348, 84 P.2d 137, 119 A.L.R. 422, I would direct the trial court to dismiss the action insofar as counts I and III of the complaint are concerned.

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24 Cal.2d 274

RISKIN v. TOWERS.

L. A. 18835.

Supreme Court of California.

May 3, 1944.

1. Motions ⇨64

Where question whether defendant had been legally served with summons was determined on conflicting evidence on motion for an order vacating a service of summons, affidavit of service, and the default entry, question was not reviewable on subsequent motion under statute to vacate a default judgment and permit defendant to answer. Code Civ.Proc. § 473.

2. Appearance ⇨2
Judgment ⇨138(3)
Process ⇨158

Where defendant claims that he has not been served or that the service is legally insufficient, he may seek relief by making a special appearance and moving the court for an order quashing the service and setting aside the default entry.

3. Judgment ⇨136

The statute relating to motions to vacate default judgments and permit defendant to answer is to be liberally construed. Code Civ.Proc. § 473.

4. Judgment ⇨139

The discretion of court in ruling on matters under statute relating to motions to vacate default judgments and permit defendant to answer is a legal discretion, not an arbitrary one, subject to review. Code Civ.Proc. § 473.

5. Judgment ⇨143(6)

Where defendant denied service upon him, defendant's counsel believed his client and relied thereon, and believed that the service would be quashed, defendant, in proceeding diligently on, and following denial of, a motion to vacate service of summons and a default entry, was entitled to have a default judgment against him set aside under statute providing for vacating default judgments on ground of mistake, inadvertence, surprise or excusable neglect. Code Civ.Proc. § 473.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and Frank G. Swain, Judges.

Action by David Riskin against Walter Towers for assault and battery and false arrest. From a default judgment and from an order denying a motion to vacate and set aside a default judgment and to permit defendant to answer, defendant appeals.

Order reversed with directions.

Prior opinion 139 P.2d 1001.

Glenn A. Lane, of Los Angeles, for appellant.

Sydney M. Williams, of Los Angeles, for respondent.

CARTER, Justice.

On January 7, 1942, plaintiff commenced an action in the Superior Court of Los Angeles County against defendant for damages for assault and battery and false arrest. According to the affidavit of service the summons was personally served on defendant in Los Angeles County on January

13, 1942. On February 4, 1942, the summons was filed with the county clerk, and pursuant to plaintiff's request the clerk entered the default of defendant. On February 10, 1942, defendant specially appeared and filed his notice of motion, hereinafter referred to as first motion, for an order vacating the service of summons, the affidavit of service, and the default entry. The motion was heard by Department 7 of the Superior Court of Los Angeles County, Judge John Gee Clark presiding, and denied on February 26, 1942. On March 10, 1942, evidence was taken in the action before Judge Emmet H. Wilson, and defendant not appearing, default judgment was entered against him. On the same day defendant filed a notice of motion under section 473 of the Code of Civil Procedure, hereinafter referred to as second motion, to vacate the default judgment and to permit defendant to answer. The motion was grounded upon mistake, inadvertence, surprise and excusable neglect. That motion was denied by Judge Swain on March 12, 1942, and the appeal now before us was taken from the order of denial and the default judgment. In support of his second motion defendant filed an affidavit of merits in which he stated that he had stated all the facts of the case to his counsel and was advised by him and believed that he had a good defense to the action. He offered a verified answer by which he raised material issues of fact. In opposition to the first motion plaintiff filed affidavits stating that after the action was commenced defendant's wife was contacted on the telephone and she stated that her husband would be home on the evening of January 13, 1942; Sanderson, the one alleged to have made the service, accompanied by plaintiff's attorney, called at the defendant's home on January 12, 1942, and talked to defendant's wife but defendant was not found; that the two persons again called at defendant's home on the evening of January 13, 1942, at which time a man answered the door and stated that he was Walter Towers (defendant) in response to an inquiry on that subject; that thereupon a copy of the summons to which was attached a copy of the complaint was handed to defendant; that on February 2, 1942, plaintiff's counsel sent a letter by registered mail to defendant, in which he stated that a default had been entered against defendant, that he suggested that defendant have his attorney contact him and if he had allowed the time to answer to elapse through inadvertence he would cooperate with him, and that unless he heard from him in five days a default judgment would be taken. No reply to the letter was received. Defendant and his wife filed affidavits denying that any service had been made. Plaintiff's counsel filed his affidavit in opposition to the second motion in which he stated that, in addition to the foregoing claim of service on defendant and before the hearing on the first motion, outside of court, defendant denied he was Walter Towers but later admitted it in court at the hearing; that upon receiving the notice of the first motion he contacted defendant's attorney and was advised by the latter that there was no question of mistaken identity, but he believed his client's assertion that he had not been served and refused an offer to set aside the default stating he was positive the court would set aside the default; that he further told defendant's counsel that by reason of his refusal to accept the offer to set aside the default he was barring himself from relief under section 473 of the Code of Civil Procedure.

It is defendant's position that he believed that no service had been made upon him; that he proceeded diligently by the appropriate procedure, his first motion, to attack the service and default entry; that after being unsuccessful in his attack, he proceeded diligently with his second motion; that the default judgment should be set aside because his failure to appear and answer was due to his surprise and excusable neglect at the outcome of his first motion, he believing it would be successful.

As appears, defendant's first motion was based upon his assertion that no service had been made upon him, but plaintiff was successful in his claim that summons was personally served on defendant in Los Angeles County. The second motion was based on the claim that defendant "believed that no service had been made upon him" and that he did not know that it had until the court in effect said so by denying his first motion.

[1] It is conceded, and properly so, that the question as to whether defendant had been legally served with summons was judicially determined on conflicting evidence on the first motion and is not now open to question. In determining the first motion the lower court exercised no discretion except in its judgment on the facts and the law. If defendant had not in fact

been served or the service was legally insufficient, the court should have without question set aside the service and the default entry. Its failure to so act would have been nullified on appropriate proceedings. On the other hand if the legality and fact of service were established, or there was a conflict in the evidence on the fact which was resolved by the court in favor of the plaintiff, the court should deny the motion. However, a ruling on the second motion under section 473 of the Code of Civil Procedure involved the exercise of discretion on the part of the court with reference to whether there existed the cause for vacating the default judgment specified in that section, that is, "mistake, inadvertence, surprise or excusable neglect." The question is therefore whether a default judgment should be set aside under section 473 of the Code of Civil Procedure where the reason the defendant did not appear or answer is that he believed he had not been served, and pursuant to that belief, diligently attacked the service rather than apply for relief under section 473, and when unsuccessful, diligently proceeded under section 473.

[2] Where defendant claims that he has not been served or that the service is legally insufficient, he may seek relief by making a special appearance and moving the court for an order quashing the service and setting aside the default entry. See Kline v. Beauchamp, 29 Cal.App.2d 340, 84 P.2d 194; McGinn v. Rees, 33 Cal.App. 291, 165 P. 52; Fanning v. Foley, 99 Cal. 336, 33 P. 1098; People v. Dodge, 104 Cal. 487, 38 P. 203; Willey v. Benedict Co., 145 Cal. 601, 79 P. 270; Burge v. Justice's Court, 11 Cal.App. 213, 104 P. 581; History Co. v. Light, 97 Cal. 56, 31 P. 627; McDonald v. Agnew, 122 Cal. 448, 55 P. 125; 21 Cal.Jur. 548-550. Certainly defendant should not be deprived of that remedy and the rights preserved by a special appearance by being forced to proceed under section 473. Hence, while defendant was proceeding thereunder he should be relieved under section 473 from a default judgment taken against him in the interim. Here defendant proceeded diligently, giving his notice of the first motion six days after the summons was returned and the entry of the default was made. In twelve days after his motion was denied and on the same day the default judgment was given, he applied for relief under section 473.

In Roehl v. Texas Co., 107 Cal.App. 691, 291 P. 255, summons was served on a representative of a corporation, its default was entered, and a motion to quash service of summons denied. This was affirmed on appeal. Defendant also applied for relief under section 473, which was denied by the trial court, but the judgment was reversed on appeal (Roehl v. Texas Co., 107 Cal. App. 708, at page 714, 291 P. 262, at page 264), the court stating:

> "In the instant case it is quite true that we have this day sustained the action of the trial court in refusing to quash service of the summons. The question, however, as to the validity of such service was at least a sufficiently doubtful one so that appellant's attorney might very reasonably have entertained the opinion that the service would be quashed. The determination of that question by the trial court involved the decision of *questions both of fact and of law:* If a mistake of law is a reasonable one under the facts as they are made to appear, the neglect to file an answer because of the belief entertained is at least excusable. Waite v. Southern Pac. Co., 192 Cal. 467, 221 P. 204. In that case the application for relief, due to the view of the law taken by defendant's counsel, was not made until five months after the default was entered. In the case at bar it is patent that from the moment that the president and counsel of appellant corporation were notified that service had been attempted, which occurred two days after an appearance should have been made, they were taking what seemed to them, and what in the circumstances this court must hold that they had ground to believe to be, reasonable measures to protect the defendant's right to a day in court. In view of the relatively short time that elapsed between the service upon Lorden and the filing of a notice of motion to vacate the default and judgment and the presentation of the same in open court, and in view of the pendency meanwhile of the proceeding to obtain an order quashing the service of the summons, it seems to us that the case is one in which the action of the lower court cannot be sustained." (Italics added.)

See, also, Waite v. Southern Pac. Co., 192 Cal. 467, 221 P. 204.

In the instant case defendant acted diligently and as is apparent from the foregoing discussion of the affidavits, vigorously resisted the issue of whether or not he had been served. It does not appear that defendant and his counsel were not reasonably mistaken in their beliefs. Defendant's counsel insisted that he believed his client and relied thereon, and was positive that the service would be quashed. Defendant squarely denied any service upon him. The fact that the court did not believe him as is evidenced by the denial of his first motion, does not require the conclusion that he did not believe that the court would believe him and quash the service. In our opinion the course which he followed in making his first motion was reasonable and proper.

[3-5] The foregoing conclusion is further supported by the well established rules that the provisions of section 473 of the Code of Civil Procedure are to be liberally construed and sound policy favors the determination of actions on their merits. 14 Cal.Jur. 1012. The discretion of the lower court in ruling upon matters under section 473 is a legal discretion, not an arbitrary one, and from the circumstances appearing we believe it is clear that the default judgment should have been set aside.

The case of Wheat v. McNeill, 111 Cal. App. 72, 295 P. 102, considered an action for equitable relief from a judgment where accident and excusable neglect were claimed rather than relief under section 473. In Thorndyke v. Jenkins, 61 Cal.App. 2d 119, 142 P.2d 348, the court appeared to be of the impression that merely because the defendant was unsuccessful in his denial of the fact of service on the motion to quash service, he had misled his counsel and therefore could not obtain relief under section 473. We do not believe that conclusion follows as appears from the foregoing discussion. Furthermore, in the case at bar defendant's counsel was firmly convinced of the propriety of his client's position.

The order denying relief under section 473 of the Code of Civil Procedure is reversed and the court is directed to set aside the default judgment and permit defendant to answer.

GIBSON, C. J., and SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

I cannot agree with the conclusion of my associates that the court abused its discretion in denying the motion to set aside the default judgment. For as there was evidence before the court from which it may reasonably be concluded that Towers did not act in good faith when he prosecuted the motion to set aside the service of summons and the entry of default, under long established principles the order should be affirmed.

The trial court, in ruling on a motion under section 473 of the Code of Civil Procedure, must exercise its discretion to determine whether the default from which relief is sought was taken against the defendant "through his mistake, inadvertence, surprise or excusable neglect" and, in addition, whether the application for relief from the default was made "within a reasonable time." Code Civ.Proc. § 473. It is well settled that an appellate court will not set aside an order denying relief from a default judgment unless an abuse of discretion of the trial court is clearly shown. And where the trial court's ruling is based upon conflicting evidence, its determination is conclusive and the ruling will not be disturbed on appeal as an abuse of discretion although the court, in denying relief under section 473, takes the plaintiff's view of the facts. Alferitz v. Cahen, 145 Cal. 397, 78 P. 878; Morton v. Morton, 117 Cal. 443, 49 P. 557; Kearney v. Palmer, 18 Cal. App. 517, 123 P. 611. "In matters of this sort," said Mr. Justice Shaw in O'Brien v. Leach, 139 Cal. 220, 222, 72 P. 1004, 1005, 96 Am.St.Rep. 105, "the proper decision of the case rests almost entirely in the discretion of the court below, and this court will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion." Later, in Lang v. Lilley & Thurston Co., 164 Cal. 294, 128 P. 1026, 1027, the following language from Ingrim v. Epperson, 137 Cal. 370, 70 P. 165, was quoted with approval: "While it has been said in some cases that this discretion is better exercised when it tends to bring about a decision of the cause upon its merits, the rule itself (not to disturb an order setting aside, or refusing to set aside, a default except in clear cases of an abuse of discretion by the lower court) has never been relaxed. This observation has been in the nature of advice to the superior court, and not for the purpose of compelling it to decide in that mode."

The cases of Waite v. Southern Pac. Co., 192 Cal. 467, 221 P. 204, and Roehl v. Texas Co., 107 Cal.App. 708, 291 P. 262, relied upon by Towers and cited by my associates as supporting his position, are not, in my opinion, authority for the present decision. In the first of them, the order upon the motion was not made upon a determination of any question of fact. "It is not questioned," said this court in considering the ruling, "that defendant was at all times acting in the honest belief that the federal court alone had jurisdiction, and that plaintiffs knew that it was for this reason that defendant did not file an answer in the state court." Page 469 of 192 Cal., page 205 of 221 P. Following this statement, correspondence is quoted showing that counsel for the railroad company were of the opinion that the state court had no jurisdiction and asked that notice be given when its default was entered in order that they might be informed as to the progress of the matter. All of the evidence which was presented in connection with the ruling upon the motion showed, as this court pointed out, that the defendant railroad company "was acting upon its honest belief that the state court had no jurisdiction of the action." Page 471 of 192 Cal., page 206 of 221 P. And although, as one of the grounds for the decision upon appeal it was said that in a proper case relief may be obtained from a default judgment entered by reason of defendant's mistake of law, the record, as summarized by this court, shows no evidence contradicting the defendant's statement of the reasons it relied upon in support of the motion. Under these circumstances, it is apparent that the trial court denied the motion upon uncontroverted evidence showing that the railroad company in good faith and with the full knowledge of the attorneys who were opposing the removal proceeding, declined to answer the plaintiff's complaint upon the advice of its counsel that the federal court had assumed jurisdiction of the action and for that reason, did not appear. And upon the appeal from the order considered in Roehl v. Texas Co., supra, it was said that the determination of the motion by the trial court "involved the decision of questions both of fact and of law." By neither of these decisions did this court reverse a determination by the trial judge concerning a question of fact based upon conflicting evidence.

In the present case, Towers gave notice that he would move the court for an order setting aside the default which had been entered and permitting the defendant's answer to be filed. As grounds for the motion the appellant stated that the default was entered "through mistake, inadvertence, surprise and excusable neglect of defendant and by reason of the fact that * * * [he] believed that no service had been made upon him of any summons or complaint * * * and that not until February 26, 1942 [the date when his motion to set aside service of summons was denied], did he know that service had been made upon him. * * *" According to this notice, the motion would be based upon it, the affidavit of merits made by him, the proposed verified answer, "and upon all the other records and files in the above entitled cause." In a counter affidavit, Sydney M. Williams, counsel for the respondent, declared that on January 13, 1942, he saw Towers served with the summons and complaint. In this affidavit, Williams also stated facts tending to prove that Towers had full knowledge of all of the steps taken in the action being prosecuted against him and that he had not in good faith proceeded in such a manner as to be entitled to relief under section 473 of the Code of Civil Procedure.

It is significant that the notice of motion does not state, as one of its grounds, that Towers had not been served with process, but only that he "believed" no service had been made upon him. Nor did he present any affidavit in this regard. True, he said that the motion would be based upon all the records and files in the action. But assuming that, by such reference, the affidavits presented to the court in connection with the motion to set aside the service were a part of the evidence which the court was entitled to and did consider in ruling upon the motion to set aside the default, they only added more directly contradictory statements concerning the asserted occurrences on January 13, 1942, when it is claimed that Towers was served. Moreover, the records and files include a minute order reciting that the prior motion was heard upon the testimony of Towers, his wife, and Williams, and was denied.

To me, the conclusion is inescapable that upon the motion to set aside the default and permit the answer of Towers to be filed, the trial judge was required to determine, upon the evidence then submitted to him, an issue of fact and that his order, based upon conflicting evidence, is beyond the reach of an appellate court.

For these reasons, in my opinion, the order should be affirmed.

24 Cal.2d 147

HISE, Building and Loan Com'r, v. McCOLGAN, Franchise Tax Com'r.
L. A. 18665.

Supreme Court of California.
April 21, 1944.

Rehearing Denied May 19, 1944.

1. Building and loan associations 🔑42(6)

Building and loan commissioner as liquidator has broad powers with respect to business of association being liquidated. Gen.Laws 1937, Act 986, §§ 13.11–13.16.

2. Taxation 🔑124½

Where commissioner after taking over building and loan association for liquidation, in exercise of his statutory powers over assets of association, made sales, rentals and transfers of assets and collections upon obligations due association on behalf of association and its creditors, association was "doing business" within meaning of Franchise Tax Act and was subject to taxation thereunder. Gen.Laws 1937, Act 986, §§ 13.11–13.16; Act 8488, §§ 4(1), 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

3. Taxation 🔑133

The criterion in determining whether a building and loan association is "doing business" so as to be subject to franchise tax is whether goal is financial or pecuniary gain and fact that no profit may have been made is not controlling. Gen.Laws 1937, Act 986, §§ 13.11–13.16; Act 8488, §§ 4(1), 5.

4. Taxation 🔑117

It is not necessary to constitute "doing business" for franchise tax purposes that there be a regular course of business or transactions. Gen.Laws 1937, Act 986, §§ 13.11–13.16; Act 8488, §§ 4(1), 5.

5. Taxation 🔑124½

The Franchise Tax Act applies to corporations being liquidated. Gen.Laws 1937, Act 8488, § 4(1, 5).

6. Taxation 🔑124½

As respects liability of commissioner for franchise taxes, provision of Building and Loan Association Act pertaining to commissioner's possession of property, business and assets of association taken over contemplates a resumption of business and affairs by duly constituted association officers and does not imply that association's franchise is forfeited and no business can be done in its name. Gen.Laws 1937, Act 986, § 13.11.

7. Building and loan associations 🔑42(6)

The commissioner, when he takes over a building and loan association, steps into shoes of association and proceeds with its affairs analogous to a liquidator or receiver and he acts for and on behalf of association, its officers and creditors. Gen.Laws 1937, Act 986, § 13.11, 13.13–13.16a.

8. Building and loan associations 🔑42(6)
Taxation 🔑124½

When commissioner takes over a building and loan association he does not lose his status as a "state officer" during liquidation but also occupies, in connection therewith, status of a "trustee" of a private trust and in latter capacity commissioner operates under association's franchise and association is liable for franchise tax. Gen. Laws 1937, Act 986, §§ 13.11-13.16; Act 8488, § 4(1, 5).

See Words and Phrases, Permanent Edition, for all other definitions of "State Officer" and "Trustee".

9. Statutes 🔑129

Under appropriate circumstances an amendment to a statute may be made for purpose of clarification rather than new matter or an alteration of formal law.

10. Taxation 🔑117

The 1943 amendment to Franchise Tax Act section dealing with definitions was only for clarification purposes. St. 1943, p. 1405, § 5.

11. Building and loan associations 🔑42(17)

When building and loan association is in process of liquidation no interest is payable during liquidation to investment certificate holders unless assets are sufficient to discharge principal obligations to all creditors including membership shareholders. Gen.Laws 1937, Act 986, §§ 13.11–13.16.

12. Taxation 🔑376(2)

Where assets of building and loan association in liquidation, distributed as dividends, were insufficient to pay principal and there was nothing to pay interest that might accrue, and no part of dividends paid was earmarked as interest, interest on claims was not deductible from gross revenue on an accrual basis in computing franchise tax. Gen.Laws 1937, Act 986, §§ 13.11–13.16; Act 8488, §§ 4, 12.

13. Taxation ⟹376(2)

Where assets of building and loan association in liquidation were insufficient to pay principal and there was a probability that no interest would be paid on claim, Franchise Tax Act section allowing deduction of interest "paid or accrued" did not authorize deduction from gross income of accrued interest in computing franchise tax. Gen.Laws 1937, Act 8488, § 8(b).

CURTIS and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Harley Hise, as Building and Loan Commissioner of the State of California, in the liquidation of Marine Building & Loan Association, against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, to recover a franchise tax paid under protest. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, 139 P.2d 995.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and James E. Sabine, Deputy Atty. Gen., for appellant.

George S. Dennison, of Los Angeles, W. G. Harmon, of San Francisco, and Frank P. Barton, of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff was successful in the trial court in this action to recover franchise taxes paid under protest, and defendant prosecutes this appeal.

In 1932, Marine Building & Loan Association, hereinafter referred to as Marine, was a corporation operating in this state under the Building and Loan Association Act. Stats. 1931, p. 483, Deering's Gen. Laws, 1937, Act 986. The following year the business, property and assets of Marine were taken over by plaintiff commissioner pursuant to the provisions of said act. Said business, property and assets remained in the possession of plaintiff in liquidation from June 2, 1933, until the liquidation was completed in 1940. Stats. 1931, pp. 483, 539–544, §§ 13.11–13.16. Marine has been insolvent since it was taken over. Pursuant to defendant's demand, plaintiff, in 1941, paid under protest a franchise tax and interest thereon for the income year ending on December 31, 1937, said tax being for an alleged liability for the year ending December 31, 1938. Plaintiff has also paid the $25 annual tax for Marine which is imposed where a corporation is not otherwise taxed by the Bank and Corporation Franchise Tax Act (§ 4(5). Stats.1929, p. 19, Deering's Gen.Laws, 1937, Act 8488.

Section 4(1) of the Bank and Corporation Franchise Tax Act provides as follows: "Every financial corporation *doing business* within the limits of this State, taxable under the provisions of section 16 of Article XIII of the Constitution of this State, shall annually pay to the State *for the privilege of exercising its corporate franchises* within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided * * *." (Italics added.) Section 4(5) of said act imposes an annual tax on all corporations not otherwise taxed under section 4 and not expressly exempted from the act.

Plaintiff does not question his obligation to pay the $25 annual tax as liquidator on behalf of Marine nor is it claimed that Marine would not be subject to the tax imposed by the above quoted portion of section 4(1), but he asserts that Marine is not doing business or exercising its corporate franchise because it is in the process of liquidation, and hence does not fall within the terms of section 4(1).

[1] Turning first to the question as to whether or not Marine was doing business, we believe that that requirement is satisfied. That conclusion follows from the facts and law here involved. The Bank and Corporation Franchise Tax Act defines doing business as: "* * * actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." Sec. 5. Under the Building and Loan Association Act the commissioner as liquidator is given broad powers with respect to the business of the corporation being liquidated. He takes over all the business, property and assets of the corporation. Stats. 1931, pp. 483, 539, § 13.11. He may place a custodian in charge of its business; collect all moneys due the corporation and "do such other acts as are necessary or expedient to collect, conserve or protect its business, property and assets." He may liquidate the affairs of the corporation and in so doing may pay claims

against it; disaffirm executory contracts; require the officers of the corporation to furnish a schedule of assets and other information (Id., § 13.13); release or reconvey property pledged or hypothecated to the corporation; prosecute actions; borrow money; reduce the amount of interest on loans and rewrite the same; sell and transfer property in his own name or that of the corporation, and any instrument executed to effectuate a transaction in connection with the liquidation shall be valid for all purposes the same as if it had been executed by the duly authorized officers of the corporation. Id., § 13.16.

[2, 3] In the instant case the stipulated facts show that no surplus remained after the completion of the liquidation; and that the assets were insufficient to fully pay all of the claims; that "After the takeover, Marine did no business in its own name and did no business through its directors or officers, or through any agents appointed by them, or by the stockholders. The plaintiff, in the exercise of his statutory powers over the assets of Marine, made sales, *rentals* and transfers of the assets of Marine and made collections upon notes and other obligations which were among the assets of Marine. These activities by the Commissioner (plaintiff) commenced upon the takeover and continued thereafter through the years 1937 and 1938, until the year 1940." (Italics added.) The doing of the foregoing things by plaintiff commissioner for and on behalf of the corporation and its creditors are clearly acts of doing business within the meaning of the definition given in the Bank and Corporation Franchise Tax Act, supra. And the fact that they were done in the course of liquidation which finally resulted in a complete disposal of all of the assets of Marine and distribution of the proceeds thereof does not change their character. While no profit may have been made as that term is usually understood, such factor is not controlling in the definition of the term "doing business"; rather the criterion is whether or not the goal or aim is financial or pecuniary gain. See Consolidated Coal Co. v. State, 236 Ala. 489, 183 So. 650. It should be clear that the commissioner in liquidating Marine was endeavoring to get the best price obtainable for its assets and to conduct its affairs in liquidation to the end that the most financial gain would be realized for its creditors and stockholders. The aim was pecuniary gain. It is true that no new deposits were accepted by plaintiff commissioner for Marine and that that is ordinarily the chief activity of a building and loan association, as a going concern, yet the transactions were of the nature typified as doing business.

[4] It is not necessary to constitute doing business for franchise tax purposes that there be a regular course of business or transactions. This court stated in Golden State T. & R. Corp. v. Johnson, 21 Cal. 2d 493, 495, 133 P.2d 395, 396: "Defendant contends that East Bay Theatres, Inc., was not 'actively' engaged in any transaction for pecuniary gain or profit since its purpose was not to operate a business but merely to acquire property and derive income therefrom, and since none of the transactions occurred regularly. Such an interpretation of 'actively' would nullify the 1933 modification of the definition of doing business by reading into it the meaning given the term under the 1931 amendment * * * defining it as 'any transaction or transactions in the course of its business' by a domestic or foreign corporation. The doing of business, however, does not necessarily mean a regular course of business under the 1933 amendment, for by its plain terms a corporation is doing business if it actively engages in any transaction for pecuniary gain or profit. Defendant would identify 'doing business' with 'carrying on a trade or business.' A series of transactions regularly engaged in may be necessary to establish the 'carrying on of a trade or business' but the Legislature made it clear that it had no such concept in mind when it referred to transaction in the singular as 'any transaction.' The word 'actively' must therefore be interpreted as the opposite of passively or inactively, and as used in section 5 it means active participation in any transaction for pecuniary gain or profit." See, also, Carson Estate Co. v. McColgan, 21 Cal.2d 516, 133 P.2d 636.

In Magruder v. Washington, B. & A. R. Corp., 316 U.S. 69, 62 S.Ct. 922, 86 L. Ed. 1278, although the court was dealing with a corporation which had been organized by the bondholders for the particular purpose of liquidating the assets of a defunct railroad company, which it was engaged in doing, as distinguished from an existing corporation being liquidated, it is pertinent in that it implicitly holds that the mere fact that the business consisted of carrying out the process of liquidation, it nevertheless possessed the character of a corporation doing business. There is no magic in the fact of insolvency or that control is being exercised by a liquidator insofar as either may have an effect on the amount and character of business being done. A net income as envisioned by the franchise tax law may result from transactions carried on by the liquidator even though the chief aim is to dispose of the assets and distribute the proceeds. Although the liabilities of a corporation may exceed its assets, its current transactions may result in a net income. If that were not true a going concern controlling its own affairs might escape the tax merely because factually it was insolvent and was disposing of its capital assets to pay its debts. Those questions go to the issue of whether there is in fact a taxable income rather than whether the franchise tax law is applicable.

[5] There is nothing in the Bank and Corporation Franchise Tax Act that necessarily precludes the assumption that it applies to a corporation being liquidated. Principles of fairness would indicate that a business being liquidated but carrying on transactions in which solvent concerns are engaged should receive the same treatment so far as tax liability is concerned. Otherwise, solvent corporations would be at a disadvantage.

The authorities dealing with the question of whether or not a corporation is subject to a franchise tax when it is in liquidation or in the hands of a receiver are numerous, and varying results have been reached. Some have considered that when a corporation is in that condition the franchise tax is not applicable, but they deal chiefly with the proposition of whether or not the corporation is exercising its corporate franchise under such conditions, a subject that is discussed later herein. Much of the diversity of opinion in these cases arises from the interpretation of the particular statute involved, some cases holding that the tax was solely on the bare right to exercise the corporate franchise regardless of whether or not business has been done. The tendency has been to treat the tax statute as applicable although the corporation is in receivership. It is said in 45 Am.Jur., Receivers, §§ 410, 411, 412:

"A question upon which authorities divide exists, however, as to the accruability of such taxes [franchise taxes] during receivership. * * * Cases affirming the accruability during receivership of franchise and privilege taxes involve various factual situations, in some of which it appears that the receiver carried on the corporate business, and in others it does not so appear or the fact is regarded as immaterial. It is generally held that a franchise or privilege tax accrues during a receivership and that the receiver must pay such tax, at least where the receiver continues the operation of the business of the corporation and where the franchise tax is regarded as one upon doing business; when a receiver is thus carrying on the business of a corporation as a going concern he is in effect exercising the corporate franchise. * * *

"Although there is contrary authority, it has been both held and intimated that a franchise tax accrues during a receivership which does not continue to operate the business of the corporation. * * *

"A Federal receiver is required to pay state-imposed franchise taxes accruing during the proceedings. Under Federal statute the liability of a receiver appointed by a Federal court for state and local taxes, where the receiver conducts any business under the authority of the court, is now specifically fixed. The purpose of the Federal statute is to subject businesses conducted under receivership in Federal courts to state and local taxation the same as if such private businesses were being conducted by private individuals or corporations. In a few cases since the enactment of this statute the courts in holding the receiver liable for franchise taxes have not relied on this statute. Although there is contrary authority, the courts have held in a few cases that a franchise tax arising during a Federal receivership was payable by the receiver even though the business of the debtor corporation was not conducted by him. The view has been expressed that it is the duty of a receiver to pay the franchise tax to protect the corporate existence. Distinguishing cases holding that a corporation in the hands of a receiver is not subject to a franchise tax where the corporation has been prohibited by law or by injunction from exercising its franchises, a court has held that the commutation excise tax upon street railways imposed by the statute of a state was a tax exacted for the privilege of operation of street railways in public ways, operation for revenue being the basis of the tax, and that there was no apparent reason why such a tax should not be paid if the railway tracks in the highway were used for operation of the railway for the purpose of obtaining receipts, even though the operation was by a receiver of the railroad. * * *

"The cases in which it has been held that a franchise or privilege tax does not accrue during the receivership of a corporation have, generally speaking, certain characteristics, as nonoperation of the corporate business by the receiver, prohibition from doing business, or practical dissolution of the corporation. In several cases the franchise tax has been regarded as one upon 'doing business,' and it has been held that if the receiver does not carry on the ordinary business of the corporation there is no ground for the tax. The same conclusion has been reached even though the corporation still exists and may, perhaps, be allowed to resume business. In some cases the decision rests apparently on the ground that the corporation is substantially dissolved. Thus, in a proceeding to wind up the affairs of an insolvent corporation and distribute its assets, in which receivers were appointed, it was held that a franchise tax assessed, under the provisions of the state law, upon the authorized capital stock of the corporation, after the appointment of the receivers, and covering the succeeding year, was not a valid claim, although the statute provided that the tax should be a debt due from the corporation to the state, and should be a preferred debt in case of insolvency; since, when the corporation passed into the hands of receivers under proceedings for its dissolution, it thereafter had no right to exercise any of the privileges conferred upon it by the state, which had taken possession of its assets for distribution among its then existing creditors. Some of the cases have held that where a Federal receiver has not continued the business of the debtor corporation franchise taxes accruing during the proceedings are not taxable." See, also, Armstrong v. Emmerson, 300 Ill. 54, 132 N.E. 768, 18 A.L.R. 700; State of Alabama v. Bradley, 207 Ala. 677, 93 So. 595, 26 A.L.R. 426; People of State of Michigan v. Michigan Trust Co., 286 U.S. 334, 52 S. Ct. 512, 76 L.Ed. 1141; Philadelphia Co. v. Dipple, 312 U.S. 168, 656, 61 S.Ct. 538, 85 L.Ed. 656, 674; Fletcher, Cyclopedia Corporations, Perm.Ed., § 7907. Because of the difference in the statutes construed, and the wide variation in results, those authorities are not of much assistance and a digest of them would serve no useful purpose. The tendency above mentioned finds support in the sound policy that a corporation in the hands of a receiver or being liquidated should not be favored by being exempt from the tax over a going solvent concern, when during the process of liquidation many transactions are engaged in which are the same as those common to the latter corporation. There is nothing in the Bank and Corporation Franchise Tax Act which clearly shows that the franchise tax should not apply or that the above policy is not approved. Plaintiff relies particularly upon State v. Old Abe Co., 43 N. M. 367, 94 P.2d 105, 124 A.L.R. 1085. That case takes a narrow view of the definition of doing business and is out of harmony with the broad position taken by this court in Golden State T. & R. Corp. v. Johnson, supra, and Carson Estate Co. v. McColgan, supra. The case of People v. Richardson, 37 Cal.App.2d 275, 99 P.2d 366, is of no particular assistance. It merely holds that under the Bank Act where a conservator of a bank in financial difficulties is continuing the business looking toward rehabilitation, the franchise tax is applicable. While it speaks of a distinction between a conservator and liquidator in that the former continues operation of the business, it does not consider the various acts that may be done by either, and which would constitute doing business, even though done by a liquidator. In the case at bar we have seen that transactions were conducted which constituted doing business.

Finally, it is true that the ordinary business of Marine was to receive deposits and make loans, however, a necessary part of that business was the rental and disposal of property, transactions which as we have seen constitute doing business.

It will be remembered that the tax under the Bank and Corporation Franchise Tax Act is imposed upon the corporation "for the privilege of exercising its corporate franchises." Plaintiff contends that pursuant to the Building and Loan Association Act he is a state officer and his taking over of Marine and proceeding with its liquidation placed the corporation in the hands of the state and forfeited its corporate franchise and the license issued to operate as a building and loan association; that hence the Bank and Corporation Franchise Tax Act cannot apply because the franchises cannot and are not being exercised and no right so to do exists.

[6-8] There is no provision in the Building and Loan Association Act which provides for a forfeiture of the franchise of

a corporation taken over and in liquidation. The act does generally provide that the commissioner retain possession of the property, business and assets of the corporation "until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him." § 13.11. Manifestly, that provision contemplates a resumption of the business and affairs by the duly constituted corporation officers with limited or no restrictions by the commissioner, rather than implying that the corporation's franchises are forfeited and no business can be done in its name. On the contrary it is contemplated that the commissioner may make sales, transfers and rentals of property, renew and rewrite loans, and "conserve or protect its business." §§ 13.13–13.16a. That is to say the commissioner steps into the shoes of the corporation and proceeds with its affairs analogous to a liquidator or receiver. As heretofore seen, broad powers are given to the commissioner in liquidation and he ousts the corporate officers from control and takes complete charge of the business of the corporation. He acts for and on behalf of the corporation, its officers and creditors. (See in analogous situations People v. United States F. & G. Co., 45 Cal.App.2d 474, 114 P.2d 389; Verder v. American Loan Society, 1 Cal.2d 17, 33 P.2d 1081.) The commissioner acts in a sense as a trustee or receiver. See Brandon v. Anglo-California Trust Co., 177 Cal. 699, 171 P. 956; Richardson v. Superior Court, 138 Cal.App. 389, 32 P.2d 405; Mercantile Trust Co. v. Miller, 166 Cal. 563, 137 P. 913; Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761; Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107. The commissioner does not lose his status as a state officer during liquidation but he also occupies in connection therewith a position described in Evans v. Superior Court, supra, 14 Cal.2d 573, 96 P.2d 113:

"During such time, the commissioner has the status of a trustee of a trust in private property, or in other words, the status of a trustee of a private trust. As was said in Richardson v. Superior Court, 138 Cal. App. 389, at page 394, 32 P.2d 405, at page 407, 'While it thus appears that the authority of the commissioner over the property and business affairs of the association when in his custody is subject to certain prescribed judicial review and control, the principal characteristics of his position as administrator are those of a public officer charged with a statutory duty which, for reasons of public policy, has been made to include a trust in private property.' In Mercantile Trust Co. v. Miller, 166 Cal. 563, at page 569, 137 P. 913, at page 916, the status of the superintendent of banks in liquidating a bank was described as that of a 'trustee of this express trust'. In Brandon v. Anglo-California Trust Co., 177 Cal. 699, at page 702, 171 P. 956, at page 958, it was said that the building and loan commissioner, in possession of an association, was 'in effect the receiver' and in Re Union Building & Loan Association, 16 Cal.App.2d 301, 60 P.2d 562, his status was compared to that of a guardian. See, also, First State Bank v. Conant, 117 Neb. 562, 221 N.W. 691. In one case, it is said 'that the superintendent of banking, as such, and the superintendent of banking as receiver are juridically two persons.' Bates v. Niles, etc., Bank, [226] Iowa [1077], 285 N.W. 626, 627. It is of course clear that a public officer does not lose his status as such public officer upon assuming his duties under a statute as a trustee of a private trust (Mitchell v. Taylor, 3 Cal.2d 217, 43 P.2d 803), but it is equally clear that he does acquire a new status and that his powers and duties must be considered in the light of such status as the trustee of such private trust. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761." Under those circumstances it cannot be said that the corporate franchises are forfeited or suspended. They are being exercised by the commissioner for the corporation, its stockholders and creditors. True, the corporate officers are ousted from control but that is quite different from a forfeiture of the corporate franchises. In the case of Mercantile Trust Co. v. Miller, 166 Cal. 563, 137 P. 913, involving the question of whether the Superintendent of Banks as liquidator of a bank in liquidation was a proper party in an action involving the bank, the court stated at page 569 of 166 Cal., at page 916 of 137 P.:

"The act (bank act) imposes upon him duties in the liquidation of such banks which will often require him to maintain or defend actions concerning them. He must collect the moneys of the bank, and do all other acts necessary to conserve and liquidate its assets. When he takes possession he supersedes the bank officials in the management and control of its property and business. Its franchise to do business as a bank is thereupon suspended. In closing up its affairs he is not required to consult its officers, or co-operate with them, but acts upon his own initiative and independent of them. Upon complete liquidation and final settlement, the residue, if any, must be transferred and delivered by him to the stockholders, not to the corporation. Thereupon the franchise of the corporation to do business as a bank is terminated and it cannot be again acquired except by compliance with the provisions of the act in the same manner as a new corporation must comply." That language indicates that the power of the corporate officials is superseded, rather than that the corporate franchise is not being exercised by the Superintendent of Banks. True it contains the statement that the taking over suspends the franchise but that must be read in the light of the other language with respect to the powers of the corporate officers and the last sentence that the corporate franchise is lost *when the liquidation has been completed*. While is was said in Fifth Street Building v. McColgan, 19 Cal.2d 143, 119 P.2d 729, 730, that the amendment to the federal statute had set at rest by express authorization the question of whether or not a trustee in bankruptcy of a corporation must pay the franchise tax (28 U.S.C.A. § 124a), it is also stated that "There is no need to amend the Bank and Corporation Franchise Tax Act to specify that a trustee in bankruptcy conducting the business of a corporation shall be subject to the tax as if he were a corporation in order to insure that an intervening bankruptcy will not interrupt the application of the tax." The clear intimation from what was said in the opinion in that case is that Congress by its plenary powers over bankruptcy matters removed all doubt of its consent, by that statute, that a trustee in bankruptcy may be subject to the tax, and that that difficulty being removed there was nothing in the Bank and Corporation Franchise Tax Act which indicated that such tax should not apply to a trusteeship or receivership. That case held that the act of Congress gave to the trustee the status of the corporation for the purpose of imposition of the tax. Likewise in the instant case we have seen that the Building and Loan Commissioner as liquidator has been declared to be in the shoes of the corporation.

[9, 10] In 1943, section 5 of the Bank and Corporation Franchise Tax Act dealing with definitions was amended to read: "The term 'bank' and the term 'corporation' as herein used shall include any 'bank' or any 'corporation' operated by any receiver, liquidator, referee, trustee or other officers or agents appointed by any court." Stats. 1943, ch. 352, p. 1405, Deering's Gen. Laws, Act 8488. According to the Assembly Journal the purpose of the amendment was stated to be: "Enlarges definition of 'bank' and 'corporation' in accordance with principal announced in Fifth Street Building v. McColgan, 19 Cal.2d 143, 119 P.2d 729. Restates existing law." Under appropriate circumstances an amendment to a statute may be for the purpose of clarification rather than new matter or an alteration of the former law. See Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425; San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 125 P.2d 36; Martin v. California Mut. B. & L. Ass'n, 18 Cal.2d 478, 116 P.2d 71. Inasmuch as we have determined that the act prior to the amendment was applicable to the instant case, and the stated purpose of the amendment, we believe the amendment was only for clarification purposes.

Plaintiff contends that there was no tax due because the operating expenses plus interest falling due on claims against Marine during the year 1937 exceeded the operating revenue for the year. Defendant asserts, however, that the interest on the claims was not a deductible item from the gross revenue because Marine was insolvent, the interest had not been paid for that year and because of Marine's insolvency, would never be paid; that to allow the deduction would be to place Marine's return on an accrual rather than a cash basis which cannot be done inasmuch as Marine's insolvency eliminates the expectation that the interest will be paid in the future; and that under section 12 of the Bank and Corporation Franchise Tax Act it is within the discretion of the commissioner whether a corporation shall be entitled to use the accrual or cash basis.

The books of Marine were kept on an accrual basis. If interest on both general creditors claims and holders of investment certificates became a fixed and certain liability during 1937, a year Marine was in liquidation, the amount thereof was $10,013.77. Plaintiff commissioner alleges in his complaint that: "* * * pursuant to the requirements of the said notice, claims were filed by creditors and investors of the said association in an original * * * sum of * * * $300,000.00; that of the said * * * sum claims of approximately $50,000.00 were paid in full * * * prior to the end of the calendar year of 1937. That there were claims filed in an original amount of $247,300.00 which remained unsatisfied as of December 31, 1937; that of the said claims, $4,246.68 represented the general claims of creditors other than investors and $243,063.32 represented the claims of investors in the association. That in addition to the said claims as filed, there were claims shown by the books of the association to exist in favor of investors against the association in the total original sum of $3,669.51, which claims were not presented or filed with the Commissioner; that the total original amount of claims of investors as of December 31, 1937, was the sum of $246,732.83. * * *

"That during the liquidation of the property, business and assets of the said association, this plaintiff and his predecessors in office have distributed, as dividends to the investors and other creditors of the said association, the total sum of $151,646.20; * * *" We assume from those allegations that the amount of claims not including interest thereon was considerably more than the payments made. In other words, there was insufficient to pay even the principal. There was nothing to pay the interest that might accrue during the year.

[11, 12] While plaintiff states that he computed about half of the $151,646.20 paid in 1937 as interest and the balance as principal the payments were not so earmarked. Under these circumstances it must be concluded that no interest in fact became a fixed and definite liability in 1937. That follows from the general rule that when an insolvent building and loan association is in the hands of the commissioner in the process of liquidation no interest is payable during liquidation to investment certificate holders until and unless the assets are sufficient to discharge the principal obligation to all the creditors including membership shareholders. In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal.2d 134, 99 P.2d 251. While some of the interest claimed to have accrued in 1937 was on claims of general creditors, the reasoning in the above cited case would indicate that the general outside creditors of an insolvent building and loan association in the process of liquidation are not entitled to interest after liquidation until the principal has all been paid to the other creditors and a surplus is available. Assuming the general outside creditors had a priority over the holders of investment certificates, yet both the investment certificate holders and general creditors are creditors of the corporation and the following rule applies: "Nor is it to be implied that the prior claimants are the only ones admitted to share in the estate. They are not. On the contrary, all that happens is that they are paid first, the other creditors getting what is left. It is for this reason that prior claimants should not be allowed interest on their claims as long as the estate is not able to pay off the general claims also with interest." Glenn on Liquidation, § 510. In the instant case the assets in 1937 were insufficient to pay the principal of the creditor's claims, and hence there was no surplus. Therefore the interest should not have been deducted on the accrual basis for that year. At least it is obvious that there was grave uncertainty of the interest for the year 1937 ever being paid because there was insufficient to meet the principal. Those circumstances fit in with the method of allowing deductions on the accrual basis or computing income on that basis, that is, the reasonable expectation and probability that the deductible expense will be paid from income received in the future. It is stated in Commissioner of Internal Revenue v. R. J. Darnell, Inc., 6 Cir., 60 F.2d 82, 84: "As to both income and deductions it is the fixation of the rights of the parties that is controlling." It is said in Law of Federal Income Taxation Paul & Mertens, § 1174: "The basic idea is that *all the events creating the liability have occurred;* no contingency remains. The taxpayer has then earned the income, or is subject to the liability to pay." See, also, Id. §§ 11.73, 11.96.

[13] The fact that the Bank and Corporation Franchise Tax Act (§ 8(b) allows the deduction of interest "paid or accrued" does not alter the result in the light of the foregoing discussion in regard to the basis of the accrual method and the probability that no interest will be paid.

The case of Zimmerman Steel Co. v. Commissioner of Int. Rev., 8 Cir., 130 F.2d 1011, 143 A.L.R. 1054, involved a contemplated bankruptcy and the interest accrued prior thereto. There did not exist in that case the circumstance of the contingency of there being a surplus before any interest could be paid.

For the foregoing reasons the judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concur.

CURTIS, Justice (dissenting).

Reference to the plain language of the Bank and Corporation Franchise Tax Act of California (Stats. 1929, p. 19, Act 8488, 2 Deering's Gen. Laws of California 1937, p. 3851) is sufficient to show that the operations of the State Building and Loan Commissioner in *liquidating* a building and loan association are not within its purview. Thus, section 4(1) of the Act imposes a tax upon "every financial corporation *doing business* within the * * * State * * * *for the privilege of exercising its corporate franchises*" therein; and section 5 of the Act defines "doing business" as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." Contrariwise, liquidation proceedings under authority of the Building and Loan Association Act (Stats. 1931, p. 483, Act 986, 1 Deering's Gen. Laws of California 1937, p. 538) contemplate *not* the exercise of the corporate franchise in pursuit of financial gain or profit *for the corporation,* but rather the administration of the assets of the insolvent association *for the protection first of its creditors,* and *then its investors* pursuant to its final dissolution.

The Building and Loan Commissioner derives his power entirely from the provisions of the Building and Loan Association Act. Thus, where it appears to the commissioner that "any [building and loan] association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors," he "may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with [his] consent * * * *resume business, or until its affairs be liquidated.*" § 13.11. (Italics added.) The italicized words clearly imply that the commissioner's possession of such association constitutes an ouster of corporate management and control, with the accompanying advantages and privileges; and that the association, as such, thereupon ceases to function under its corporate franchise as a building and loan company. Whatever acts the commissioner takes in *liquidating* the association's affairs are in pursuance of legislative mandate and in the performance of his statutory duty (Richardson v. Superior Court, 138 Cal.App. 389, 392, 32 P.2d 405), and not by virtue of the corporate franchise to do business as a building and loan association, a privilege which to all practical purposes and intent is suspended by the very act of the commissioner in assuming control of the association for the sole purpose of winding up its affairs. Cf. Mercantile Trust Co. v. Miller, 166 Cal. 563, 569, 137 P. 913.

Illustrative of such situation is the present case where the plaintiff as the Building and Loan Commissioner "took possession" of the Marine Building & Loan Association, and thereafter, according to the stipulated facts, "Marine did no business in its own name and did no business through its directors or officers, or through any agents appointed by them or by the stockholders." Rather, the plaintiff under statutory authority acted wholly upon his own initiative and independent of Marine's officials, without the use or employment in any way of the corporate franchise, but in complete derogation thereof, and for the single purpose of reducing Marine's assets to cash and distributing them to the persons who were beneficial participants therein as a trust fund—that is, the association's creditors, and then its investors. Evans v. Superior Court, 14 Cal.2d 563, 573, 574, 96 P.2d 107. Indisputably, the plaintiff did not undertake to manage an association for a brief interlude because it was confronted with immediate financial embarrassment which made advisable the assumption of temporary administrative control in the conservation of its assets and the adjustment of its affairs so that it might continue its business without complete liquidation, a distinguishable status which has been held a sufficient basis for the levy of the franchise tax (People v. Richardson, 37 Cal.App.2d 275, 279, 99 P.2d 366), but rather he took charge of Marine as an insolvent association to wind up its affairs, and his restricted operations as required incident to such purpose would not reasonably come within the concept of "doing business" in the exercise of the corporate franchise as specified in the state Franchise Tax Act, as above quoted. Thus, in commenting upon analogous considerations with relation to operating as contrasted with liquidating receivers, it is said in Thompson on Corporations, 3d Ed., vol. 8, § 6393, p. 554: "The receiver is liable for a franchise tax where he continues the business, but not where he was appointed to wind up the corporation in a proceeding instituted by the state, and the reason is that the state has intervened and prevented the corporation from further exercising its franchises." See annotations, 18 A.L.R. 704-705; 75 L.Ed. 1146-1148.

The case of Magruder v. Washington, B. & A. Realty Corp., 316 U.S. 69, 62 S.Ct. 922, 923, 86 L.Ed. 1278, cited in the main opinion as illustrating that liquidation proceedings may establish that a corporation is "doing business" within the concept of franchise tax implications, involves a wholly distinct factual situation. There the property of a railroad company consisting of "certain rights of way, easements, terminal properties, and other real estate," was purchased at foreclosure sale by certain persons constituting a committee of bondholders. This committee *transferred the title* to the properties so bought to a corporation which had been organized for the purpose of owning, holding and disposing of them. From time to time the corporation sold various portions of its properties as satisfactory offers were received, it rented unsold properties under short term leases, it paid all expenses incident to its activities and it distributed "all net income, except small reserves for contingencies," *to its own stockholders.* For four years the corporation had paid the federal capital stock tax levied with respect to "carrying on or doing business." At the end of that time the corporation, still continuing its activities and having about a quarter of its original properties left, sued for a refund of the tax payments. In reversing the decision of the lower courts that the corporation as a liquidating company was exempt from the levy in question (D.C., 35 F.Supp. 340; 4 Cir., 120 F.2d 441), the Supreme Court of the United States held that the applicable federal regulation including within the concept of "doing business" the "orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distributing the proceeds as liquidation is effected," precisely described the corporation's activities and sustained the imposition of the tax. Thus it is said by the Supreme Court (316 U.S. 73, 62 S.Ct. 924, 86 L.Ed. 1278): "During the period in question respondent [the corporation] did not fall into that state of quietude [an exception to "doing business"] * * * in which it was merely owning and holding specific property and distributing the resulting proceeds. (citing cases.) On the contrary, respondent was actively engaged in fulfilling the purpose of its creation, the liquidation of its holdings for the best obtainable price." The distinguishing feature of that holding is the purpose of the "liquidation"—for the benefit of the *liquidating corporation and its stockholders.* Such decision would not sustain a franchise tax, based on doing business, payable by the original corporation whose operative properties had been taken away by the foreclosure and its business possibilities terminated—a situation more factually similar to the present case. As above noted, liquidation under the Building and Loan Association Act of this state contemplates only such proceedings as are necessary and incidental to ascertain the amount of liabilities of an association and apportion the assets towards the discharge of its indebtedness; and it is not for the purpose of pecuniary profit or benefit to the association but for the protection of its creditors, looking to the ultimate dissolution of the association and the complete winding up of its affairs.

The recent decisions of this court that limited activities of *solvent corporations in the exercise of their corporate franchises* may constitute "doing business" for state franchise tax purposes (Golden State T. & R. Corp. v. Johnson, 21 Cal.2d 493, 133 P.2d 395; Carson Estate Co. v. McColgan, 21 Cal.2d 516, 133 P.2d 636) have no application to the present case involving the *liquidation of an insolvent corporation by an officer of the state* acting under legislative mandate. Likewise distinguishable in the premise of its decision is the case of Fifth Street Building v. McColgan, 19 Cal.2d 143, 119 P.2d 729, holding that under an express amendment to the federal statute [28 U.S.C.A. § 12a] a trustee in bankruptcy conducting the business of the corporation, and thereby having for tax purposes the status of the corporation, is not immune from payment of the state franchise tax. Such conclusion resting solely upon the applicable federal law does not affect the question of whether a state officer is liable for payment of the corporate franchise tax by reason of his operations incident to the liquidation of an insolvent association. The plain terms of the state Franchise Tax Act, as above quoted, purport to exempt such proceedings as a basis for computation of the levy in question.

The 1943 amendment to section 5 of the Franchise Tax Act, quoted in the main opinion and expressly extending the scope of the law in its enlarged definition of the term "corporation" to "include * * * any 'corporation' operated by any * * * liquidator," of course, cannot serve to resolve the point of dispute here as to the character of the plaintiff's management of Marine during the period of liquidation in the year 1937. However, such material change in the expanse of the act is a legislative indication that a corporation in the process of liquidation by a public officer was not theretofore within its contemplation, and that the added language was necessary to effect the desired change. 23 Cal. Jur. p. 778; People v. Weitzel, 201 Cal. 116, 118, 119, 255 P. 792, 52 A.L.R. 811; Meyerfeld v. South San Joaquin Irr. Dist., 3 Cal.2d 409, 417, 45 P.2d 321; Loew's, Inc., v. Byram, 11 Cal.2d 746, 750, 82 P.2d 1. The FranchiseTax Commissioner's explanation, as printed in the Assembly Journal for April 20, 1943, p. 2428, that the amendment "enlarges definition of * * * corporation in accordance with principle announced in Fifth Street Building v. McColgan, 19 Cal.2d 143, 119 P.2d 729. Restates existing law," is by no means conclusive of the meaning of the prior statutory language. While it has been held that if a certain class of taxpayers is resisting the payment of taxes pursuant to a claimed construction of the taxing statute, the Legislature in enacting an addition to the statute may very well be deemed to intend a clarification of its previous language rather than a change in the existing law (Union League Club v. Johnson, 18 Cal.2d 275, 279, 115 P.2d 425; San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 264, 125 P.2d 36), such circumstances do not appear of record to have motivated the Legislature's adoption of the 1943 amendment here noted. It may be conceded, as appears from the Assembly Journal, that such additional enactment was prompted by the discussion of the express federal law in Fifth Street Building v. McColgan, 1941, supra, as to the obligation of a trustee in bankruptcy to pay state and local taxes accruing in consequence of the carrying on of business and the resultant desire to place state officers in the conduct of liquidating proceedings on a parallel basis for tax purposes; but the materiality of the enlargement thereby effected in the act's scope precludes agreement with the Franchise Tax Commissioner's asseveration that the added provision was only a restatement or clarification of existing law rather than the engrafting of a new concept into the basis of imposition of the tax as theretofore declared. In 2 Sutherland, Statutory Construction, § 5110, pp. 527-528, reference is made to the test employed by the New York courts as "highly satisfactory" in determining the import of an amendment: "The force which should be given to subsequent, as affecting prior legislation, depends largely upon the circumstances under which it takes place. If it follows immediately and after controversies upon the use of doubtful phraseology therein have arisen as to the true construction of the prior law it is entitled to great weight. * * * If it takes place *after a considerable lapse of time and the intervention of other sessions of the legislature,* a radical change of phraseology would indicate an intention to supply some provisions not embraced in the former statute." (Italics added.)

Without amplifying this discussion and having regard for the genesis of the legislation, it is plain that its purpose was to impose a tax upon a *corporation* actively engaged in any transaction for the purpose of financial or pecuniary gain or profit *in the exercise of its corporate franchise* within this state. In *liquidating* the business of Marine, an admittedly *insolvent* building and loan association, the plaintiff, even conceding he was "carrying on a business" as required to effectuate his purpose, was not a corporation but an individual, and under no conceivable theory could he be held to be a corporation "doing business," prior to the express specification in the 1943 amendment above noted. He was liquidating the business of Marine under the terms and limitations of the Building and Loan Association Act, and not in the exercise of the corporate franchise of the association. With these plain and undisputed facts in the case, I think the conclusion is irresistible that the plaintiff's operations incident to winding up the affairs of the Marine Building and Loan Association did not come within the purport of the Franchise Tax Act as here applicable. Accordingly, I am of the opinion that the judgment sustaining the plaintiff's challenge of the propriety of the tax levy under the conditions here presented should be affirmed.

EDMONDS, J., concurs.

24 Cal.2d 177

PEOPLE v. ALCALDE.

Cr. 4498.

Supreme Court of California.

April 26, 1944.

1. Criminal law ⚿572

Circumstantial evidence authorized conviction of premeditated murder as against defense of alibi.

2. Witnesses ⚿268(6)

In murder prosecution where defendant's father testified to a material matter which, if true, would tend to establish defendant's alibi, cross-examination of father on question of his alleged offer to pay two witnesses to testify, contrary to fact, that they saw defendant in hotel at a particular time and date, was proper.

3. Witnesses ⚿346, 349

A witness who has testified to material matters may be cross-examined as to his attempt to bribe other witnesses, and it may be shown by other witnesses that he offered bribes to obtain false testimony.

4. Criminal law ⚿419(1)

Decedent's declaration of intent to do a particular thing, from which an inference that thing was done might fairly be drawn, where declaration possesses a high degree of trustworthiness, is admissible as an exception to hearsay rule to prove truth of its contents.

5. Criminal law ⚿363, 415(1)

A decedent's declaration of an intent to do a certain act in future is not strictly a part of the "res gestae", but is admissible, under proper circumstances, under section 1870, subd. 15, as "other facts from which facts in issue are presumed or are logically inferable". Code Civ.Proc. § 1850; § 1870, subd. 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

6. Criminal law ⚿415(1)

Decedent's declaration of intent to do an act in future, to be admissible as proof that act was done, must tend to prove intention at time it was made, must have been made under circumstances which naturally give verity to utterance, and must be relevant to the issue.

7. Criminal Law ⚿415(1)

Where defendant in murder prosecution was nicknamed "Frank" and registered in hotel under such name, declaration by victim to brother-in-law and roommate on date of her death that she was going out that evening with a man named "Frank" was admissible. Code Civ.Proc. § 1870, subd. 15.

8. Homicide ⚿307(3)

Where facts unquestionably pointed to a premeditated murder and only defense offered was that of alibi, court properly refused defendant's request to instruct on second-degree murder and manslaughter.

9. Criminal law ⚿864

All communications between court and jury should be made in open court and private communications are improper.

10. Criminal law ⚿864

Ordinary procedure requires that trial judge afford parties an opportunity to be apprised of any communication between court and jury and to have opportunity to make timely objection to any action by court or jury which might be deemed irregular.

11. Criminal law ⚿1174(5)

Where, during deliberations of jury in murder prosecution, foreman in writing asked if jury could render a decision of life imprisonment "and not eligible for parole?" and judge returned paper to foreman with notation, "The answer is 'no' ", which answer or its equivalent was only answer that could be given and which properly could have been made over objection of defendant, defendant was not prejudiced by fact that communication took place out of presence of defendant and his counsel.

TRAYNOR and EDMONDS, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Florencio "Frank" Alcalde was convicted of murder and sentenced to suffer the death penalty, and an appeal was automatically taken under Penal Code, § 1239.

Affirmed.

Joseph J. Bullock, of Redwood City, for appellant.

Robert W. Kenny, Atty. Gen., and James F. Brennan, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant, Florencio "Frank" Alcalde, was convicted of first degree murder and sentenced to suffer the penalty of death. His motion for a new trial was denied. He appealed from the judgment and from an order denying his motion for a new trial.

On Monday morning, November 23, 1942, the body of Bernice Curtis was found in a plowed field adjacent to Alma Road between Palo Alto and Mountain View in Santa Clara County. Death had been caused by a basal fracture of the skull resulting from the application of some blunt instrument or substance. The jaw also showed a fracture. The eyes were blackened and the forehead lacerated. The position of the body was face down, the head and hair were matted with blood, the sod beneath was soaked with blood, the face appeared to have been pressed into the sod, and the head was covered with clods of earth. Bloody handprints were perceptible on the fence boards bordering Alma Road. A woman's shoe, some "bobby" pins, a comb, and some wearing apparel, including Bernice Curtis' black caracul fur coat, were found on the road near where the body lay. The mate to the shoe was found on the highway several hundred feet away. The circumstances under which the body was discovered indicated unmistakably that Bernice Curtis had been killed with premeditated design.

The defendant's main contention is that the evidence is insufficient to sustain the jury's conclusion that he was the perpetrator of the crime. The evidence was in the main circumstantial.

The deceased was a divorced woman of about thirty years of age. She was described as a "blond" her hair having been bleached. About four months prior to her death she had gone to San Francisco from Chicago to be with and to assist her married sister and the latter's husband, who were about to become parents. She stayed with them in their home on Sacramento Street until after the event. She then moved to a rooming house on San Jose Avenue where other young women resided and with one of whom she shared a room. She accepted employment at a cigar store located at Powell and Market Streets in San Francisco.

The defendant worked as a welder at the shipyards of the Western Pipe and Steel Company in South San Francisco. He was married and had been residing with his wife and five-year-old daughter in the nearby town of San Bruno on premises owned and also occupied by his father. About November 9, 1942, because of a misunderstanding with his wife, he moved to a hotel in South San Francisco under the assumed name of Frank Galarda.

It was in evidence that the defendant told other workers at the shipyards that he had a "hot blond" who visited him at his hotel room; that he frequently called her on the telephone; that he showed her picture to his fellow workmen; that he never spoke of her by name, but that he used slang and low expressions in his references to her. Other evidence disclosed that the defendant called Bernice Curtis on the telephone at her rooming house. On the 18th of November, preceding Bernice Curtis' death, the defendant said to a fellow worker that the "blond" he was going with was the type of girl who wanted to marry, that she didn't know he was married, that he was going back to his wife, and he would "have to get rid of her some way by the week-end." On the morning of Saturday, November 21st, to another fellow worker he showed a picture of a blond woman and another picture of his wife and daughter. The witness took the picture of the wife and baby from the defendant's hand saying, "You mean to tell me you give up that baby for this girl? There doesn't seem to be any class out of that," to which the defendant replied: "I'll tell you, Pop, I have a date with her tonight. I am going to try to have her" commit an act of sex perversion on me "and get rid of her."

On November 22d Bernice Curtis stated to two persons, her brother-in-law and her roommate, that she was going to dinner that night with "Frank." She spent a portion of the day riding horseback with one of the other young women who lived at the rooming house on San Jose Avenue. Her riding companion saw Bernice board a homeward bound streetcar about 4:30 in the afternoon. That evening at 6:00 her roommate saw Bernice dressing, and it was then that the latter expressed her intention of going out with Frank. The roommate left the house at 6:15 while Bernice was still dressing. Bernice's riding companion arrived home at 6:45 at which time she observed a green sedan in front of the house with a man and woman in it, which was then driven away. The witness testified that she believed that the woman in the car was Bernice.

The defendant owned and drove a faded 1936 green Chevrolet sedan with a dent in the right front door. A green Chevrolet sedan was observed parked near the scene of the crime by a bus driver who saw the black fur coat on the road in the early morning of November 23d. He slowed down to pick up the coat, but "straddled" it before the bus, coasting, could come to a stop. He testified that a little farther up the road, close to the fence, was a parked Chevrolet, "between a '34 and '37, faded paint job, old paint, sort of green colored," with its lights burning, its right front door open, but that the car was unoccupied. He looked at his wrist watch, the hands of which pointed to 12:45, put the bus in gear and drove on, leaving the coat, which was picked up shortly thereafter by another motorist. The bus driver also testified that he saw the car again about a week or ten days later when it was parked at the rear of the sheriff's office in San Jose. The car that he observed at the latter time was admittedly the defendant's car. An impression was made of a tire mark found at the scene of the crime. It showed the same kind of tire as that used by the defendant on his automobile. The police officer who patrolled the alley to the rear of the hotel in South San Francisco on the morning of November 23d testified that there was only one car there at 12:20, a Chevrolet coupe. He patrolled the alley the next time at 2:20, and then saw also parked in the alley a 1936 green Chevrolet sedan with a flat front tire. He was able to identify it as the defendant's car because on the early morning of the previous November 20th he saw the same car parked in a restricted outlying district of South San Francisco, when he flashed a light on the defendant and the deceased, whom he recognized later from a photograph, and examined the defendant's operator's license. The period between 12:45 and 2:20 a. m. was ample time within which to cover the distance between the scene of the crime and the hotel in South San Francisco by automobile.

There was testimony that hair found on the ceiling of the defendant's car was identical with the decedent's hair, some of which was received in evidence. A fingerprint found on the rear-view mirror was shown to be identical with the thumb print of the decedent. A bit of dyed feather found at the scene of the crime was identical with feathers in the defendant's hat. Particles of human blood were found on a coat belonging to the defendant and which he was wearing on the evening of November 22d. On the Monday or Tuesday following the night of the crime the defendant took his soiled linen to a different laundry than that which he had been in in the habit of patronizing. The inside of the car was quite damp indicating that it had been washed. Spots on the upholstery reacted positively to the presumptive blood test. There was a fracture on the right front side of the windshield of the defendant's car which a witness testified was not there before the 23d of November, but which he observed for the first time on the 24th.

Upon his apprehension the defendant denied that he knew Bernice Curtis, that he ever bought flowers or gave flowers to her, or that he ever took her out. On the trial he took the stand in his own defense and there admitted that those statements were false. He testified that he met the deceased at a public dance in San Francisco about three weeks prior to November 22, 1942; that he took her to other dances, drove her about in his car, bought her corsages, and that on one occasion she visited him at his hotel room in South San Francisco. He claimed that the last time he saw her was on Saturday night, November 21st, when he drove her home from a dance. He attempted to establish that on November 22d he arrived at the hotel from work about 4:30 in the afternoon and parked his car in the alley; that the car was not again removed until 6:30 or 7:00 the next morning. He testified that he played rummy in a pool hall from about 6:30 until 9:00 on Saturday evening with his father and two friends whom he named; that he told his father he was going back to his wife; that he went to the car, discovered the tire was flat, and telephoned his home; that there was no answer, so he went back to his hotel room about 9:30 and to bed; that about 11:30 that night he heard a friend coughing in the adjoining room, inquired the trouble, and received an answer. His testimony in this respect was directly contradicted by the men he hoped would corroborate him. They testified that they did not see him after six o'clock on the evening of the

22d; that the conversation about the cough did take place but that it occurred about nine o'clock on the morning of the 23d. The only witness who testified in support of the defendant's asserted alibi was his father who stated that he left his son at nine o'clock on the night of November 22d, when the defendant said to him, "Tell my wife I come home tomorrow." But the father was discredited by evidence that he offered to pay two witnesses "good and well" if they would testify that the defendant was in his hotel room at 9:30 on the night of November 22d.

The defendant also testified that about 6:30 or 7:00 on the morning of November 23d he changed the valve on the wheel carrying the flat tire, put air in the tire, and went to his home in San Bruno where he washed the car, although it was raining, and that his wife brushed out the interior. He admitted that he returned to the hotel about nine o'clock the same morning to get his clothes. He stated that the fracture in the windshield of his car occurred in the previous month of June. To officers before the trial he said that it had happened some time ago when he "slammed on" his brakes and a girl he had with him struck her head against the windshield.

[1] Without recounting further details appearing in the record it becomes apparent from the foregoing narrative that the circumstantial evidence was sufficient to connect the defendant with the commission of the crime and to establish beyond a reasonable doubt that he was the perpetrator thereof.

In People v. Nagy, 199 Cal. 235, 236, 248 P. 906, it was said: "Circumstantial evidence is legal evidence and may be as conclusive in its convincing force as the testimony of direct witnesses to the overt act. Circumstances very largely control the conduct of men in the most important affairs of life and may be sufficient to justify a conviction of crime where they are such as to exclude any other reasonable theory than that of the guilt of the accused." That circumstantial evidence may be as convincing in its force and as conclusive as the testimony of witnesses to the overt act was reiterated in People v. Latona, 2 Cal.2d 714, 725, 43 P.2d 260, 265, where it was said: "The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof."

The defendant relies on People v. Lamson, 1 Cal.2d 648, 36 P.2d 361, wherein the judgment of conviction was reversed. As stated heretofore that case decided nothing except that the judgment be reversed. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. In the Newland case it was said: "If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury," citing numerous cases.

In the present case the sufficiency of the evidence to prove premeditated murder may not fairly be questioned. The record otherwise is sufficient to support the conclusion of the jury that the inferences to be drawn therefrom were consistent with the defendant's guilt and inconsistent with any other rational hypothesis.

[2, 3] The defendant claims that prejudicial error resulted from the trial court's ruling permitting the cross-examination by the prosecution of the defendant's father on the question of his alleged offer to pay two witnesses to testify, contrary to the fact, that they saw the defendant in the hotel at 9:30 p. m. on November 22d. The ruling was not erroneous. A witness who has testified to material matters may be cross-examined as to his attempt to bribe other witnesses and it may be shown by other witnesses that he offered bribes to obtain false testimony. The father testified to a material matter which, if true, would tend to establish the defendant's alibi. The attempt to suborn witnesses, if proved, is material in weighing the testimony of the one guilty of the attempt. People v. Wong Chuey, 117 Cal. 624, 49 P. 833; 27 Cal.Jur. p. 125.

The defendant contends that prejudicial error was committed by admitting in evidence over the defendant's objection the declarations of the decedent made on November 22d that she was going out with "Frank" that evening. In overruling the objection the court took the precaution to state in the presence of the jury that the evidence was admitted for the limited purpose of showing the decedent's intention.

It is argued by the defendant that declarations not under oath, made when the declarant is not confronted by the adverse party, are admissible to prove physical or mental condition and only when either condition is a matter in issue. The admission of such utterances, due precaution having been taken by the court as here, is not so limited.

This is not a case such as People v. Wright, 167 Cal. 1, 138 P. 349, or People v. Thomas, 51 Cal.App. 731, 197 P. 677, where the defendant was charged with homicide resulting from criminal abortion and the physical condition of the decedent was a matter in issue. Nor is it a case such as Estate of Snowball, 157 Cal. 301, 107 P. 598, or Bridge v. Ruggles, 202 Cal. 326, 260 P. 553, where the mental state of the declarants was material on issues of duress and undue influence. In those cases the declarants' utterances were received in evidence not to prove their truth, but to indicate the mental condition of the declarants. See, also, Adkins v. Brett, 184 Cal. 252, 193 P. 251; Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239. In the present case the decedent's mental condition at the time of her declaration was not an issue, and her utterance could not be offered as proof thereof. Her utterance was hearsay. It was made extrajudicially and offered as proof of the truth of its content. It was a declaration of intent to do an act in the future, offered as evidence that the deceased had the intent she declared and that the intent was probably carried out, namely, that she intended to and did go out that night with a man named "Frank."

[4] From the declared intent to do a particular thing an inference that the thing was done may fairly be drawn. Such declarations have been deemed admissible where they possessed a high degree of trustworthiness. Where they are relevant to an issue in the case and the declarant is dead or otherwise unavailable the necessity for their admission has been recognized. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L. Ed. 706, appears to be the leading case on the admissibility of declarations of intent to do an act as proof that the act thereafter was accomplished. The courts of this state have followed what is deemed to be the weight of authority (see Wigmore, Evidence, 2d Ed. 1923, § 1725; 19 Cal.L.Rev. 231 and 367; 35 Harv.L.Rev. 302, 444) to the effect that declarations of present intent are admissible to prove a future act. In cases of homicide the admissibility of uncommunicated threats of the deceased against the defendant has been upheld to show that the declarant was the aggressor. People v. Arnold, 15 Cal. 476; People v. Scoggins, 37 Cal. 676; People v. Alivtre, 55 Cal. 263; People v. Thomson, 92 Cal. 506, 28 P. 589; People v. McGann, 194 Cal. 688, 230 P. 169; People v. Speraic, 87 Cal.App. 724, 262 P. 795. Declarations by the deceased of an intent to commit suicide have been held admissible. Rogers v. Manhattan Life Insurance Co., 138 Cal. 285, 71 P. 348; Benjamin v. District Grand Lodge, 171 Cal. 260, 152 P. 731; People v. Tugwell, 28 Cal.App. 348, 152 P. 740; see, also, Wilbur v. Emergency Hospital Ass'n, 27 Cal.App. 751, 151 P. 155.

In Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313, involving the issue of paternity, a declaration of intention of the husband to leave his home and go to a distant city was held admissible to show that the declarant actually went where he said he was going. The court said, in reliance on Mutual Life Insurance Co. v. Hillmon, supra, that it was well established that declarations of intention were admissible under such circumstances. In Union Oil Co. v. Stewart, 158 Cal. 149, 110 P. 313, Ann.Cas.1912A, 567, an action to quiet title, a husband's declaration of intent to desert his wife was admitted as bearing upon the fact of desertion.

In People v. Thomas, supra, a declaration of intent to go to the defendant's office for an operation was admitted as proof that the intention was carried out. Admissibility of a declaration of intent to go to a certain place was upheld in the case of People v. Fong Sing, 38 Cal.App. 253, 175 P. 911, where the defendant sought to rely on his own declaration to establish an alibi. See, also, People v. Burke, 18 Cal.App. 72, 122 P. 435.

In other jurisdictions cases are found which recognize the admissibility of declarations of intent to go to a certain place or with a certain person in the future. Hunter v. State, 40 N.J.L. 495; State v. Hayward, 62 Minn. 474, 65 N.W. 63; State v. Mortensen, 26 Utah 312, 73 P. 562, 633.

[5] In some of the cases the declaration of an intent to do a certain act in the future has been admitted as a part of

the res gestae. But such declarations are not, strictly speaking, part of the transaction. They are not encompassed within section 1850 of the Code of Civil Procedure. They more properly fall within section 1870, subdivision 15, as one of "Any other facts from which the facts in issue are presumed or are logically inferable." Greenleaf on Evidence, vol. 1, 16th ed., § 162, points out that the existence of a person's design or plan to do a certain thing is relevant circumstantially to show that he did it, and may be evidenced by his assertion of present intent when made in a natural way and not under circumstances of suspicion; that the declaration is admissible not properly as part of the res gestae, but merely as an exception to the general rule excluding hearsay evidence; that where such declarations have been excluded it has usually been due to a misapplication of the res gestae doctrine. Some courts have expressly rejected any necessity for concluding that they were part of the res gestae. Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961, 24 L. R.A. 235; State v. Mortensen, supra.

[6, 7] No attempt need be made here to define or summarize all the limitations or restrictions upon the admissibility of declarations of intent to do an act in the future or to indicate what degree of unavailability or corroboration should exist in every case. Elements essential to admissibility are that the declaration must tend to prove the declarant's intention at the time it was made; it must have been made under circumstances which naturally give verity to the utterance; it must be relevant to an issue in the case. Those qualifications are here present. The declaration of the decedent made on November 22d that she was going out with Frank that evening stated a present intention to do an act in the future. Certainly it was a natural utterance made under circumstances which could create no suspicion of untruth in the statement of her intent. It did not necessarily refer to the defendant as the person named. But the defendant was called "Frank" as a nickname and he registered as Frank at the hotel where he lived. The defendant admittedly had been entertaining the decedent. Manifestly that fact, together with other corroborating circumstances, bore directly on the question of the relevancy of the declaration. Unquestionably the deceased's statement of her intent and the logical inference to be drawn therefrom, namely, that she was with the defendant that night, were relevant to the issue of the guilt of the defendant. But the declaration was not the only fact from which an inference could be drawn that the deceased was with the defendant that night. Other facts were in evidence from which the inference could reasonably be drawn. The cumulation of facts corroborative of the guilt of the defendant was sufficient to indicate that the trial court did not err in admitting the declaration.

The trial court refused to instruct the jury at the defendant's request on the subjects of second degree murder and manslaughter. The court submitted to the jury the alternatives of finding the defendant guilty of first degree murder or of acquitting him. The defendant assigns the refusal to instruct as requested and the instruction given as prejudicial error.

[8] Instructions are to be given with reference to the facts before the jury. The facts unquestionably pointed to a premeditated homicide. No defense was offered by the defendant except that of alibi. It is proper to refuse to give an instruction as to a lesser degree, or as to an included lesser offense, if the evidence warrants only a verdict of first degree murder in the event the accused is guilty at all. People v. Watts, 198 Cal. 776, 793, 247 P. 884; People v. Lapara, 181 Cal. 66, 73, 183 P. 545. There was therefore no error in the refusal to give the requested instructions or in the giving of the instruction complained of. Furthermore it appears from the record that the defendant had a full and fair trial and that the jury was otherwise correctly instructed.

During the deliberations of the jury a sheet of foolscap paper was delivered to the trial judge on which was written the question, with emphasized words as indicated, "May we render a decision of life imprisonment *and not eligible for parole?*" followed by the foreman's signature. The judge returned the paper to the foreman with the notation thereon, "The answer is 'No'." Prejudice is asserted because of this communication between the judge and jury out of the presence of the defendant and his counsel.

[9-11] It has been said that courts are practically unanimous in holding that private communications between court and jury are improper, and that all communica-

tions should be made in open court. Dodge v. United States, 2 Cir., 258 F. 300, 169 C.C.A. 316, 7 A.L.R. 1510. Ordinary procedure would require that the trial judge afford the parties an opportunity to be apprised of any such communication and to have the opportunity to make timely objection to any action by the court or jury which might be deemed irregular. But in this instance the court could not have responded by any other answer than "No" or its equivalent, namely, that the jury was to be guided solely by the instructions already given. The answer of the trial judge could properly have been made over the objection of the defendant or his counsel if the ordinary procedure had been followed. The episode may not be deemed to be prejudicial, and would therefore not justify a reversal of the judgment or of the order denying the motion for a new trial.

The judgment and the order are affirmed.

GIBSON, C. J., and CURTIS, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

It is my opinion that the trial court erred in admitting the testimony that the deceased said on November 22d that she was going out with "Frank" that evening. A declaration of intention is admissible to show that the *declarant* did the intended act, if there are corroborating circumstances and if the declarant is dead or unavailable and hence cannot be put on the witness stand. See McBaine, Admissibility in California of Declarations of Physical or Mental Condition, 19 Cal.L.Rev. 231, 371, 378. A declaration as to what one person intended to do, however, cannot safely be accepted as evidence of what another probably did. See Maguire, The Hillmon Case—Thirty Three Years After, 38 Harv.L.Rev. 709, 717, 719. The declaration of the deceased in this case that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went with her. In the words of Mr. Justice Cardozo, "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed." Shepard v. United States, 290 U.S. 96, 104, 54 S.Ct. 22, 25, 78 L.Ed. 196. Such a declaration could not be admitted without the risk that the jury would conclude that it tended to prove the acts of the defendant as well as of the declarant, and it is clear that the prosecution used the declaration to that end. There is no dispute as to the identity of the deceased or as to where she was at the time of her death. Since the evidence is overwhelming as to who the deceased was and where she was when she met her death, no legitimate purpose could be served by admitting her declarations of what she intended to do on the evening of November 22d. The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her. Her declarations cannot be admitted for that purpose without setting aside the rule against hearsay.

The evidence in question was so damaging to the defendant that it cannot reasonably be said that it probably had no effect on the jury's verdict. People v. Putnam, 20 Cal.2d 885, 892, 893, 129 P.2d 367.

EDMONDS, J., concurred.

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24 Cal.2d 200

BAUGH v. ROGERS et al.

L. A. 18805.

Supreme Court of California.

May 1, 1944.

Rehearing Denied May 29, 1944.

1. Workmen's compensation 🔑252

Where physician maintained office in his residence, a woman engaged by his wife for cleaning and other household duties was "engaged in household domestic service" while working in living quarters and was not an "employee" as defined in Labor Code, but was an "employee" when working on maintenance of business premises. St.1937, pp. 267, 268, 270, §§ 3351, 3355, 3700; St.1939, pp. 2873, 2874, §§ 3352(g), 3358.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Engaged in Household Domestic Service".

2. Workmen's compensation 🔑2136

In action by woman, employed for cleaning house wherein physician maintained office, for injuries suffered when struck by automobile driven by physician, evidence established as matter of law that plaintiff and physician at time of accident were employee and employer, and subject to compensation statutes. St.1937, pp. 267, 268, 270, §§ 3351, 3355, 3700; St.1939, pp. 2873, 2874, §§ 3352(g), 3358.5.

3. Workmen's compensation 🔑2084, 2158

A domestic employed by a physician in home wherein the physician maintained an office and who was struck by an automobile driven by physician and owned by another was not entitled to recover damages against physician, where both physician and the domestic were covered by compensation statutes, but domestic could recover against owner of automobile who permitted physician to drive it, notwithstanding that physician might eventually be liable to owner of automobile for the damages recovered by domestic under law of bailments. St.1937, pp. 269, 271, §§ 3600, 3601; Vehicle Code, § 402, St.1937, p. 2353.

4. Workmen's compensation 🔑2223

An automobile operator might eventually be liable over to owner of automobile for amounts recovered by one injured by negligent driving, and hence was a proper and necessary defendant in action by injured person against owner, though driver had a good defense against primary liability because injured person was his employee and subject to compensation statutes. St.1937, pp. 269, 271, §§ 3600, 3601.

5. Workmen's compensation 🔑2138

If only a single inference and one conclusion may be drawn from all the facts, whether one is an employee or an independent contractor is a question of law. St.1937, p. 267, § 3353.

6. Workmen's compensation 🔑306

In determining whether woman was an employee or an independent contractor, that employer did not maintain constant supervision over her was immaterial. St.1937, p. 267, § 3353.

7. Workmen's compensation 🔑306

A material and generally conclusive factor in distinguishing between "independent contractor" and "employee" is employer's right to exercise complete and authoritative control of the manner in which work is done. St.1937, p. 267, § 3353.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

8. Workmen's compensation 🔑307

The existence of employer's right of control, and not the extent of its exercise, constitutes a relationship that of employer-employee. St.1937, p. 267, § 3353.

9. Workmen's compensation 🔑309

An "employee" may quit, but an "independent contractor" is legally obligated to complete his contract. St.1937, p. 267, § 3353.

10. Workmen's compensation 🔑2084

Where conditions of compensation existed and employer had secured payment of compensation by proper insurance, jurisdiction to hear claim for compensation was exclusively in the Industrial Accident Commission, and court could not award damages to employee for employer's negligence. St.1937, pp. 269, 271, 291, §§ 3600, 3601, 3706, 5300, 5301; Const. art. 20, § 21.

11. Automobiles 🔑192(1)

Under statute governing liability of owner of motor vehicle for injuries resulting from use of vehicle with owner's permission, provisions that recourse shall be first had against property of operator, and that owner shall be subrogated to plaintiff's rights against operator are not "conditions" imposed upon provision making owner liable, and owner's liability can attach though such rights are not available. Vehicle Code, § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition".

12. Automobiles 🔑192(1)

The purpose of statute governing owner's liability for negligent operation of vehicle with his permission was to change the common-law rule of bailments and impose upon owner a liability for operator's imputed negligence which, as between owner and injured person, is direct and unconditional within the limits set. Vehicle Code, § 2, St.1935, p. 94; § 402, St.1937, p. 2353.

13. Statutes 🔑240

The asserted rule of strict construction of statutes creating a new right of action does not authorize court to thwart, by narrow interpretation, the palpable legislative intent to impose a new liability consonant with new conditions, and does not require court to deny recovery in a case which, both by wording of the statute and in accordance with its purpose, is within its tenor. Civ.Code, § 4.

14. Automobiles 🔑192(1)

Inappropriate incidents of the doctrine of respondeat superior cannot be attributed to the statutory relationship whereby automobile operator's negligence is imputed to owner permitting him to drive, and hence operator's negligence need not be actionable against operator in order to be imputable to owner. Vehicle Code, § 402, St.1937, p. 2353.

15. Automobiles 🔑192(1)

The negligence of automobile operator, and not his liability or status, is imputed by statute to automobile owner who permits him to drive, and liability for negligence thus imputed is that of the owner. Vehicle Code, § 402, St.1937, p. 2353.

16. Workmen's compensation 🔑2158

The Labor Code does not alter the correlative rights and liabilities of persons who do not occupy the reciprocal statuses of employer and employee, nor relieve one not the employer from any liability imposed by statute or common law. St.1939, p. 2519, § 3852.

17. Workmen's compensation 🔑2158

An employee's right under Labor Code to recover against a "person other than the employer" is not affected by fact that third person has entered into a contractual legal relationship with employer. St.1939, p. 2519, § 3852.

18. Workmen's compensation 🔑2142

The provisions of the Labor Code governing reciprocal rights and liabilities between injured employee and employer operating automobile do not abrogate the independent and correlative rights and obligations between owner of automobile as bailor and employer as bailee. St.1939, p. 2519, § 3852; Vehicle Code, § 402, St.1937, p. 2353.

19. Bailment 🔑1

When automobile owner gives possession of automobile, with permission to operate it, to another person, a contract of "bailment" is created.

See Words and Phrases, Permanent Edition, for all other definitions of "Bailment".

20. Bailment 🔑21

At common law a bailor is not liable to third persons for damages resulting from bailee's negligent use of bailed property.

21. Bailment 🔑11

A bailee is responsible in damages to bailor for any injury to bailed property resulting from failure to exercise a proper degree of care in protecting it. Civ. Code, §§ 1886, 1889.

22. Bailment 🔑13

Where bailment is for sole benefit of bailee, he must exercise great care or extraordinary diligence. Civ.Code, §§ 1886, 1889.

23. Indemnity 🔑13(1)

The statutory right of automobile owner to recover from negligent operator who has made owner liable to a third person becomes an element of every contract of bailment of a motor vehicle in California. Vehicle Code, § 402, St.1937, p. 2353.

24. Workmen's compensation 🔑2142, 2243

Where employee, injured through employer's negligent operation of automobile with owner's permission, recovers judgment against owner under automobile statute, owner may have credited on the judgment any amount paid by employer or his insurance carrier as compensation for injuries, and owner's recovery from employer will be reduced pro tanto. Vehicle Code, § 402, St.1937, p. 2353; St.1937, pp. 269, 271, 291, §§ 3600, 3601, 3706, 5300, 5301; Const. art. 20, § 21.

25. Appeal and error 🔑1135

Where two defendants appeared jointly by a single answer, and joint judgment for costs was rendered in favor of both defendants, and it did not appear on appeal that one defendant severally was necessarily entitled to exactly that judgment, though such defendant might be entitled upon new trial to have action dismissed as to him, order granting plaintiff a new trial must be affirmed as to both defendants.

TRAYNOR, CURTIS, and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge pro tem.

Action by Ora Baugh against Francis L. Rogers and another for injuries suffered when struck by automobile. From an order granting plaintiff's motion for new trial, defendants appeal.

Affirmed.

Prior opinion, 138 P.2d 757.

Nourse & Jones, Paul Nourse, and Everett W. Thompson, all of Los Angeles, for appellants.

Russell H. Pray, Robert E. Krause, and Samuel J. Nordorf, all of Long Beach, for respondent.

SCHAUER, Justice.

This case presents four fundamental problems, two of which, so far as the research of counsel and ourselves discloses, have not heretofore been considered by a court of last resort either in this state or elsewhere. The problems may be more conveniently defined after a statement of the essential facts.

Essential Facts and Legal Relationship of the Parties

[1] The plaintiff was employed in a dual capacity by the defendant Rogers, who was a physician and surgeon and who, in addition to living quarters, maintained certain rooms in his residence as an office for the practice of his profession. Plaintiff was engaged by the wife of defendant Rogers to work at the residence by the hour one day a week. She did cleaning and other household duties in such parts of the premises as Mrs. Rogers from time to time directed. While she was working in the living quarters she was "engaged in household domestic service" and was not an employee as that term is defined in sections 3352(g) and 3358.5 of the Labor Code, St.1939, pp. 2873, 2874, but when her services were devoted to the maintenance of the "business premises" she came within the statutory definition of "employee." See Labor Code, §§ 3351 and 3355, St.1937, pp. 267, 268.

On July 22, 1941, at a time when plaintiff was cleaning the office quarters of her employer, she was directed by Mrs. Rogers to go "outside to push and jam the [office] window [which was open] in, while she [Mrs. Rogers] was holding and pulling on it on the inside." While plaintiff was occupied in performing this task she was struck and injured by an automobile negligently operated by her employer, the defendant Dr. Rogers. The automobile was owned by the defendant Warnock and was being driven with his consent. Dr. Rogers carried compensation insurance as required by section 3700 of the Labor Code.

At the trial, which was without a jury, the court found all essential basic facts in favor of the plaintiff and also found, in support of defendants' pleaded "second affirmative defense," that "at the time and place of the accident * * * plaintiff was in the employ of the defendant Francis L. Rogers and that the accident * * * occurred while the plaintiff was acting in the scope and course of her employment"; that plaintiff and defendant Rogers were subject to the compensation provisions of the Labor Code; that defendant Rogers carried compensation insurance; and (obviously a conclusion of law) that "this court has no jurisdiction of the cause of action * * * and the plaintiff has no capacity to sue." Judgment for the defendants was entered but plaintiff's motion for a new trial was granted as to both defendants on the ground, among others, that the evidence was not sufficient to support the decision. This appeal is by the defendants from the order granting a new trial.

Statement of Questions Involved

The following legal questions are presented: 1. Does the evidence establish as a matter of law that the employee-employer relationship existed between plaintiff and defendant Rogers and that they are subject to the provisions of the Workmen's Compensation Law (Labor Code) in relation to plaintiff's injury? 2. If they are subject to such compensation law, is that fact a defense to this action insofar as defendant Rogers is concerned? 3. If recovery cannot be had in this action by plaintiff against defendant Rogers, the negligent operator, may she nevertheless recover from the owner of the automobile, defendant Warnock, by virtue of the provisions of section 402 of the Vehicle Code, St.1937, p. 2353? 4. (a) If plaintiff recovers judgment herein against the owner Warnock, is such owner necessarily precluded from any recourse against the negligent operator by reason of the latter's relation to the plaintiff? (b) Is the negligent operator a necessary or proper party defendant in this action?

[2-4] The last two questions (3 and 4), so far as we are advised, have not heretofore been passed on by any court of last resort. We have concluded that: 1. The evidence establishes as a matter of law that plaintiff and defendant Rogers, at the time of the accident, were in the relation of employee-employer and are subject to the compensation provisions of the Labor Code. 2. Such relation is a defense to this action insofar as defendant Rogers is concerned. 3. Plaintiff may, nevertheless, recover from the defendant owner. 4. (a) The negligent operator, even though he has an available defense herein as against plaintiff, may eventually be liable to the defendant owner under the law of bailments, and (b) such operator is a proper and, upon the facts of this case, a necessary, party defendant.

Discussion of the Law

[5, 6] 1. *Upon the Evidence, as a Matter of Law, Plaintiff Was an Employee.* The conclusion we have reached relative to the first question of law above stated needs little discussion. Plaintiff contends that from the evidence the trial court might have found that she was an independent contractor, and, hence, that the order must be affirmed. See Newman v. Overland Pac. Ry. Co. (1901), 132 Cal. 73, 74, 64 P. 110; Cox v. Tyrone Power Enterprises (1942), 49 Cal.App.2d 383, 392, 121 P.2d 829. But "If from all the facts only a single inference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law." Yucaipa Farmers, etc., Ass'n v. Industrial Acc. Comm. (1942), 55 Cal. App.2d 234, 238, 130 P.2d 146, 148; see, also, Burlingham v. Gray (1943), 22 Cal. 2d 87, 100, 137 P.2d 9. Here the controlling facts are undisputed. From the plaintiff's own testimony, and without substantial conflict by inference or otherwise, it appears that plaintiff was at all times subject to the right of control by her employer as to the duration of her employment and as to what she did and how she did it. The employer did not maintain constant supervision over plaintiff but that fact is immaterial. On her part, the plaintiff could have quit working for Dr. Rogers at any time she saw fit so to do.

[7-9] An independent contractor is one "who renders services for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." Labor Code, § 3353. The distinction between the status of independent contractor and that of employee has often been considered by this court, and it is well established that a material and generally conclusive factor is the right of the employer to exercise complete and authoritative control of the manner in which the work is done. The existence of such right of control and not the extent of its exercise constitutes the relationship that of employer-employee. S. A. Gerrard Co. v. Industrial Acc. Comm. (1941), 17 Cal.2d 411, 413, 414, 110 P.2d 377; Burlingham v. Gray (1943), supra, 22 Cal.2d 87, 95, 99, 137 P.2d 9; Riskin v. Industrial Acc. Comm. (1943), 23 Cal.2d 248, 253, 144 P.2d 16. "Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so." Press Pub. Co. v. Industrial Acc. Comm. (1922), 190 Cal. 114, 120, 210 P. 820, 823; Hillen v. Industrial Acc. Comm. (1926), 199 Cal. 577. 582, 250 P. 570; Chapman v. Edwards (1933), 133 Cal.App. 72, 77, 24 P.2d 211. "An employee may quit, but an independent contractor is legally obligated to complete his contract." Los Flores S. Dist. v. Industrial Acc. Comm. (1936), 13 Cal.App.2d 180, 183, 56 P.2d 581, 583.

Viewing the evidence here in any light admits of no reasonable conclusion save that plaintiff was an employee and that all the conditions of compensation prescribed in the Labor Code existed.

2. *The fact that All the Conditions of Compensation Existed, Is a Defense Available to the Employer in this Action by his Employee.* Section 3600 of the Labor Code declares that "Liability for the compensation provided by this division [Div. 4] in lieu of any other liability whatsoever to any person except as provided in section 3706, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment * * * in those cases where" the conditions of compensation, as itemized, exist. Section 3601 provides that "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the

employer for the injury or death." Section 3706 creates the exception that "If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission [Industrial Accident Commission], and, in addition, may bring an action at law against such employer for damages, as if this division did not apply."

[10] The above-quoted language is plain. The conditions of compensation existed and the employer (Dr. Rogers) had secured the payment of compensation by proper insurance. Jurisdiction to hear the claim for compensation is exclusively in the Industrial Accident Commission. Cal. Const., art. XX, § 21; Labor Code, §§ 5300, 5301. The trial court, therefore, had no authority to render judgment for the recovery by plaintiff (the employee) of damages from the defendant Rogers (the employer). This, however, as will later appear, does not mean that defendant Rogers is not a proper or necessary party defendant.

3. *The Fact that the Negligent Operator of the Automobile Is Liable to Plaintiff for Workmen's Compensation Only, Does Not Preclude Recovery by Plaintiff from the Owner for the Negligence Imputed by Section 402 of the Vehicle Code.* By subdivision (a) of section 402 of the Vehicle Code it is provided that "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." Subdivision (b) of the same section limits the liability of the owner "to the amount of five thousand dollars for the death of or injury to one person in any one accident." Subdivision (c) requires that "the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this State. Upon recovery of judgment, recourse shall first be had against the property of said operator so served." Subdivision (d) declares that "In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner." From what has already been said it appears that recourse cannot "first [or at all] be had against the property of said operator" because he has a special defense to this action; also it appears that the provision that "such owner is subrogated to all the rights of the person injured" is meaningless here because plaintiff has no right of action in the premises to which the owner may be subrogated.

[11, 12] Defendants argue, in effect, that subdivisions (c) and (d) create *conditions* upon subdivision (a) and, hence, that the liability otherwise imposed by subdivision (a) does not attach unless all of the rights given the owner by subdivisions (c) and (d) are available. But this contention cannot be sustained. It has long since been determined that the purpose of the Legislature in enacting section 402 of the Vehicle Code, and its predecessor, section 1714¼ of the Civil Code, was to change the common law rule of bailments (for common law rule see 8 C.J.S., Bailments, p. 318, § 40) and to impose upon the bailor-owner a liability for the imputed negligence of the operator, to whom he has entrusted the possession and control of his vehicle, which, as between the owner and the injured person, is direct and unconditional within the limits set.

The case of Broome v. Kern Valley Packing Co. (1935), 6 Cal.App.2d 256, 44 P.2d 430, involved a cause of action arising under section 1714¼ of the Civil Code. The provisions now found in subsections (c) and (d) of section 402 were then in the form of provisos, which might thus more readily than the present subsections have been interpreted to limit the availability of the cause of action against the owner to a situation where the owner could protect himself against loss by the means given him in the provisos. The statute, however, was not so interpreted.

Speaking through Mr. Presiding Justice Barnard, the court said (at page 261 of 6 Cal.App.2d, at page 432 of 44 P.2d): "It would seem that the main purpose of this section is to make such an owner directly responsible to a person injured through the negligence of an operator driving the car with the owner's permission, although the section also contains provisions calculated to protect the owner from the results of the operator's negligence in so far as this may be done between those parties without interfering with the rights of the injured party."

"[6 Cal.App.2d at page 262, 44 P.2d at page 433] While this section is not as clear as could be desired, we think it imposes a primary and direct liability upon such an owner, with secondary provisions to enable him to protect himself as against the operator of the car." Not only was a petition for hearing of the above quoted from case denied by this court but the reasoning and quoted language were expressly approved in Holland v. Kodimer (1938), 11 Cal.2d 40, 43, 77 P.2d 843, 845, wherein it was said that "in our opinion, the decision in Broome v. Kern Valley Packing Co. * * * accurately analyzes and applies section 1714¼ * * *."

It is settled that the liability of the owner is not affected by the fact that he cannot avail himself of the provision of subdivision (c) of section 402 that "recourse shall first be had against the property of said operator", either because, although the operator was served and appeared, there was no final adjudication of his liability (Holland v. Kodimer, supra; Broome v. Kern Valley Packing Co. (1935) supra, 6 Cal. App.2d 256, 44 P.2d 430; see, also, Sanderson v. Niemann (1941), 17 Cal.2d 563, 572, 110 P.2d 1025) or because the operator had disappeared (Sutton v. Tanger (1931), 115 Cal.App. 267, 270, 1 P.2d 521) or died (Sayles v. Peters (1936), 11 Cal.App.2d 401, 403, 404, 54 P.2d 94; Lee v. Deasy (1937), 19 Cal.App.2d 667, 66 P.2d 175; National Automobile Insurance Co. v. Cunningham (1940), 41 Cal.App.2d 828, 831, 107 P.2d 643).

In the last-cited case, the court said (at page 831 of 41 Cal.App.2d, at page 645, of 107 P.2d): "While the cause of action against the driver of the car abates on his death, such death does not bar the cause of action against the owner whose liability is primary * * *." As the liability of the owner to the injured plaintiff remains even though the plaintiff's cause of action against the negligent operator "dies with the death of the wrong-doer," so it remains even though the plaintiff is deprived of his cause of action for civil damages against the negligent operator because the accident occurred under the conditions of workmen's compensation.

[13] In further support of their contention that negligence can be imputed under section 402 only where such negligence is actionable against the operator and the owner can avail himself of the protection of subdivisions (c) and (d) of that section, defendants contend that "Since the imputed negligence statute created a new right of action, giving a remedy against a party who would not otherwise be liable, it must be strictly construed." Weber v. Pinyan (1937), 9 Cal.2d 226, 229, 70 P.2d 183, 185, 112 A.L.R. 407, 409. In addition to the Weber case, defendants cite Swing v. Lingo (1933), 129 Cal.App. 518, 526, 19 P.2d 56, and Cook v. Superior Court (1936), 12 Cal. App.2d 608, 610, 611, 55 P.2d 1227. From a consideration of these cases and of others construing the statute, it appears that in sustaining the action against the automobile owner in the present situation we do no violence to the so-called rule of strict construction. We are not called upon here to determine whether that rule can properly be applied to any liability created by our Codes. In each of the cases cited by defendants there was an unsuccessful attempt to stretch the statute to cover a situation readily found, by reference to the language of the statute itself (or, in the Weber case, by reference to the language of the Legislature in a statute covering a kindred subject), to be beyond its purport. The instant case, however, appears to be within the contemplation of the statute as construed in Broome v. Kern Valley Packing Co. (1935), supra, 6 Cal.App.2d 256, 44 P.2d 430, and Holland v. Kodimer (1938), supra, 11 Cal.2d 40, 77 P.2d 843.

Certainly the asserted rule of strict construction does not authorize us to thwart, by narrow and strained interpretation, the palpable intent of the Legislature to impose a new liability consonant with new conditions; we are not required to deny recovery in a case which both by the wording of the statute and in accordance with the purpose of its enactment as declared in the opinions interpreting it is within its tenor. We cannot, in any preoccupation with the common law rule of strict construction, overlook the rule of construction imposed by section 4 of the Civil Code that the provisions of the Code "are to be liberally construed with a view to effect its objects and to promote justice." If there were any question as to the applicability of a similar rule of construction to a provision of the Vehicle Code it would be set at rest insofar as section 402 is concerned, since that section had its origin in the Civil Code, and section 2 of the Vehicle Code, St.1935, p. 94, provides that "The provisions of this code, in so far as they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments." Thus the rule of construction applied in the Broome case, supra, to effect the objects of section 1714¼ of the Civil Code followed the section, as it were, when in slightly different form it became section 402 of the Vehicle Code.

[14] Defendants further argue in support of their contention that only when negligence of the operator is actionable against him is it imputable to the owner under section 402, that the liability created by that section is analogous to that of a master for the acts of his servant under the doctrine of respondeat superior and "just as the liability of the master is dependent upon the liability of the servant so is the liability of the owner dependent upon the liability of his bailee." However, from the limited analogy pointed out by the courts of this state (Sutton v. Tanger (1931), supra, 115 Cal.App. 267, 269, 1 P.2d 521; Swing v. Lingo (1933), supra, 129 Cal.App. 518, 522, 526, 19 P.2d 56), it does not follow that inappropriate incidents of the doctrine of respondeat superior can be attributed to the statutory relationship. The analogy has never been considered controlling in the construction of the imputed negligence statute.

Whether the liability of a master under the doctrine of respondeat superior depends, as stated by defendants, "upon the liability of the servant" or only upon the servant's culpability, is a question on which there is a lack of harmony among the jurisdictions which have considered the point. In California one aspect of the question was presented in the case of Myers v. Tranquility Irrigation District (1938), 26 Cal.App.2d 385, 79 P.2d 419, cited by defendants. That case held that an unemancipated minor could not recover damages against the employer of his father for injuries caused by the negligence of the father acting within the scope of his authority and in the course of business. The court reasoned that the child could not recover from the father in a tort action (26 Cal.App.2d at page 388, 79 P.2d at page 420), that the employer would be able to recoup from the father the amount of damages recovered by the child (26 Cal.App.2d at page 389, 79 P.2d at page 421), and that "What the child cannot do directly he should not be permitted to accomplish by indirection" (26 Cal.App.2d at page 390, 79 P.2d at page 421). The conclusion there reached by the court was predicated on the philosophy that "The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interest of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent" (quoted in Myers v. Tranquility Irrigation District, (1938), supra, from 20 R.C.L. 361), and that "Any proceeding tending to bring discord into the family and disorganize its government may well be regarded as contrary to the common law, and not to be sanctioned by the courts" (quoted in the Myers case from Matarese v. Matarese (1925), 47 R.I. 131, 133, 131 A. 198, 199, 42 A.L.R. 1360, 1361). No such basis exists here for limiting the liability imposed by section 402 of the Vehicle Code. Indeed, that philosophy has no application to section 402. If we were to apply it and were to follow the reasoning of defendants, we should have to hold that such section was inoperative when a child by consent drives his parent's automobile (or when a parent by consent drives that of his child) because to give effect to the section would set up a basis for conflicting claims between parent and child. It is, of course, common knowledge that the section finds frequent application in parent and child cases. A recent case where it was so applied is Souza v. Corti (1943), 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861.

[15] In contending that defendant Rogers' negligence is nonactionable it is apparent that defendants use the term "nonactionable" only in the limited sense that recovery for such negligence from the defendant Rogers by court action is barred by the Labor Code, in that by its provisions the employer's sole liability for the employee's injury is workmen's compensation and the exclusive remedy therefor is an application to the Industrial Accident Commission. Obviously the character of the act itself is not damnum absque injuria or otherwise inherently nonactionable. Actually, while the fact of negligence as a proximate cause of the injury is made immaterial, a remedy for the *injury* is provided which may be enforced in the forum creat-

ed. The special defense of the negligent operator, based on the business relationship and status of the operator and the plaintiff, and the provisions of the Workmen's Compensation Law, is not available to the owner. It is the negligence of the operator, and not his liability or status, which is imputed to the owner. The negligence being imputed, the liability therefor is his own.

In Schwartz v. Forty-Second St., M. & St. N. A. R. Co. (1940), 175 Misc. 49, 22 N.Y.S. 2d 752, a similar problem was presented as to application of section 59 of the New York Vehicle and Traffic Law, which provides in part that "Every owner of a motor vehicle * * * operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle * * *, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner." Laws N.Y.1929, vol. 1, ch. 54, p. 82. The trial court there proceeded on the theory that, because by virtue of the New York Workmen's Compensation Law the employee cannot maintain an action against his co-employee (the negligent operator), "it logically follows that he cannot maintain one against another person [the owner of the vehicle] whose sole liability derives from the negligence of a co-employee." Page 754 of 22 N.Y.S.2d. This is the only case dealing directly with the question which has come to our attention. It does not appear to have been presented to a higher court. As indicated above, such an approach in the present case would ignore the meaning and purpose of our imputed negligence statnte. Hence, and for the other reasons given, we are impelled to a contrary conclusion.

[16, 17] It is to be observed also that the Labor Code does not purport to alter the correlative rights and liabilities of persons who do not occupy the reciprocal statuses of employer and employee. Our Workmen's Compensation Laws were not designed to relieve one other than the employer from any liability imposed by statute or by common law. "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer." Labor Code, § 3852, St.1939, p. 2519; see, also, Stackpole v. Pacific Gas & Elec. Co. (1919), 181 Cal. 700, 703, 186 P. 354; Van Zandt v. Sweet (1922), 56 Cal.App. 164, 165, 204 P. 860; Driscoll v. California St. Cable R. Co. (1926), 80 Cal.App. 208, 214, 250 P. 1062. The employee's right to recover against a third person is not affected by the fact that the "person other than the employer" is not a stranger but has entered into a consensual legal relationship with the employer. Wallace v. Pacific Electric R. Co. (1930), 105 Cal.App. 664, 668, 288 P. 834; Merino v. Pacific Coast Borax Co. (1932), 124 Cal.App. 336, 338, 341, 12 P.2d 458. In each of the above-cited cases the liability of the third person was based upon his own common-law negligence, whereas the liability here sought to be imposed upon the owner Warnock is statutory, based upon the imputation to him of the operator's negligence. However, we find nothing in the present case which must impliedly exclude plaintiff's right of action against Warnock from the operation of the quoted section, Labor Code, § 3852, and we are satisfied that the action may proceed to judgment as against him.

[18-22] 4. (a) *The Provisions of the Labor Code Governing the Reciprocal Rights and Liabilities between the Plaintiff and the Defendant Operator as Employee and Employer Do Not Abrogate the Independent and Correlative Rights and Obligations between the Owner and the Operator as Bailor and Bailee.* When the owner of an automobile gives possession of it, with permission to operate it, to another person, a contract of bailment is created. At common law a bailor is not liable to third persons for damages resulting from the bailee's negligent use of the bailed property (6 Am.Jur. 396, § 313) and hence we find no decisions as to the right of the bailor to recover from the bailee the amount of any judgment to which the bailor may have been subjected by reason of the bailee's negligent use of the bailed property. However, it is elementary in the law of bailments that a bailee is responsible in damages to the bailor for any injury to the bailed property resulting from a failure of the bailee to exercise a proper degree of care in protecting it. See Milgate v. Wraith (1942), 19 Cal.2d 297, 303, 121 P. 2d 10; Brown v. Roland (1940), 40 Cal.App. 2d Supp. 825, 104 P.2d 138. "Where the bailment is for the sole benefit of the bailee, he is bound to exercise great care

or extraordinary diligence" (8 C.J.S., Bailments, p. 280, § 29; see, also, Civ.Code, § 1886); and "Where, through negligence of the bailee, bailed property in his hands is injured * * * the bailor is entitled to recover such a sum as will reasonably compensate him for the injury sustained * * *." 6 Am.Jur. 379, § 294; see, also, Civ.Code, § 1889. If Dr. Rogers, in negligently backing Warnock's car into the plaintiff, had injured the *vehicle* we have no doubt but that under the above-stated principles of the law of bailments he would be liable to Warnock for the damage to the bailed property. *The fact that it was with an employee of the bailee that the damage-causing collision occurred would be wholly immaterial.* This principle, we are satisfied, is equally applicable to the case before us insofar as concerns the independent and correlative rights and obligations of the owner and of the operator as between them.

As hereinabove suggested, section 402(a) of the Vehicle Code has operated to modify the law of bailments in this state, insofar as the bailment of motor vehicles is concerned, in that it places upon the bailor responsibility for the bailee's negligence in operation of the bailed property.

[23] In the nature of reciprocity for the liability thus created in subdivision (a), subdivision (d) provides, among other things, that "In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner * * * may recover from such operator the total amount of any judgment and costs recovered against such owner." The right of the owner to recover from the negligent operator, thus created by subdivision (d), becomes an element of every contract of bailment of a motor vehicle in this state (see Brown v. Ferdon, (1936), 5 Cal.2d 226, 230, 54 P.2d 712; Hales v. Snowden (1937), 19 Cal.App.2d 366, 369, 65 P.2d 847; Mueller v. Elba Oil Co. (1942), 21 Cal.2d 188, 204, 130 P.2d 961; Fernelius v. Pierce (1943), 22 Cal.2d 226, 243, 138 P.2d 12) and is now just as effectively a part of the law of bailments (of motor vehicles) in California as is the obligation of the bailee to respond in damages for injury to the bailed property occasioned by his negligence. There is nothing in the Labor Code which abrogates this obligation imposed on the bailee by the law of bailments. If the owner of a motor vehicle, without fault on his part, suffers a judgment based on the imputed negligence of his bailee, he becomes entitled to recover the amount of that judgment and costs from the negligent bailee. What may have been the relationship between the plaintiff in the original action and the bailee is immaterial in an action between the bailor and the bailee, based exclusively upon their independent, correlative rights and obligations.

[24] It has been suggested that this holding may tend to impose double liability upon the negligent operator; i. e., liability to his employee for workmen's compensation and to the owner for the amount of the judgment against him arising out of the same injury. But the conclusion is not sound. The owner will be entitled to have credited on the judgment against him any amount paid by the operator (or his insurance carrier) by way of compensation for the injury, and the amount to be recovered by the bailor-owner from the bailee-operator necessarily will be reduced pro tanto.

4. (b) *The Negligent Operator is a Proper (and on the Facts Here a Necessary) Party Defendant Even though He Has a Complete Defense to this Action.* Subdivision (c) of section 402 of the Vehicle Code requires that "In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this State" and there follows the further provision that "Upon recovery of judgment, recourse shall first be had against the property of said operator so served." In this case, although as previously mentioned recourse cannot "first [or at all] be had against the property of said operator" because no recovery can be had against him, he must nevertheless be named as a party defendant and served with process if such service can be had within this state. The statute expressly so requires and the operator, even though he be the employer of plaintiff and subject to the conditions of compensation, is a person interested in the action against the owner because the amount of the judgment, if any, against the owner may well determine, in part at least, the amount of a potentially impending recovery by the owner-bailor against the bailee-operator.

[25] It may be that upon the new trial defendant Rogers, upon his separate application, will be entitled to have this action

dismissed as to him, but upon the record before us it appears that the order granting a new trial must be affirmed as to both defendants. Both defendants appear jointly, by a single answer, and the judgment entered was "that the plaintiff * * * take nothing by this action and that the action be dismissed and that the defendants Francis L. Rogers and A. W. Warnock have judgment against the plaintiff for their costs in the sum of $33.25." As this is a joint judgment and it does not appear that the defendant Rogers severally is necessarily entitled to exactly that judgment, we cannot hold that the order granting a new trial as to him is improper.

The order appealed from is affirmed as to both defendants.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

TRAYNOR, Justice.

The majority opinion recognizes that the plaintiff cannot recover damages from her employer, since section 3601 of the Labor Code makes her right to recover workmen's compensation the exclusive remedy against her employer. In effect, however, it allows recovery of damages against the employer by holding that the owner of the vehicle can shift the damages for which he is liable under section 402 of the Vehicle Code to the employer because of the bailor-bailee relationship between him and the employer. The employer's liability for damages in such a case is thus determined by the chance circumstance that he did not own the car that he negligently operated. Had he owned it, he would not be liable for damages directly or indirectly. Because he does not own it, he is made liable for damages, indirectly but none the less actually. It is my opinion that recovery in the one case as in the other would violate the policy and provisions of the Workmen's Compensation Law.

The California Constitution (art. XX, § 21) provides that all matters essential to a complete system of workmen's compensation are the public policy of the state, binding upon all departments of the state government. Pursuant to this provision, the Legislature has enacted a complete system of rights and obligations for the compensation of workmen for injuries incident to their employment. This system supersedes the statutory and common law that formerly governed the liability of employers for injuries to their employees, and covers "the entire field of injury to workmen in the course of their employment." Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 415, 156 P. 491, 494, Ann.Cas. 1917E, 390; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 692, 151 P. 398; Alaska Packers' Association v. Industrial Acc. Comm., 200 Cal. 579, 583, 253 P. 926. When conditions specified in the Compensation Law arise, the remedy therein provided excludes all other statutory or common-law remedies against the employer for all injuries to employees in the course of their employment regardless of the manner in which they occur. De Carli v. Associated Oil Co., 57 Cal.App. 310, 311, 207 P. 282; Liberty Mutual Ins. Co. v. Superior Court, 62 Cal. App.2d 601, 145 P.2d 344; Freire v. Matson Navigation Co., 19 Cal.2d 8, 10, 118 P.2d 809.

Section 3601 of the Labor Code expressly denies to the employee any remedy against the employer except the right to recover compensation pursuant to the provisions of the Workmen's Compensation Law: "Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy against the employer for the injury or death." * Although directed against the owner of the car, the plaintiff's claim under section 402 of the Vehicle Code is in practical effect a claim for damages against her employer. Under the majority opinion, the employer, as the negligent operator of the car, and not the owner, bears the ultimate burden of the employee's claim, since the owner can shift that burden to the employer. Such indirect recovery of damages from the employer, who is responsible only for the payment of compensation as specified in the Workmen's Compensation Law is, as contrary to the public policy and provisions of that law as a direct claim for damages against the employer.

Section 3600 of the Labor Code expressly provides that liability of the employer for the compensation provided by the Workmen's Compensation Law shall be, except as provided in section 3706 "in lieu of any other liability whatsoever to any person." Immunity from liability to "any

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* Section 3706 has no application, for appellant had secured the payment of compensation by procuring insurance in accordance with Section 3700.

person" clearly includes immunity from any liability to the owner of the car on account of the injury to the employee. This section precludes liability other than that imposed by the Workmen's Compensation Law to third persons for independent claims of such persons, as for example, claims of such persons for wrongful death of the employee. Treat v. Los Angeles Gas & Elec. Corp., 82 Cal.App. 610, 616, 256 P. 447; McLain v. Llewellyn Iron Works, 56 Cal.App. 60, 62, 204 P. 869; Gerini v. Pacific Employers' Ins. Co., 27 Cal.App.2d 52, 54, 80 P.2d 499. It must therefore preclude liability for an employee's claim for damages that has been converted into a claim of the third person for reimbursement for the satisfaction of the employee's claim for damages.

The majority opinion relies on section 3852 of the Labor Code, which provides, "The claim of an employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer." It goes on to allow the owner to have credited on the judgment against him any amount paid by the employer or his insurance carrier. The allowance of such a credit, however, is contrary to the provisions in section 3852 and section 3856 that an employer who pays or becomes obligated to pay compensation is subrogated up to the amount of his obligation to the employee's claim against the third person. National Automobile Ins. Co. v. Cunningham, 41 Cal.App.2d 828, 107 P.2d 643; Morris v. Standard Oil Co., 200 Cal. 210, 252 P. 605. If the provision in section 3852 of the Labor Code relied upon in the majority opinion is applicable, the rest of that section must likewise be applicable, with paradoxical results. A negligent employer, who cannot be sued in a common-law action for damages, is nevertheless held liable to the owner of the car for damages less the amount of workmen's compensation paid the employee, but the owner is in turn liable to his negligent bailee for the amount of workmen's compensation that the bailee was required to pay for the injury resulting from the negligent operation of the vehicle by the bailee. To hold that section 3852 is operative to permit the bailee-employer to recover against his bailor even though the only basis for the bailor's liability is the negligence of the bailee, would be a violation of the principle set forth in section 3517 of the Civil Code that no one can take advantage of his own wrong.

The conclusion is inevitable that the operator-employer is not liable for damages either directly or indirectly. The question remains whether the owner can be held liable for damages to the employee regardless of the nonliability of the employer. It is my opinion that since the employer's liability is completely covered by the Workmen's Compensation Law no liability on the part of the employer remains for which a third person can be liable.

The majority opinion relies on cases holding that the owner's liability under section 402 of the Vehicle Code is in form "a primary and direct liability," and concludes that the owner's liability is not affected by the fact that the employee has no right of action against his employer because of the latter's negligence in driving the car. These cases hold that lack of final adjudication of the liability of the operator of the car. Holland v. Kodimer, 11 Cal.2d 40, 43, 77 P.2d 843; Broome v. Kern Valley Packing Co., 6 Cal.App.2d 256, 44 P.2d 430, or disappearance of the operator subsequent to the injury (Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521) or his death (Sayles v. Peters, 11 Cal.App.2d 401, 54 P.2d 94; Lee v. Deasy, 19 Cal.App.2d 667, 66 P.2d 175; National Automobile Ins. Co. v. Cunningham, 41 Cal.App.2d 828, 107 P.2d 643) does not affect the statutory liability of the owner. It does not follow, however, that because the liability of the operator of the automobile need not be determined by judgment before the plaintiff can recover against the owner, the latter can be held liable for imputed negligence of the operator despite specific provisions of the Labor Code barring any recovery of damages from the employer-operator. Labor Code, §§ 3600, 3601. Again, the abatement of an action against the operator of the car because of his death differs materially from the prohibition of such an action by the Workmen's Compensation Law. The abatement of the right of action by death succeeds the creation of the claim, and the claim for personal injury is lost because of its personal character. Clark v. Goodwin, 170 Cal. 527, 531, 150 P. 357, L.R.A.1916A, 1142; see 1 Cal.Jur. 71. Abatement because of the death of the wrongdoer affects only the personal relationship, not the liabilities of co-obligors that existed before the death of the wrongdoer. The Workmen's Compensation Law denies recovery of damages against the employer, not because of the personal character of the claim for personal injury, but to insure the effective operation of its own system. An action for damages is not regarded as the appropriate remedy for the negligence of the employer. The Workmen's Compensation Law, therefore, does not abate a claim that has been created but prevents it from ever arising.

CURTIS and EDMONDS, JJ., concur.

Rehearing denied; CURTIS, EDMONDS, and TRAYNOR, JJ., dissenting.

24 Cal.2d 267

METCALF et al. v. LOS ANGELES COUNTY.

L. A. 18763.

Supreme Court of California.

May 2, 1944.

1. Officers 🔑103

A party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief.

2. Counties 🔑55

Where county zoning ordinance was alleged to be unconstitutional only as applied to particular property and ordinance contained provision whereby owner could apply to administrative body for permission to put his land to nonconforming use, owner could not attack the constitutionality of ordinance until he had applied to administrative body for an exception or variance under the ordinance.

3. Equity 🔑44

Equity court's jurisdiction is limited by existence of a tribunal created or given additional power for the very purpose of making factual determinations and alleviating hardships of an oppressive statute as applied to facts related by each complainant.

4. Injunction 🔑108

Where county zoning ordinance contained provision whereby owner could apply to administrative body for permission to put his land to nonconforming use, the fact that an exception might have been granted or denied in discretion of administrative body had application been made did not render the administrative remedy inadequate so as to authorize resort to courts for injunctive relief before exhausting administrative remedy.

5. Injunction 🔑108

Where county zoning ordinance contained provision whereby owner could apply to administrative body for permission to put his land to nonconforming use, resort to equity court for injunctive relief prior to exhaustion of such administrative remedy could not be justified on ground that remedy was inadequate because an application for an exception would admit constitutionality of ordinance.

6. Counties 🔑55

Where county zoning ordinance contained provision whereby owner could apply to administrative body for permission to put his land to nonconforming use, landowners who request an exception which is denied would not be barred from asserting, in appropriate judicial proceeding, that the zoning ordinance was unconstitutional as applied to their property.

7. Injunction 🔑108

Where zoning ordinance, which contained provision whereby owner may apply to administrative body for permission to put his land to nonconforming use, was alleged to be unconstitutional only as applied to particular property, the rule that owner must exhaust administrative remedy before resorting to court for injunctive relief could not be avoided on ground that it would operate to delay legal assertion of property owners' rights and to suspend the use of their land until their application had been acted upon.

8. Courts 🔑107

Cases are not authority for propositions not considered therein.

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In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Paul Metcalf and others against the County of Los Angeles to enjoin the enforcement of a zoning ordinance. From a judgment dismissing the action, plaintiffs appeal.

Affirmed.

Prior opinion, 142 P.2d 66.

Anderson & Anderson, of Los Angeles, for appellants.

J. H. O'Connor, County Counsel, and Edward H. Gaylord, Deputy County Counsel, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is an appeal from a judgment of dismissal in an action to enjoin the enforcement of a zoning ordinance of the county of Los Angeles insofar as that ordinance affects certain real property owned by plaintiffs.

Plaintiffs are the owners of five contiguous parcels of land aggregating about 83½ acres, which, according to the allegations of the complaint, are unfitted for and have no appreciable value for any purpose other than use in the business of rock development and rock crushing. Plaintiff company, in addition to owning two of such parcels, has obtained options to purchase the real property of its coplaintiffs and intends to exercise the same "if, only, and when the [property] can legally be used for * * * rock development and rock crushing purposes * * * without interference * * * by defendant * * *." By the provisions of Ordinance No. 1494, New Series, of the County of Los Angeles, as amended by Ordinance No. 2903, New Series, plaintiffs' land is placed in an area zoned principally for residential and agricultural uses and its use for purposes of rock development and rock crushing is prohibited. Section 21 of that ordinance provides that an owner of property located within any zone established thereby may petition the Regional Planning Commission to have his property excepted from any particular restriction applicable to such property, that the commission shall cause an investigation to be made and file its report with the board of supervisors, and that the board may except such property from the restriction if it is satisfied that the exception is necessary for the preservation and enjoyment of any substantial property right of the petitioner and is not materially detrimental to public welfare or injurious to the other property in the vicinity. Under Ordinance No. 1454, New Series, it is unlawful for any person, firm, or corporation to establish, maintain or operate any rock quarry, sand or gravel pit, rock-crushing plant, or any apparatus for the manufacture or production of rock, sand or gravel upon plaintiffs' land without first obtaining a license and permit to do so. A license may be issued thereunder by the tax collector upon approval of the board of supervisors after due notice and hearing, and a permit may be issued by the chief engineer of the County Flood Control District upon conditions prescribed by the board of supervisors. None of the plaintiffs nor their predecessors in interest has ever applied for an exception pursuant to section 21 of Ordinance No. 1494 or for a license pursuant to Ordinance No. 1454.

It is alleged that defendant threatens to prevent plaintiffs from establishing a rock-crushing plant upon their premises and to compel them to restrict the use of their land to residential and agricultural uses. The action was brought on the theory that enforcement of Ordinance No. 1494 would unconstitutionally deprive plaintiffs of their property by inhibiting the use of their land for purposes for which it is particularly suited and for which it has a reasonably high value. At the trial the parties filed a stipulation of facts and waived findings and conclusions of law. The trial court sustained defendant's objection to the introduction of evidence by plaintiffs and dismissed the action on the ground that it was "prematurely brought in that none of the plaintiffs applied for an exception to the zoning ordinance attacked and none of the plaintiffs applied for a permit pursuant to Ordinance No. 1454, New Series, to establish or maintain a rock quarry."

[1] A party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief. Alexander v. State Personnel Bd., 22 Cal.2d 198, 199, 137 P.2d 433; United States v. Superior Court, 19 Cal.2d 189, 194, 120 P.2d 26; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715; Gantner & Mattern Co. v. California E. Comm., 17 Cal.2d 314, 317, 109 P.2d 932; Teeter v. City of Los Angeles, 209 Cal. 685, 687, 290 P. 11. Defendant contends that plaintiffs failed to comply with this rule since they did not petition the Regional Planning Commission to have their property excepted from the restrictions of the challenged zoning ordinance pursuant to section 21 thereof. On the other hand, plaintiffs contend that the doctrine of exhaustion of administrative remedies does not require

them to follow the procedure prescribed by an ordinance which they allege is void as to their property.

[2] It should be noted at the outset that plaintiffs challenge the ordinance only insofar as it prevents a particular use of their property and do not otherwise question its validity. Where an ordinance is attacked as unconstitutional in its entirety, the authorities are divided as to the necessity of invoking administrative remedies prescribed by that ordinance. See Porter v. Investors' Syndicate, 286 U.S. 461, 468, 52 S.Ct. 617, 76 L.Ed. 1226; Hirsh v. Block, 50 App.D.C. 56, 267 F. 614, 618, 11 A.L.R. 1238; United States v. Superior Court, 19 Cal.2d 189, 195, 120 P.2d 26; Central Trust Co. v. City of Cincinnati, 62 Ohio App. 139, 23 N.E.2d 450, 452, 453. But where, as here, the ordinance is alleged to be unconstitutional only as applied to particular property, it has been held in other jurisdictions that before a party can make such an attack he must apply to the zoning authorities for an exception or variance under the act. Central Trust Co. v. City of Cincinnati, 62 Ohio App. 139, 23 N.E.2d 450; Taylor v. Haverford Township, 299 Pa. 402, 149 A. 639; see Downham v. City Council of Alexandria, D.C., 58 F.2d 784, 788; Dowsey v. Village of Kensington, 257 N.Y. 221, 229, 177 N.E. 427, 86 A.L.R. 642; cf. People v. Calvar Corporation, 286 N.Y. 419, 36 N.E.2d 644, 136 A.L.R. 1376; Payne v. Borough of Sea Bright, 14 N.J.Misc. 756, 187 A. 627. While there are no California cases directly in point, we are of the opinion that logic and the decisions of this court in analogous situations compel a like holding in this case. Cf. San Joaquin, etc., Irr. Co. v. Stanislaus County, 155 Cal. 21, 99 P. 365; Collier & Wallis, Ltd., v. Astor, 9 Cal.2d 202, 70 P.2d 171; Alexander v. State Personnel Bd., 22 Cal.2d 198, 137 P.2d 433.

[3] A zoning ordinance places limitations upon the use of land within designated areas in accordance with the general policy adopted by the legislative body. The ordinance may be arbitrary and discriminatory in isolated cases as applied to certain property, and compliance therewith may present unusual difficulties in many other instances. But it is manifestly impracticable, if not impossible, to enumerate in the ordinance itself the varied factual situations to which the ordinance is not applicable because of constitutional objections or other special considerations. Consequently, almost every zoning ordinance, including the one under consideration, contains provisions whereby an owner may apply to an administrative body for permission to put his land to a nonconforming use. As stated in Thomas v. Board of Standards and Appeals, 263 App.Div. 352, 33 N.Y.S.2d 219, 230, "the variances permitted by the Zoning Resolution are in the nature of safety valves to prevent the oppressive operation of the Zoning Regulations in particular instances. * * * The history of all the litigation involving zoning regulations shows that to insure the validity of the zoning plan for an entire municipality, the legislative body must vest in some subordinate body the power to grant variances in appropriate cases. * * *" See, also, Rubin v. Board of Directors, 16 Cal.2d 119, 124, 104 P.2d 1041. In our opinion, until an application for a variance or exception is made and acted upon, the "legislative process remains incomplete." Porter v. Investors' Syndicate, 286 U.S. 461, 468, 52 S.Ct. 617, 620, 76 L.Ed. 1226. This conclusion is strengthened by the fact that in excepting property from the restrictions of Ordinance No. 1494 the board of supervisors may impose "such terms and conditions as said board may deem proper under the * * * circumstances." If the landowner is permitted to ignore the procedure set forth in the ordinance whereby he may have his property excepted from the restrictions thereof, the board's statutory power to impose terms and conditions upon particular uses of property is circumvented. Equity's jurisdiction is limited by the existence of a tribunal created or given additional powers for the very purpose of making factual determinations and alleviating the hardships of an oppressive statute as applied to the facts related by each complainant.

Plaintiffs argue, however, that in applying for an exception under section 21 they would in legal effect be requesting a mere favor from the zoning authorities upon the assumption and admission that the ordinance is valid, and that, therefore, an application for an exception is not a remedy or, in any event, not an adequate remedy. The argument that an application for an exception is not a remedy rests upon the assumption that the means provided by an ordinance to redress or prevent an injury is not a remedy when the relief sought thereby may be granted or withheld in the discretion of the body to which application is made. In San Joaquin, etc., Irrigation Co. v. Stanislaus County, 155 Cal. 21, 27, 99 P. 365, 367, however, this court stated that the "remedy" to be exhausted before judicial relief might be obtained includes or consists of the "opportunity to obtain adequate relief by application to a legislative or administrative municipal body, like a board of supervisors, with reference to the very matter of which [the parties] complain in an action in equity * * *." In the present case plaintiffs seek by judicial intervention to be relieved from the restrictions imposed by the zoning ordinance, and by the provisions of section 21 of that ordinance they are afforded an "opportunity to obtain adequate relief by application to a legislative or administrative municipal body, like the board of supervisors, with reference to the very matter of which they complain in [this] action in equity." See, also, United States v. Superior Court, 19 Cal.2d 189, 196, 120 P.2d 26.

[4, 5] The fact that an exception might have been granted or denied in the discretion of the board of supervisors had application been made (Rubin v. Board of Directors, 16 Cal.2d 119, 126, 104 P.2d 1041; Regan v. Council of City of San Mateo, 42 Cal.App.2d 801, 806, 110 P.2d 95), does not render the remedy inadequate. See Alexander v. State Personnel Board, 22 Cal.2d 198, 200, 137 P.2d 433; Gantner & Mattern Co. v. California E. Comm., 17 Cal.2d 314, 318, 109 P.2d 932; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 300, 301, 109 P.2d 942, 132 A.L.R. 715. Nor does the fact that an application for an exception admits the constitutionality of the ordinance render the remedy inadequate.

[6] Had plaintiffs requested and been denied an exception, they would not have been barred from asserting in appropriate judicial proceedings that the zoning ordinance was unconstitutional as to their property. Rubin v. Board of Directors, 16 Cal.2d 119, 104 P.2d 1041; Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93.

[7] Plaintiffs further contend that the rule relied upon by defendant is inequitable because it would operate to delay the legal assertion of their rights and to suspend the use of their land until their application had been acted upon. That contention constitutes an attack upon the entire doctrine of the exhaustion of administrative remedies. Cf. Collier & Wallis, Ltd., v. Astor, 9 Cal.2d 202, 206, 70 P.2d 171; United States v. Superior Court, 19 Cal.2d 189, 196, 120 P.2d 26.

[8] The cases cited by plaintiffs do not support their position that an owner may attack the constitutionality of a zoning ordinance as applied to his property without first seeking to have such property excepted by the zoning authorities from the restrictions of the ordinance. In Rubin v. Board of Directors, 16 Cal.2d 119, 104 P.2d 1041, the landowner applied for and was denied a variance before he sought to challenge the constitutionality of the zoning ordinance in a judicial proceeding. Similarly, in Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93, plaintiff petitioned the city trustees for inclusion of his property in the business district before seeking a judicial declaration that a zoning ordinance placing his property in a residential district was void as to such property. In Matter of Application of Throop, 169 Cal. 93, 145 P. 1029; Bank of America, etc., v. Town of Atherton, 60 Cal.App.2d 268, 140 P.2d 678; and Del Fanta v. Sherman, 107 Cal.App. 746, 290 P. 1087, it does not appear that the challenged ordinances provided for applications to the zoning authorities for exceptions or variances nor that the property owners failed to apply to the administrative bodies to have their property excepted from the restrictions of the ordinances, and cases are not authority for propositions not considered therein. Maguire v. Hibernia S. & L. Soc., 23 Cal.2d —, 146 P.2d 673.

The judgment is affirmed.

SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

24 Cal.2d 258

ROSS et al. v. CITY OF LONG BEACH.
L. A. 18674.

Supreme Court of California.
May 2, 1944.

1. Constitutional law ⚷12

Courts cannot add provisions to what Constitution declares in definite language.

2. Constitutional law ⚷14
Taxation ⚷242(8)

The constitutional provision requiring taxation of all property not otherwise exempt and providing that property used exclusively for public schools shall be exempt from taxation is free from ambiguity, requires no interpretation, and exempts all property used exclusively for public schools regardless of ownership. Const. art. 13, § 1.

3. Constitutional law ⚷14
Statutes ⚷190

Where a law is unambiguous, whether expressed in general or limited terms, legislature or framers of Constitution will be deemed to have intended to mean what they have plainly expressed and no room is left for construction.

4. Taxation ⚷242(8)

The fact that constitutional provision exempting from taxation "property used exclusively for public schools" was in original Constitution adopted in 1879, that it has been readopted without change, and that other sections subsequently adopted exempting church property and orphanages from taxation expressly provide that no rented property for which rent is received by owner shall be exempt from taxation emphasizes intent of framers of Constitution to exempt from taxation property in private ownership leased to school district and used exclusively for public schools. Const. art. 13, §§ 1, 1½, 1½a.

5. Taxation ⚷242(8)

The constitutional exemption from taxation of property used exclusively for public school purposes is not for benefit of private owner who may rent his property for such purpose, but for advantage of school district that may be compelled to rent property rather than to buy land and erect buildings thereon to be used for maintenance of its school. Const. art. 13, § 1.

6. Taxation ⚷242(8)

Property leased to school district for school purposes is exempt from taxation as "property used exclusively for public schools" within constitutional provision exempting such property from taxation, though owner derives revenue therefrom. Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Used Exclusively for Public School".

7. Landlord and tenant ⚷7, 183, 200(1)

Ordinarily, occupancy of premises by one person with consent of owner creates relation of landlord and tenant, and in absence of an understanding to contrary implies an agreement by tenant to pay a reasonable rent for such occupation. Code Civ.Proc. § 1963, subd. 20.

8. Evidence ⚷69

It is presumed that in business transactions between individuals the ordinary course of business has been followed. Code Civ.Proc. § 1963, subd. 20.

9. Taxation ⚷242(8)

Under constitutional provision exempting from taxation property used exclusively for public schools, it is the use, not the ownership, of property in possession of a school district that determines its status as property exempt from taxation. Const. art. 13, § 1.

TRAYNOR, J., dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Edna E. Ross and another against the City of Long Beach to recover taxes paid under protest. From a judgment for plaintiff after the overruling of a demurrer to the complaint, defendant appeals.

Affirmed.

Prior opinion, 138 P.2d 394.

Irving M. Smith, City Atty., and Joseph B. Lamb and Frank C. Charvat, Deputy City Attys., all of Long Beach, for appellant.

J. H. O'Connor, County Counsel, and Gordon Boller, Deputy County Counsel, both of Los Angeles, amici curiae on behalf of appellant.

W. Ward Johnson and Frederic A. Shaffer, both of Long Beach, for respondent.

CURTIS, Justice.

This is an appeal from a judgment in favor of the plaintiffs after the overruling of a general demurrer to plaintiffs' complaint. The defendant was given time in which to answer the complaint, but failed to do so with the result that judgment was entered against it on January 15, 1943, and the appeal now before us is from said judgment.

The action was brought to recover taxes alleged to have been illegally levied upon real property belonging to plaintiffs and paid by them under protest. The property involved is certain property situated in the city of Long Beach and the improvements thereon.

It is alleged in the complaint "that there is now, and at all times herein mentioned has been, located upon said real property a building, and the entire premises, both said real property and building, are now and at all times herein mentioned, and ever since February 28, 1941, have been exclusively possessed and occupied by Long Beach City High School District of Los Angeles County, California, and during all such times said premises have been used exclusively as and for a public school."

It is plaintiffs' contention that said property is exempt from taxation under the provisions of section 1 of article XIII of the Constitution of this state. Said section of the Constitution in part provides that "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed * * *. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; * * * *provided,* that property used for free public libraries and free museums, growing crops, *property used exclusively for public schools,* and such as may belong to the United States, this State, or to any county, city and county, or municipal corporation within this State *shall be exempt from taxation.*" (Italics ours.)

[1] It will be noted that under this section of the Constitution, property which is exempt from taxation is divided into two separate and distinct classes, that is, "property used exclusively" for certain purposes including "public school purposes," and property "as may *belong* to the United States," and other governmental bodies. The contention is made and supported by some authorities that if property is in private ownership but rented to a school district, and the district occupies it and is in physical possession of the whole of said property and uses it for school purposes and for no other purpose, still said property is not exempt under said constitutional provision for the reason that it is owned by a private individual, and by the owner rented or leased to the school district. To so construe the constitutional provision would tend to eliminate the main distinction between the two classes of property enumerated therein. In order to so construe this provision of the Constitution it would be necessary to insert therein the words "which may belong to a school district" or words of similar import, so that the clause respecting property used for public school purposes would read "property which may belong to a school district and used exclusively for public school purposes." To insert these suggested words into this section of the Constitution would give to it an added meaning not to be found in the definite language of the section as adopted by the people. "Courts are no more at liberty to add provisions to what is declared [in the Constitution] in definite language, than they are to disregard existing express provisions [of the Constitution]." 5 Cal.Jur. 599; People v. Campbell, 138 Cal. 11, 15, 70 P. 918.

[2] As we read the section of the Constitution above quoted in part, we find nothing therein which is either uncertain or ambiguous or calls for construction or interpretation. It clearly provides that property which belongs to the United States, the state, county, city and county or municipal corporation in the state, is exempt from taxation, and it just as clearly provides that property used exclusively for certain purposes, including public schools, is also exempt from taxation. This section of the Constitution was before this court in the case of Anderson-Cottonwood I. Dist. v. Klukkert, 13 Cal.2d 191, 192, 88 P.2d 685, 686. In that case this court stated the problem in the following language: "Basically, the merits of the cause are determinable from a consideration of the pertinent provisions that are contained within

section 1 of article 13 of the Constitution of this state. Therein, it is provided that '* * * property *used* for free public libraries and free museums, growing crops, property *used* exclusively for public schools, and such *as may belong to* the United States, this state, or to any county, city and county, or municipal corporation within this state shall be exempt from taxation, * * *.' (Italics added.)" It was there contended that this provision of the Constitution in certain respects was ambiguous and should be construed by the court. In considering this contention the court following the decision in San Francisco v. McGovern, 28 Cal.App. 491, 152 P. 980, held (page 196 of 13 Cal.2d, page 688 of 88 P.2d): "We find ourselves unable to discover, from the language employed in the Constitution [art. 13, sec. 1], any reason for interpretation, or ground for entertaining doubt as to its meaning. The language employed in classifying the property declared to be exempt from taxation, it will be noted, limits the exemption as to property *used* for free public libraries and free museums and property *used* for public schools, but the language following is: 'And such (property) as may *belong* to the United States, this state, or to any county or municipal corporation within this state shall be exempt from taxation.'"

[3] "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature (or framers of a Constitution) should be intended to mean what they have plainly expressed, and consequently, no room is left for construction. Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere." San Francisco v. McGovern, 28 Cal.App. 491, 499, 152 P. 980, 984, quoting from State v. McGough, 118 Ala. 159, 24 So. 395.

[4] It is further suggested that the intent of the framers of the Constitution, and of the people in adopting it, to exempt from taxation property in private ownership and leased to a school district and used by the district exclusively for public schools, is emphasized by reason of subsequent enactments of said section of the Constitution without amendment, while similar constitutional exemptions were subsequently made respecting other and different classes of property and by such subsequent enactments it was expressly provided that no property so used which may be rented and the rent received by the owner therefor shall be exempt from taxation.

Section 1 of article XIII was in the original Constitution adopted in 1879. This section was readopted with certain amendments in 1894, 1910, and 1914, but the provision exempting property used exclusively for public schools from taxation was retained without any change whatever. Subsequently section 1½ of article XIII, exempting church property from taxation, was adopted in 1900, and section 1½a, exempting orphanages, was adopted in 1920. Each of these subsequently adopted sections expressly provides that no property "so used" which may be rented and the rent received by the owner therefor shall be exempt from taxation. We may well infer from a consideration of these three sections of the Constitution, each providing for the exemption of a certain class of property, as two of them contain an express exception of property where rented and the owner thereof receives the rent, and the other of the three sections contains no such exception, that a different rule is to be applied in one case from that which would control in the other. In other words, by section 1 of article XIII property used exclusively for public school purposes is declared exempt from taxation, while under sections 1½ and 1½a church property and property used as an orphanage are declared exempt from taxation only when not rented from a private owner who receives rent for the use of his property.

[5] Evidently the framers of the Constitution in making the exception in favor of property used exclusively for public school purposes had in mind the great benefits derived from our educational institutions and desired to relieve them from the burden of taxation. The history of this state shows that it has been the steadfast policy of the people of the state to encourage in every possible way the cause of education. The exemption of property used for public school purposes is not for the benefit of the private owner who may rent his property for said purpose, but for the advantage of the school district that may be compelled to rent property rather than to buy land and erect buildings thereon to be used for the maintenance of its school. With this advantage the school district is able to rent property for a lower rental than the owner of the same property would

be willing to accept from a private individual, for the reason that if rented to a school district the owner is relieved from the payment of taxes thereon. On the other hand, if there is no exemption from taxation of property in private ownership but rented to a school district and by it used exclusively for public school purposes, then a school district, when finding it necessary to rent property to be used in the work of maintaining its school, must compete with private persons and pay the same or higher rental than private persons would pay in order to secure property of the same kind and character.

[6] We conclude therefore that the property involved herein is property used exclusively for public school purposes and is thus exempt from taxation. In the consideration of the question now before us, we are assuming that the real property of the plaintiffs has been rented or leased by them to the school district for a monetary consideration, and that the school district is not using the same free of rent. The complaint is silent on this question, and we are controlled entirely by the facts alleged therein. Of course, the plaintiffs would be in a much more advantageous position were they permitting the school district to use their property without the payment of rent. Were that the situation between the parties, we would expect that fact to be set forth in the complaint. Not being alleged, we assume that it does not exist.

[7, 8] Furthermore, in the ordinary course of business the occupancy of premises by one person with the consent of the owner creates the relation of landlord and tenant, and in the absence of an understanding to the contrary, implies an agreement on the part of the tenant to pay a reasonable rent for such occupation. 32 Am.Jur. p. 349. It is presumed that in business transactions between individuals the ordinary course of business has been followed. Code Civ.Proc. § 1963, subd. 20. We are making this situation clear, as we desire it to be definitely understood that our opinion in this case is not based on any assumption or on any uncertain supposition that the school district is in the possession and is enjoying the use of the property free of rent.

Appellant and amicus curiae take the position, relying principally upon certain decisions of other jurisdictions, that the property in question is not exempt from taxation for the reason that, as they construe said constitutional section, it is not "used exclusively for public school purposes." They concede that the school district is in the exclusive physical possession of the entire property and is actually using the whole thereof for public school purposes. However, they take the position that such possession and such use of the property by the school district does not bring it within the terms of the Constitution declaring that property "used exclusively for public school purposes" is exempt from taxation. They contend that there is a further and additional use of said property than that for which the school district uses it, and that is the use by the private owner who rents it for the purpose of deriving revenue therefrom. In this contention they cite and claim that they are supported by the decisions of a number of courts of other jurisdictions. Travelers' Ins. Co. v. Kent, 151 Ind. 349, 50 N.E. 562, 51 N.E. 723; People v. City of Chicago, 323 Ill. 68, 153 N.E. 725; Turnverein "Lincoln" v. Board of Appeals, 358 Ill. 135, 192 N.E. 780; State ex rel. Hammer v. Macgurn, 187 Mo. 238, 86 S.W. 138, 2 Ann.Cas. 808; South Dakota Sigma Chapter House Ass'n v. Clay County, 65 S.D. 559, 276 N.W. 258; Norwegian Lutheran Church v. Wooster, 176 Wash. 581, 30 P.2d 381.

The cases from the Supreme Courts of South Dakota and Washington and Turnverein "Lincoln" v. Board of Appeals from the Supreme Court of Illinois are easily distinguishable from the present case. The cases from the Supreme Courts of Missouri and Indiana and People v. City of Chicago from the Supreme Court of Illinois may be said to support the position of the appellant and amici curiae. As against these authorities the respondents cite the following cases which appear to be in point and sustain their position: State v. Alabama Educational Foundation, 231 Ala. 11, 163 So. 527 and two prior decisions from the same state; Washburn College v. Board of Com'rs of County of Shawnee, 8 Kan. 344; Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N.W. 624; Gerke v. Purcell, 25 Ohio St. 229.

The opinion in the case of Washburn College v. County of Shawnee, supra, was written by Mr. Justice Brewer, who later became a member of the United States Supreme Court. We find the following paragraph from the opinion, which we quote: (8 Kan. 349) "To bring this property within the terms of the section quoted it must be 'used exclusively for literary and educational purposes.' This involves three things, first, that the property is used; second, that it is used for educational purposes; and third, that it is used for no other purpose. * * * Nor is ownership evidence of use. * * * This is too plain to need either argument or illustration. If the framers of the constitution had intended to exempt all property belonging to literary and charitable institutions from taxation, the language employed would have been very different. They would have used the simple, ordinary language for expressing such intention. The fact that they ignored 'ownership,' and made 'use' the test of exemption, shows clearly that they recognized the essential distinction between the two, and established the latter rather than the former as the basis of exemption."

In Scott v. Society of Russian Israelites, supra, it is concisely stated (59 Neb. page 573, 81 N.W. page 625): "To hold that a religious society must be the absolute owner of the property occupied or used by it exclusively for church purposes, to create the exemption, would be to inject words into the constitution and statute which are not therein written. This we have no power to do."

[9] It thus appears that the authorities from other jurisdictions are in conflict. To hold, however, with the appellant and follow the authorities cited by it and amici curiae, it would be necessary for us to construe the constitutional section of our state as requiring property used by a school district for public school purposes not only to be solely used by the district but also to be owned by the district before it would be exempt from taxation. As previously stated in this opinion, we are not able to so construe the applicable section of our Constitution. On the other hand, we are in accord with the decisions of those courts in other jurisdictions, as well as in our own, which hold that it is the *use* and not the *ownership* of the property in the possession of a school district and used by it for public school purposes that determines its status as property exempt from taxation.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice.

It is the established rule in this state that no property shall be exempt from taxation unless the Constitution clearly makes it exempt. Tax exemption provisions are therefore strictly construed. Cypress Lawn Cemetery Association v. San Francisco, 211 Cal. 387, 390, 295 P. 813; City and County of San Francisco v. Pacific Telephone & Telegraph Co., 166 Cal. 244, 135 P. 971; Bay Cities Transportation Co. v. Johnson, 8 Cal.2d 706, 68 P.2d 710. It is to be noted that section 1 of article XIII of the California Constitution does not exempt all property *owned* by a public school district, as it does property owned by the United States, the state, counties, and municipal corporations. The school property exempted is limited to that used exclusively for public schools. It is my opinion that in so wording the section, the framers of the Constitution did not intend to accord greater tax exemption privileges to school districts than to the United States, the state, counties, and municipal corporations, and certainly did not intend to exempt from taxation privately owned property. On the contrary, by setting apart school property from that of the other public bodies and making its exemption dependent on its use for public schools, they intended to provide for the taxation of any property belonging to school districts but not used exclusively for public schools.

The constitutional provisions relied upon by plaintiffs exempt "*property* used exclusively for public schools." (Italics added.) The word "property" includes all of the interests and estates therein. There is a recognized distinction in the several interests that may exist in property, and this court has sanctioned their separate consideration for purposes of taxation. Pacific Wharf & Storage Co. v. County of Los Angeles, 180 Cal. 31, 179 P. 398; San Pedro, etc., R. R. Co. v. Los Angeles, 180 Cal. 18, 179 P. 393; Central Manufacturing Dist. Inc. v. State Board of Equalization, 214 Cal. 288, 5 P.2d 424; Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 20 L.R.A.,N.S., 211; Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 285 P. 896; Hammond Lumber Co. v. City of Los Angeles, 12 Cal.App.2d 277, 55 P.2d 891. It follows that the property is not tax exempt unless all interests in the property, including the lessor's interest, are used exclusively for public schools.

Even if the interest of the lessee school district is used exclusively for public schools, it does not follow that the interest of the lessor who has rented his property for private gain is so used. The lessor, like any other lessor of commercial property, uses his interest in the property, not for public schools, but for the ordinary commercial use of producing income. In re South Dakota Sigma Chapter House Ass'n v. Clay County, 65 S.D. 559, 276 N.W. 258; State ex rel. Hammer v. Macgurn, 187 Mo. 238, 86 S.W. 138, 2 Ann.Cas. 808; Jefferson Standard Life Ins. Co. v. City of Wildwood, 118 Fla. 771, 160 So. 208; Travelers' Ins. Co. v. Kent, 151 Ind. 349, 50 N.E. 562, 51 N.E. 723; Spohn v. Stark, 197 Ind. 299, 150 N.E. 787; Norwegian Lutheran Church v. Wooster, 176 Wash. 581, 30 P.2d 381; Laurent v. City of Muscatine, 59 Iowa 404, 13 N.W. 409; see Carteret Academy v. State Board of Taxes, 102 N.J.L. 525, 133 A. 886. The removal of such property from the tax rolls serves only to increase the tax burden on other property to meet the costs of government that would otherwise be met by taxes on the exempted property.

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64 Cal.App.2d 314

PEOPLE v. SAVAGE.

Crim 3772.

District Court of Appeal, Second District, Division 2, California.

May 9, 1944.

Poisons 🔑4

Defendant who admitted that cigarettes found on him contained marijuana, admitted that cigarettes contained a narcotic referred to in statute making illegal possession of certain narcotics an offense, since "marijuana" is synonymous with "Indian hemp" or "cannabis sativa" referred to in statute. St.1940, 1st Ex. Sess., pp. 17, 18, §§ 11001, 11003; St.1941, p. 2820, § 11160.

See Words and Phrases, Permanent Edition, for all other definitions of "Cannabis Sativa", "Indian Hemp" and "Marijuana".

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Clay A. Savage was convicted of violating section 11160 of the Health and Safety Code, St.1941, p. 2820, pertaining to narcotics, and he appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for defendant and appellant.

Robert W. Kenny and T. G. Negrich, both of San Francisco, for plaintiff and respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 11160 of the Health and Safety Code, St.1941, p. 2820, pertaining to narcotics after trial before a jury, defendant appeals.

Viewing the evidence in the light most favorable to the People (respondent), the essential facts are:

Between eleven and twelve p.m. on June 12, 1943, Los Angeles Police Officers entered a two-story building located at 169 East 35th Street, Los Angeles. There they saw defendant and proceeded to search his clothing. One of the officers ran his hand underneath defendant's belt and an object slipped from the vicinity of defendant's right hip and fell to the floor. The officer picked up the object and found it to be a cigarette. Thereafter the officer took defendant to another room in the same house where was found a second cigarette under a bed and a third cigarette beneath a dressing table. Defendant stated to the officer that the first cigarette mentioned above he knew contained marijuana which was given to him by a friend. When asked regarding the other two cigarettes found on the premises, defendant made no reply. At the trial defendant stipulated that the cigarettes contained marijuana.

This is the sole question necessary for us to determine:

Is marijuana synonymous with Indian Hemp (cannabis sativa)?

This question must be answered in the affirmative. Marijuana (variants: mariahuana, marajuana, maraguana, marihuana, and mariguana) is another name for Indian Hemp (cannabis sativa). (See section 11003, Health and Safety Code, St.1940, 1st Ex.Sess. p. 17; Vol. 2, Webster's New International Dictionary, 2d Ed. 1939, page 1503; State v. Navaro, 83 Utah 6, 26 P.2d

955, 956 et seq; Fawcett v. State, Tex.Cr. App., 127 S.W.2d 905, 906; State v. Economy, 61 Nev. 394, 130 P.2d 264, 269.

Since defendant admitted that the cigarette found on him contained marijuana, he admitted that it contained cannabis sativa which is a narcotic referred to in sections 11160 and 11001 of the Health and Safety Code.

The judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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64 Cal.App.2d 340

PAGE v. MILLER et al.

Civ. No. 3140.

District Court of Appeal, Fourth District, California.

May 11, 1944.

Venue 🔑68

In action against individual and corporation to recover real estate commission, motion of individual for change of venue to county of his residence was properly denied where pleadings, instruments and counter affidavits showed plaintiff maintained office in county of suit, that land was situated in such county, that contract was executed in such county and was to be performed in such county. Code Civ.Proc. § 395.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Z. E. Page against Mervin Miller and another to recover a real estate commission. From an order denying a motion for a change of venue, defendant named appeals.

Affirmed.

C. W. Braswell, of Long Beach, for appellant.

John T. Fuller, of Portersville, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion for a change of venue.

The action is one to recover a real estate commission and was filed in the Superior Court of Tulare County. The complaint named as defendants Mervin Miller, and Mervin Miller Incorporated, Ltd., a corporation. Among other things it set forth a copy of a written instrument signed by Mervin Miller authorizing the plaintiff to sell certain real property situated in Tulare County and agreeing to pay a commission therefor. It was also alleged that Mervin Miller executed this contract both in his individual capacity and as the agent of the corporate defendant.

Each defendant filed a demurrer and the individual defendant moved to change the place of trial to Orange County on the ground that he was and is a resident of that county and that Tulare County is not the proper county for the trial of the action. In support of this motion he filed affidavits alleging that he was and is a resident of Orange County and that he was not an officer of the defendant corporation and was not authorized to make any contract in its behalf. After a hearing the court denied the motion and he has appealed.

It may first be observed that while a conflict appears with respect to whether the appellant was authorized to make a contract for the corporate defendant no attempt was made to show that the principal place of business of the corporate defendant was not in Tulare County.

Irrespective of any question as to the residence of the parties no attempt was made by the appellant to show that Tulare County was not the proper place for the trial of this action for another reason, and that such was the situation amply appears from the showing made by the respondent. It appears from the verified complaint that the plaintiff maintained his office in the County of Tulare and that the land to be sold was situated in that county. The written instrument discloses that the land to be sold was in Tulare County and there is nothing therein to indicate that it was not executed in that county. A counter-affidavit filed by the respondent alleges that this contract was entered into in Tulare County; that the obligation was incurred in that county; that the contract was to be and was actually performed in that county; and that no further or additional contract was ever entered into with respect to the place of performance. These facts were not denied and there was no showing of any kind in opposition to them.

Upon the facts shown, and under the plain provisions of section 395 of the Code of Civil Procedure, Tulare County was a proper county for the trial of the action and the motion was properly denied by the trial court. Pacific Const. Finance Co. v. Kramer, 42 Cal.App.2d 190, 108 P.2d 723; Limited Mut. Comp. Ins. Co. v. Curtis, 45 Cal.App.2d 507, 114 P.2d 404; Armstrong v. Smith, 49 Cal.App.2d 528, 122 P.2d 115; Joe Lowe Corp. v. Rasmusson, 53 Cal.App.2d 490, 127 P.2d 1002.

The order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

64 Cal.App.2d 244

BLUME v. MacGREGOR et al.
HARTLEY et al. v. BLUME.

Civ. 12376.

District Court of Appeal, First District, Division 2, California.

May 5, 1944.

As Corrected on Denial of Rehearing June 3, 1944.

Hearing Denied June 29, 1944.

1. Pleading 🔑147

In action involving land as the subject matter, a cross-complaint affecting that land and also other land may properly be filed where the cause of action set up therein affects such other land and that described in complaint as a unit, or in such manner that one cannot be separated from the other without prejudice to the parties filing the cross-complaint.

2. Trial 🔑4

In action in ejectment, where part of defendants filed cross-complaint to quiet title, issues raised by cross-complaint, being equitable, were properly tried first.

3. Trial 🔑4

In action in ejectment, where part of defendants filed cross-complaint to quiet title, and issues raised by cross-complaint were first tried by court, the court acted properly in not signing the findings and entering judgment on cross-complaint before trying legal issues raised by complaint.

4. Trial 🔑2

Issues between same parties in same litigation should not be decided piecemeal, but should all be settled by one set of findings and one judgment.

5. Deeds 🔑90

Interpretation must be given to a deed as to make it effective rather than to defeat it. Civ.Code, § 3541.

6. Deeds 🔑101

A deed indefinite in terms may be made certain by conduct of parties acting under it.

7. Deeds 🔑38(1)

An omission of part of boundaries or calls is not fatal to validity of deed, where such boundaries or calls can be supplied or description rendered certain.

8. Deeds 🔑38(1)

If description in deed is indefinite, as by omission of a line, a statement of the quantity may help to locate the boundaries.

9. Boundaries 🔑6

In order to determine what land was intended to be described in case of ambiguity in deed, the description may be read by reversing the courses.

10. Deeds 🔑38(1)

In general, if a competent surveyor can take deed and locate land on ground from description contained therein, with or without aid of extrinsic evidence, the description will be held to be sufficient.

11. Stipulations 🔑14(7)

In action involving title to strip of land adjoining railroad right of way, where letter signed by chief engineer of railroad contained references to books and pages at which deeds were recorded, and references corresponded to books and pages at which deeds, allegedly containing defective descriptions were recorded, and letter was admitted by stipulation, letter, though hearsay, was competent evidence that the railroad traced its record title to the strip involved to the deeds referred to.

12. Pleading 🔑126

In ejectment action, wherein cross-complaint to quiet title was filed, complaint expressly excluded, from property which plaintiff alleged that he owned in fee, any land described in certain deed, and court found that strip in issue was described in such deed, admission, implicit in the negative pregnant, in answer, which denied that plaintiff was owner in fee of property described in complaint, was that plaintiff was owner, other than in fee, of land described in complaint, expressly excluding therefrom by allegations of complaint any portion of the strip involved.

13. Pleading 🔑114

It is not necessary, in order to constitute a good traverse, that it should be expressed in negative terms, and it is sufficient if matters set forth in answer are contrary to what is charged in the complaint.

14. Evidence 🔑16

Where first course in description of railroad right of way conveyed by deed read: "North 70′ east twenty (20) feet up Cordonices Creek," court could take judicial notice that it is not customary to write "70′," but if "70′" was actually intended, it would be written "1° 10′."

15. Railroads 🔑67(1)

Where first course in description of railroad right of way conveyed by deed read "North 70′ east twenty (20) up Cordonices Creek," trial court was justified in view of all facts in treating "70′" as clerical misprision for "70°" and in construing the first course accordingly.

16. Appeal and error 🔑1073(1)

Where some of defendants occupied part of railroad right of way, recognizing that their use was subordinate to right of railroad and by its sufferance, and title of railroad was not involved, failure of court to give plaintiff judgment ejecting such defendants from the portions of the right of way occupied by them was not prejudicial to plaintiff.

17. Ejectment 🔑95(1)

Generally, a plaintiff in ejectment makes a prima facie case by evidence connecting defendant with a common source of title and proving in himself a better title from that source.

18. Quieting title 🔑44(4)

In ejectment, wherein cross-complaint to quiet title was filed, cross-complainants proved chains of title to themselves and to plaintiff from a common source, and a superior title in themselves from such common source, cross-complainants established a prima facie case for recovery.

19. Ejectment 🔑86(3)
Quieting title 🔑44(1)

Generally, where both parties derive title from a common source, the burden is placed upon party having inferior title from the common source, if he relies upon title from another independent source, to prove that title acquired from independent source is paramount to title in the common source.

20. Ejectment 🔑86(3)
Quieting title 🔑44(1)

In ejectment wherein cross-complaint to quiet title was filed, cross-complainants proved chains of title to themselves and to plaintiff from a common source and a superior title in themselves from such common source, fact that cross-complainants also introduced a deed tending to show title in plaintiff from another independent source did not relieve plaintiff of burden of proving that title acquired from independent source was paramount to title in the common source.

21. Adverse possession 🔑114(3)

Evidence regarding cross-complainants' adverse possession under color of title for prescriptive period was sufficient to justify judgment quieting title in cross-complainants. Code Civ.Proc. §§ 323–325.

22. Adverse possession 🔑20

The preparation of a block for building, at a time when party making the preparation had color of title to block as a whole, by dumping loose soil on portions thereof and filling in low places to make the entire block level, was sufficient occupancy to support finding that it started period of adverse possession running in favor of such party. Code Civ.Proc. §§ 323–325.

23. Adverse possession 🔑20, 21

It is sufficient to establish "adverse possession," even where entry is not under color of title, that the land be cultivated or improved in the manner or to the extent usual in case of similar property. Code Civ.Proc. §§ 323–325.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Possession".

24. Adverse possession 🔑17, 20

In the case of unimproved town property, the preparation of that property for building of residence buildings thereon, the construction of such buildings without undue delay, and their occupancy for dwelling purposes when completed is sufficient to establish "adverse possession". Code Civ.Proc. §§ 323–325.

25. Adverse possession ⚷20

"Actual possession" may be denoted by making of improvements which are permanent in their nature, are usual in case of similar property, and are such as to indicate exclusive management and control, rather than a mere temporary trespass.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Possession".

26. Adverse possession ⚷44

Where construction of residence buildings on unimproved town property was relied upon to establish adverse possession, fact that buildings in some instances might not have been occupied continuously after their completion would not, standing alone, destroy continuity of the possession, so long as there was no intrusion by any other person upon land or disturbance of claimants' possession thereof. Code Civ. Proc. §§ 323–325.

27. Deeds ⚷115

Where description in deed commenced on the "westerly" line of a certain avenue, but consideration of rest of description showed that "westerly" should be read "easterly," the trial court properly so treated the description.

28. Appeal and error ⚷1050(1)

Where judgment was amply supported without reference to judgment admitted in evidence, error, if any, in admitting such evidence, was not prejudicial.

◆

Appeal from Superior Court, Alameda County; Andrew R. Schottky, Judge.

Action in ejectment by N. A. Blume against C. M. MacGregor and others and Robert E. Hartley and others, wherein Robert E. Hartley and others filed a cross-complaint seeking to quiet title to 14 separate lots improved with residence buildings. From an adverse judgment, N. A. Blume appeals.

Affirmed.

Prior opinion, 144 P.2d 375.

Robert E. Knowlden, of Berkeley, and Johnson & Harmon, of San Francisco, for plaintiff-appellant and cross-defendant-appellant.

McKee, Tasheira & Wahrhaftig, Ridley Stone, and T. P. Wittschen, all of Oakland, for defendants and respondents.

DOOLING, Justice pro tem.

Through the town of Albany, in Alameda County, runs a railroad right of way 40 feet in width, occupied and used since shortly after 1900, at the very least, by the Atchison, Topeka and Santa Fe Railway Co. as a part of its main line in that section. The Santa Fe, to give the railway company its popular name, claims title to this strip of land by mesne conveyances through deeds originally executed in 1884 to California and Nevada Railroad Company by Pacific Improvement Company as to an undivided two-thirds and by Maria Hall as to an undivided one-third, respectively. The descriptions in these two deeds of 1884, which were in identical terms, are patently incomplete upon their face. In these incomplete descriptions lay the hardy seeds of future litigation which, after lying dormant and apparently unnoticed for over fifty years, finally germinated and bore fruit in the instant action.

The action commenced with the filing of a complaint in ejectment by plaintiff and appellant Blume against defendants and respondents. This complaint, for reasons which may be readily surmised and will later become apparent, was adroitly drawn to cast doubt upon the defendants' title to a ten-foot strip of land immediately adjoining the above-mentioned Santa Fe right of way, without making a frontal attack upon such title. This was done by alleging that plaintiff is the owner in fee of a larger parcel of land described so as to include the Santa Fe right of way and all of said ten-foot strip except a small portion thereof two one-hundredths of a foot wide and then expressly excepting from this description any and every part of the property before described "which is described in the deed from Berkeley Development Company to C. M. MacGregor dated December 17, 1925." The real claim of plaintiff, although not in express terms alleged in the complaint, was that the description in the 1925 deed from Berkeley Development Company to MacGregor was defective because it tied in by reference as its easterly boundary to the strip of land granted in 1884 by Pacific Improvement Company to California and Nevada Railroad Company, and the 1884 description in turn was so defective that it could not be located on the ground. The description in this deed to MacGregor had been copied verbatim into the judgment quieting MacGregor's title to this ten-foot strip, which judgment was affirmed in MacGregor v. Knowlden, 102 Cal.App. 42, 282 P. 438. (The ten-foot strip involved in this action is a part of parcel 3 discussed by this court in MacGregor v. Knowlden, supra, 102 Cal. App. commencing at page 49, 282 P. at page 441.) The effect of the description as pleaded in the complaint herein was therefore to cast doubt by the same method of indirection upon the sufficiency of the judgment affirmed in MacGregor v. Knowlden, supra, to describe or quiet title to any property in MacGregor.

We may pause here to note that one of the defendants in MacGregor v. Knowlden, supra, appears in the present action in the dual capacity of one of the attorneys for plaintiff Blume and a grantor of the plaintiff. The judgment in MacGregor v. Knowlden, supra, enjoined the defendants and all persons claiming under them from claiming or ascertaining any interest in the property as to which MacGregor's title was thereby quieted. The record makes clear the fact that contempt proceedings had at some time been instituted against this attorney for violating the terms of this injunction and on the trial of this action at one stage of the proceedings he objected to answering questions concerning his connection with the deeds to his client, Blume, giving as one ground of his objection to doing so, to quote: "I don't know what he has in mind here, whether he is attempting to lay a foundation to have Mr. Blume declared in contempt I don't know, but if he has, I think it is highly improper for him to go into it." We have no doubt that the unusual manner of pleading the description of the property involved in the complaint was in the effort to avoid having either this attorney or his client run any risk of further contempt proceedings based upon their prosecution of the present action. This they sought to do by describing the property so as to include most of the ten-foot strip and then excluding therefrom any property included in the 1925 deed to MacGregor. If the ten-foot strip was found to be included in that deed (and hence in the judgment in MacGregor v. Knowlden, supra) they could not be in contempt because their complaint expressly excluded it from the property in litigation. If they succeeded in convincing the court that the 1925 deed to MacGregor did not describe the ten-foot strip they could not be in contempt because it would then not be described in the judgment in MacGregor v. Knowlden, supra.

Against the complaint so drawn defendants and respondents were compelled to join issue, since if they defaulted or disclaimed the cloud thus cast upon their title could only be removed by subsequent litigation. Fourteen sets of defendants joined in a cross-complaint to quiet title to fourteen separate lots improved with residence buildings. In each count of this cross-complaint it was alleged that the lot therein described was improved with a dwelling house, that the rear ten feet of each lot was involved in the ejectment action and, by amendment, that a portion of each dwelling house was constructed on the ten-foot strip and that each dwelling occupies almost all of said lot including the ten-foot strip as an integral part thereof.

[1] Appellant, relying on Pacific Palisades Ass'n v. Menninger, 219 Cal. 257, 26 P.2d 303, and similar cases, claims that it was improper to allow cross-complainants to seek to quiet title to property not described in his complaint. It is clear that the allegations of this cross-complaint bring it within the rule recently so plainly stated in People v. Buellton Development Co., 58 Cal.App.2d 178, 189, 136 P.2d 793, 799, in the following language:

"But it is well established that in an action involving land as its subject matter, a cross-complaint affecting that land and also other land may properly be filed, where the cause of action set up therein affects such other land and that described in the complaint as a unit, or in such manner that one cannot be separated from the other without prejudice to the party filing the cross-complaint." Cf. the cases cited on pages 189 and 190 of 58 Cal.App.2d, on page 799 of 136 P.2d in support of the quoted statement.

[2-4] The issues raised by the cross-complaint, being equitable, were properly tried first. Thomson v. Thomson, 7 Cal.2d 671, 682, 62 P.2d 358, 117 A.L.R. 1. The court was right in not signing findings and entering judgment on the cross-complaint before trying the legal issues raised by the complaint. Issues between the same parties in the same litigation should not be decided piecemeal, but should all be settled by one set of findings and one judgment.

De Vally v. Kendall de Vally O. Co., Ltd., 220 Cal. 742, 745, 746, 32 P.2d 638; Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. 557, 577, 33 P. 633.

The final judgment denied appellant any relief and quieted cross-complainants' title to the several lots described in the cross-complaint. The true issue as to the ten-foot strip, as developed at the trial, arose from the fact that the description of the land conveyed in 1884 by Pacific Improvement Company to California and Nevada Railroad Company omitted certain courses and distances and if followed literally described an irregular parcel varying in width from approximately 14 feet at its narrowest, to over 80 feet at its widest, and would only close by drawing an arbitrary line from the end of the last course given to the point of beginning. The omission of certain courses and distances by the scrivener is graphically illustrated by the following table, in which the northerly and southerly calls are placed in parallel columns with dashes inserted where the southerly calls corresponding to certain northerly calls have been omitted:

Read Down	Read Up
N. 70° E. 20 ft. along center of Cordonices Creek; thence from said center:	N. 70° E. 20 ft. to point of beginning.
N. 20° W. 494 ft.	S. 20° E. 494 ft.
N. 19° W. 99 ft.	S. 19° E. 101 ft.
N. 17° W. 99 ft.	S. 17° E. 100 ft.
N. 15¼° W. 74 ft.	S. 15¼° E. 76 ft.
N. 14½° W. 3425 ft.	S. 14½° E. 3425 ft.
N. 8½° W. 100 ft.	S. 8½° E. 100 ft.
N. 14½° W. 400 ft.	——
N. 20½° W. 100 ft.	——
N. 14½° W. 300 ft.	S. 14½° E. 300 ft.
N. 15° W. 100 ft.	S. 15° E. 100 ft.
N. 16° W. 100 ft.	S. 16° E. 100 ft.
N. 17° W. 100 ft.	S. 17° E. 99 ft.
N. 18° W. 100 ft.	S. 18° E. 100 ft.
N. 19° W. 100 ft.	——
N. 20° W. 101 ft.	——
N. 21° W. 100 ft.	——
N. 22° W. 100 ft.	S. 22° E. 100 ft.
N. 23° W. 101 ft. to center of Cerritos Creek	S. 23° E. 99 ft.
S. 66½° W. 40 ft. (along center of Cerritos Creek).	

In view of the fact that this 1884 conveyance was expressed to be of "a strip of land" and "for the right of way of its (grantee's) railroad", the missing courses and distances fairly suggest themselves on the face of the deed, bearing in mind the well-known fact that railroad rights of way are commonly strips of land of a uniform width. In any event the evidence shows that by starting at a point in Cordonices Creek where the center of the existing right of way actually occupied by the Santa Fe crosses said creek and tracing the courses and distances of this 1884 deed, the northerly calls follow, with very slight variation, the easterly boundary of the forty-foot strip now used and claimed by the Santa Fe as its right of way; and by supplying the missing southerly calls on the westerly side and making them correspond to the appropriate northerly calls, the description so arrived at describes a strip of land of a uniform width of forty feet substantially following the boundaries of the Santa Fe right of way on the ground. An expert witness further testified that the strip so laid out contains 5.72 acres, as compared to 5.73 acres called for by the 1884 deed. It further appears that by starting at the end and tracing the calls backward to the first omitted call the calls so traced coincide with the line arrived at by supplying the missing calls.

The trial court found that "as to each and every of the fourteen parcels * * * the rear portion of each parcel consists of a ten foot strip of land immediately adjacent on the west and parallel to the railroad right of way commonly called the 'Santa Fe Right of Way' * * *." The above-recited evidence amply supports this finding, to which legal support is given by the following briefly summarized rules of law:

[5-10] Such interpretation must be given to a deed as to make it effective rather than to defeat it. Hall v. Bartlett, 158 Cal. 638, 642, 112 P. 176; 9 Cal.Jur. 258–9; Civ. Code, sec. 3541. A deed indefinite in terms may be made certain by the conduct of the parties acting under it. Pico v. Coleman, 47 Cal. 65; Schmidt v. Klotz, 130 Cal. 223, 62 P. 470; California Packing Corp. v. Grove, 51 Cal.App. 253, 257, 258, 196 P. 891; 9 Cal.Jur. 303; 18 C.J. 262, 279; 26 C.J.S., Deeds, §§ 93, 100, pp. 346, 360. An omission of part of the boundaries or calls is not fatal to the validity of a deed, where such boundaries or calls can be supplied or the description rendered certain. 26 C.J.S., Deeds, § 30, p. 220; 18 C.J. 185; Fortenberry v. Cruse, Tex.Civ.App., 199 S.W. 523; Ray v. Pease, 95 Ga. 153, 22 S.E. 190; Cornett v. Creech, Ky., 100 S.W. 1188; Myers v. Hatler, 121 Or. 332, 254 P. 355; Grisham v. Tate, Tex.Civ.App.,

35 S.W.2d 264; Thompson on Real Property, Perm.Ed., Vol. 6, sec. 3275, p. 446. If the description is indefinite, as by the omission of a line, then a statement of the quantity may help to locate the boundaries. 4 Cal.Jur. 404; 9 Cal.Jur. 314–5. In order to determine what land was intended to be described in case of ambiguity the description may be read by reversing the courses. 9 C.J. 169; 11 C.J.S., Boundaries, § 9, p. 549; Walsh v. Hill, 38 Cal. 481, 486. In general if a competent surveyor can take the deed and locate the land on the ground from the description contained therein, with or without the aid of extrinsic evidence, the description will be held to be sufficient. Best v. Wohlford, 144 Cal. 733, 738, 78 P. 293; Thompson v. McKenna, 22 Cal.App. 129, 132, 133 P. 512.

Appellant contends that there is nothing in the record to connect the right of way conveyed to California and Nevada Railroad Company in 1884 with the present right of way of the Santa Fe. On cross-examination of cross-complainants' witness Wilner counsel for appellant educed testimony tracing the Santa Fe's title to this strip back to California and Nevada Railroad Company. In addition counsel for appellant read into the record testimony of a witness, Prather, given on the trial of MacGregor v. Knowlden, supra. In consenting to the use of this testimony on the ground that the witness was dead counsel for respondents insisted that a map with letter attached which had been introduced as a part of Prather's testimony should go into evidence in this case. Mr. Wittschen (counsel for respondents) stated: "The letter from the Santa Fe is attached to the map. I want them both." He further stated that if the introduction of the letter was not agreed to he would be under the necessity of calling the writer thereof as a witness, and expressed the understanding that he too might be dead. After a running discussion Mr. Johnson (counsel for appellant) said: "If they want to put in the letter and map, that is all right." Pursuant to this stipulation letter and map were introduced. The map delineated the present Santa Fe right of way and the letter, signed by R. B. Ball, chief engineer of the Santa Fe, contained the following statement:

"Our deed record shows we have a width of 40 feet, a two-thirds interest in which is covered by deed recorded in Book 282, page 223, Records of Alameda County, the original of which is filed as our secretary's number 3974, and an undivided one-third interest by deed recorded in Book 284, page 91 of said County filed as our secretary's number 3975."

[11] The references to book and page correspond to the book and page at which the deeds from Pacific Improvement Company and Maria Hall to California and Nevada Railroad Company are respectively recorded. This letter, although hearsay, having been admitted by stipulation, is competent evidence to connect the present Santa Fe right of way with the two deeds of 1884 to California and Nevada Railroad Company. Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 518, 55 P.2d 859.

[12, 13] Appellant relies on a negative pregnant in the answer to support his claim of title to the portion of the ten-foot strip claimed by him. This is based on the fact that respondents denied that plaintiff "is the owner in fee" of the property described in his complaint. The insubstantiality of this contention is readily apparent by reference to the allegation attempted to be denied, but actually admitted, by the negative pregnant. The complaint, as earlier noticed, alleged that plaintiff "is the owner in fee" of a described tract, "Excepting and excluding therefrom: The part or portion, if any, of the above described property which is described in the deed from Berkeley Development Company, a corporation, to C. M. MacGregor, dated December 17, 1925 * * *." The effect of the negative pregnant was to admit the ownership by plaintiff of the land described in the complaint excluding therefrom any land included in the exception stated in the complaint. If, as the court found, the ten-foot strip in controversy was described in the deed from Berkeley Development Company to MacGregor its ownership by plaintiff was not alleged in the complaint and therefore not admitted by the negative pregnant. Furthermore the several counts of the cross-complaint were stated to be "as a further and separate defense, and as a * * * ground of cross-complaint." They severally alleged ownership in fee by the cross-complainants of the respective portions of the ten-foot strip claimed by each. Insofar as they were pleaded as a defense, they tendered the issue of ownership. "The rule is that it is not necessary, in order to constitute a good traverse, that

it should be expressed in negative terms. It is sufficient if the matters set forth in the answer are contrary to what is charged in the complaint." Watterson v. Owens River Canal Co., 167 Cal. 370, 371, 139 P. 804, 805; People v. Southern Pacific Co., 177 Cal. 555, 171 P. 294; Elliott v. Bertsch, 59 Cal.App.2d 543, 139 P.2d 332.

[14, 15] The first course in the description of the right of way in the 1884 deed from Pacific Improvement Company reads "north 70′ east 20 feet up Cordonices Creek." The closing course reads "north 70° east 20 feet to the point of beginning." A witness testified that it is not customary to write 70′, but if 70′ was actually intended it would be written "1° 10′." We might, without such evidence, take judicial notice that this is so. In the deed from Maria Hall the first call reads "70° " and not "70′." The court was justified in treating "70′ " as a patent clerical misprision for "70° ". 9 Cal.Jur. 301.

[16] The evidence showed that the cross-complainants by tacit sufferance of the Santa Fe raised some flowers and vegetables, and in some cases had some small greenhouses at the rear of their respective lots and inside of the railroad right of way. Appellant claims, by reason of the negative pregnant above discussed, that the court erred in not giving him judgment ejecting such respondents from the portions of the right of way so occupied. The evidence shows, as above outlined, that the Santa Fe has continuously occupied and used this strip of land for over 35 years under a chain of title tracing back to the 1884 deeds from Pacific Improvement Company and Maria Hall. Those 1884 deeds conveyed the land and not a mere easement. Appellant chose not to make the Santa Fe a party defendant. Cross-complainants herein claim no right or title to any part of this right of way, but recognize that such use as they are making of small parts thereof is subordinate to the rights of the Santa Fe and by its sufferance. Their casual occupancy makes them no more than implied licensees of the Santa Fe. So long as the Santa Fe continues to occupy the entire right of way to the exclusion of appellant we fail to see how appellant could gain any substantial rights by a judgment ejecting any of the respondents from trifling portions thereof. He has suffered no substantial prejudice in that respect which would justify a reversal.

[17] The trial court found in favor of the cross-complainants on their cross-complaint and gave them judgment quieting their title to the respective parcels claimed by them. The findings were of record title and also title by adverse possession. Appellant attacks the finding of record title because cross-complainants proved their title only to a common source of title with appellant. This they did by introducing deeds showing a chain of title to themselves and also one to appellant by mesne conveyances from a common grantor. Appellant elected to put cross-complainants to their proof of title and introduced no evidence of his own title. Cross-complainants rely upon the rule that where both parties claim title from a common source it is not necessary to prove title back of that source. Central Nat. Bank v. Bell, 5 Cal.2d 324, 328, 329, 54 P.2d 1109; Sorensen v. Hall, 219 Cal. 680, 28 P.2d 667; Cohn v. Klein, 209 Cal. 421, 287 P. 459. Appellant argues that cross-complainants cannot thus force upon him a claim of title that he did not make. He cites McConnell v. Rhodes, 14 Ga. 313, which supports him in his argument that one party cannot take advantage of the common source of title rule by proof merely that the other party has a chain of title from a common grantor. The rule announced in this early Georgia case is apparently no longer followed in that state (Beetles v. Steadham, 186 Ga. 110, 197 S.E. 270, 271) and the rule generally accepted in American jurisdictions is that a plaintiff makes a prima facie case by evidence connecting the defendant with a common source of title and proving in himself a better title from that source. 19 C.J. 1180, 1181; 28 C.J.S., Ejectment, § 97; Sedgwick & Wait on Trial of Title to Land, sec. 803, p. 680; Warvelle on Ejectment, secs. 265, 266, pp. 274, 275; Note, 47 Am.St.Rep. 75; Keen v. Parker, 217 N.C. 378, 8 S.E.2d 209, 214; Conner v. Jarrett, 120 W.Va. 633, 200 S.E. 39, 41; Alexander v. Duncan, 247 Ky. 422, 57 S.W.2d 58, 60; Norwegian Lutheran Church v. Armstrong, 112 Mont. 528, 118 P.2d 380, 382; Anderson v. Reid, 10 App. D.C. 426, 429; Dean v. Gorton, 177 Ill. 624, 52 N.E. 880; Bradley v. Lightcap, 201 Ill. 511, 66 N.E. 546; Stewart Bros. v. Ransom, 204 Ala. 589, 87 So. 89; Howell v. Shaw, 183 N.C. 460, 112 S.E. 38; Vance v. Pritchard, 213 N.C. 552, 197 S.E. 182; Roosevelt v. Hungate, 110 Ill. 595, 600; Zahm v. Dopp, Super. 19 N.Y.S. 863;

Rice v. St. Louis, A. & T. R. Co., 87 Tex. 90, 26 S.W. 1047, 47 Am.St.Rep. 72.

The rule is stated in the note in 47 Am. St.Rep. at page 75 in the following language:

"As a matter of evidence there is no doubt that when either of the parties to an action for the recovery of real property, or otherwise affecting the title thereto, proves that both of the parties have acquired their respective titles from a common grantor, it will be assumed prima facie that such grantor was the owner of the property at the time he executed the first conveyance thereof, and the grantee in such conveyance or his successors in interest must recover the property as against any person claiming under a conveyance executed after that by which the common grantor first parted with his title."

[18] Cross-complainants in this case proved chains of title to themselves and to plaintiff and cross-defendant from a common source and a superior title in themselves from this common source. They thereby established a prima facie case for recovery under the rule of evidence above discussed.

Cross-complainants also introduced a deed from one Gansevoort-Nazzari and wife to appellant and appellant argues that they thereby nullified their prima facie showing of title from a common source. No authority is cited in support of this contention but the argument runs that having proved two possible sources of title in appellant cross-complainants are in no position to assert that appellant bases his claim of title on one rather than the other.

[19] It seems to be the generally accepted rule that where both parties derive title from a common source the burden is placed upon the party having the inferior title from the common source, if he relies upon title from another independent source, to prove that the title acquired from the independent source is paramount to the title in the common source. The rule is thus stated in Sedgwick & Wait on Trial of Title to Land, sec. 803, p. 680:

"It is obviously sufficient, in order to make a prima facie case, to prove derivation of title from the common source; but it may be essential to go behind the common source. Hence, it is held that the rule is not strictly an estoppel, though often spoken of as such, but a rule of justice and convenience adopted by the courts to relieve the plaintiff from the necessity of going behind the common source. Where the defendant can show a better title outstanding, and has acquired it, the rule ceases to apply. When the defendant is allowed to impeach the common source of title he must establish that he himself has acquired a superior title, and except to this extent he is not permitted to invoke the rule that the defendant can defeat the plaintiff by showing a better title in a third person." Cf. Warvelle on Ejectment pp. 276–7; Stewart v. Cary, 220 N.C. 214, 17 S.E.2d 29, 33, 144 A.L.R. 1287; Stewart Bros. v. Ransom, supra, 204 Ala. 589, 87 So. 89; Sell v. McAnaw, 138 Mo. 267, 39 S.W. 779, 780; Smith v. Lindsey, 89 Mo. 76, 79, 80, 1 S.W. 88; Wade v. Thompson, 52 Miss. 367, 372; Caldwell v. Neely, 81 N.C. 114, 116; Ryan v. Martin, 91 N.C. 464, 470; Reid v. Anderson, 13 App.D.C. 30, 32.

[20] The problem under these rules of practice is simply one of the burden of proof and the burden of going forward with the evidence. The proof by one party of better title from a common source makes out a prima facie case for him, and the burden of establishing a superior title from some other source is then cast upon the other party. Under these rules if cross-complainants had rested upon proof of better title from the common source without introducing the Gansevoort-Nazzari deed, the burden would have been upon appellant, if he relied upon the Gansevoort-Nazzari deed, to prove that the Gansevoort-Nazzari title was paramount to the title from the common source. It would seem that the fact that the Gansevoort-Nazzari deed was introduced by cross-complainants on their case would not relieve appellant of this burden.

[21] We need not rest our decision on this ground however because we are satisfied that the finding of title in cross-complainants by adverse possession is supported by the evidence. At a time when title to the entire tract stood in the name of respondent C. M. MacGregor under the color of title of the deeds introduced on cross-complainants' case, MacGregor, more than five years before the commencement of this action, from time to time had caused loose dirt to be hauled upon the land and spread

out to level it for building. He then commenced the construction of homes upon the land so filled and leveled. The construction of five of these buildings was commenced over five years, and of the other nine slightly less than five years, before the filing of this action. The lots upon which these fourteen homes were built were conveyed by MacGregor in one instance immediately, and in the others through intermediate grantees, to the cross-complainants herein. It was stipulated that taxes were paid on all fourteen lots by the cross-complainants and their predecessors in interest for the five years immediately preceding the commencement of this action, i. e. for the years 1936–'37 to 1940–'41, inclusive. The distinction between the character of possession necessary to constitute adverse possession where the entry is under color of title and without color of title is fixed by Code provision and well settled in law. Code Civ.Proc. §§ 323, 324, 325; 1 Cal.Jur. 580–583.

[22–26] The preparation of the tract for building by MacGregor at a time when he had color of title to the block as a whole, by dumping loose soil thereon and spreading it out to make the tract level for building, was a sufficient occupancy to support a finding that it started the period of adverse possession running in his favor. Goodrich v. Mortimer, 44 Cal.App. 576, 186 P. 844; Rideout v. Covillaud, 39 Cal.App. 417, 179 P. 211. The filling of the land was the first step in a continuous occupancy which was followed with no undue delay by the construction of the buildings, their subsequent conveyance and their actual use and occupation as dwelling houses. It is sufficient to establish adverse possession, even where the entry is not under color of title, that the land be "cultivated or improved in the manner or to the extent usual in the case of similar property." Gray v. Walker, 157 Cal. 381, 385, 108 P. 278, 279. In the case of unimproved town property the preparation of that property for the building of residence buildings thereon, the construction of such buildings without undue delay and their occupancy for dwelling purposes when completed obviously falls within this rule. "Actual possession may be denoted by the making of improvements which are permanent in their nature, are usual in the case of similar property, and are such as to indicate exclusive management and control, rather than a mere temporary trespass." 2 C.J.S., Adverse Possession, § 26, pp. 542, 543; 2 C.J. 58, 59. The fact that the buildings in some instances may not have been occupied continuously after their completion, would not, standing alone, destroy the continuity of the possession, so long as there was no intrusion by any other person upon the land or disturbance of the claimants' possession thereof. Montgomery & Mullen L. Co. v. Quimby, 164 Cal. 250, 253, 128 P. 402.

[27] The descriptions in certain deeds in the chain of title of some of the cross-complainants commenced on the "westerly" line of Masonic Avenue. This was a clerical error obvious on the face of the deeds from a consideration of the rest of the descriptions, which make it clear that "westerly" should read "easterly". The trial court properly so concluded. 9 Cal. Jur. 301.

[28] Complaint is made of the admission in evidence of the judgment in MacGregor v. Knowlden, supra, and of the opinion of this court in the same case. Since we have concluded that the judgment herein is otherwise amply supported the error, if any, in admitting such evidence was not prejudicial.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

64 Cal.App.2d 259

DALTON v. BALDWIN et al.

BALDWIN v. SEASIDE OIL CO. et al. (two cases).

RIPLING et ux. v. SAME.

Civ. 14156, 14157.

District Court of Appeal, Second District, Division 1, California.

May 5, 1944.

1. Partles 🔑51(4)

Owner of automobile whose liability, if any, for damages arising out of collision arises solely because of such ownership, cannot bring into principal action parties responsible to owner under statute, but must await outcome of principal cause before asserting rights against those to whom owner gave permissive use of automobile. Vehicle Code, § 402, St.1937, p. 2353.

2. Indemnity 🔑13(1)

Under statute providing that, where recovery is had against automobile owner on account of imputed negligence, owner is subrogated to all rights of person injured against the "operator", owner may proceed against operator's employer as person secondarily liable as well as against operator who is primarily liable; the word "all" meaning not only any right but every right. Vehicle Code, § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "All" and "Operator".

3. Statutes 🔑147

Presumption that statutory amendment was intended to change meaning of statute applies only when there is a material change contained in language of amended act.

4. Indemnity 🔑13(1)

Amendment of 1943 containing sentence to effect that both bailee and driver shall be deemed operators of vehicle, within statutory subdivision giving automobile owner right of subrogation against operator where recovery has been had against owner because of imputed negligence, did not change meaning of subdivision, but merely clarified meaning prior to amendment as meaning owner could proceed against operator and person secondarily liable. Vehicle Code, § 402(d) St.1937, p. 2353.

Appeals from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Julia H. Dalton against Helen S. Baldwin and others, and action by William J. Ripling and wife against Seaside Oil Company, Helen S. Baldwin, and others, in which defendant Helen S. Baldwin filed a cross-complaint against the Seaside Oil Company and others in each case. Demurrers on motion to strike the amended cross-complaint were filed by cross-defendants and were sustained, and from the judgment entered thereon in each case cross-complainant Helen S. Baldwin appeals and the two cases were consolidated for purposes of appeal.

Affirmed.

Betts & Garrison and Forrest A. Betts, all of Los Angeles, for appellant.

Norris Montgomery and J. E. Delwiche, both of Los Angeles, for respondents.

WHITE, Justice.

On the morning of April 24, 1941, appellant Helen S. Baldwin, one of the defendants in the court below, took her Buick automobile to a service station in the City of Santa Barbara to have the vehicle washed. The service station in question was one selling the products of cross-defendant Seaside Oil Company. The service station was painted in colors distinctive of Seaside Oil service stations, and upon the premises were certain products and advertisements of Seaside Oil Company products. There was hung over the pump-driveway and below the large word "Seaside" a sign in comparatively small letters, not indicating his connection, but carrying the name "Lorton S. Clough".

After Mrs. Baldwin's automobile had been washed, it was turned over by Clough to an employee named Forest Caufield, also named as a defendant herein, to be delivered to Mrs. Baldwin at her residence. While carrying out his commission, Caufield became involved in the automobile accident which gave rise to this litigation, and in which accident, Mrs. Mildred N. Ripling, driver of the other involved vehicle, and Mrs. Julia H. Dalton, her guest, were injured.

Subsequent to the filing of the two actions herein, attorneys for the plaintiffs and for defendants Clough and Seaside Oil Company negotiated a compromise of their litigation by way of a covenant not to sue further, pursuant to which agreement dismissals without prejudice were filed as to such last named defendants. In each case the covenant not to sue contained an indemnifying agreement whereby these plaintiffs bound themselves to indemnify defendants Clough and Seaside Oil Company against any claims or loss which such defendants might suffer because of plaintiffs' injuries or otherwise arising out of the accident.

In an endeavor to assert her rights under section 402 of the Vehicle Code, St.1937, p. 2353, defendant, Mrs. Baldwin, having given possession of her automobile to defendants Clough and Seaside Oil Company, and they no longer being parties to the action by reason of the dismissal thereof as to them pursuant to the aforesaid agreement not to sue, secured an ex parte order permitting her to file cross-complaints against Clough and Seaside Oil Company in each case. After filing and service of the aforesaid amended cross-complaints, each of the aforesaid cross-defendants filed demurrers and motions to strike the amended cross-complaints. The demurrers were sustained and the motions to strike were granted. From the formal judgment entered thereon in each case these appeals are prosecuted. It has been stipulated that the two cases may be consolidated for all purposes of appeal.

The first amended cross-complaints (hereinafter referred to as the cross-complaints) are the only pleadings requiring consideration on this appeal.

The first cause of action is predicated upon the allegation that Forest Caufield (who is also a cross-defendant) at the time of the happening of the accident was the agent and servant of the other defendants; that the complaint charges the defendant Mrs. Baldwin with responsibility because of her ownership of the Buick automobile, and then in each case alleges:

"That the cross-complainant was not present at the time said accident occurred, and that the driver of her car was not her agent or servant, and that in the event there is a judgment against her because of the provisions of Section 402 of the California Vehicle Code, she will be subrogated to all the rights of the plaintiffs and may recover from the operators of her automobile the total amount of any judgment and costs recovered against her as such owner."

The second cause of action in each case, sets out that the cross-defendants were bailees for hire, and that, if they were negligent, and if, because of such negligence, a judgment should be rendered in favor of plaintiffs and against Mrs. Baldwin, she will thereby be damaged in the sum of such judgment, and that such judgment against her can be predicated only upon proof of negligence on the part of the cross-defendants.

The third cause of action in each case is against the cross-defendant bailees for $250 damages to Mrs. Baldwin's automobile.

With reference to the last named causes of action, the trial court held that they did not come within the provisions of either section 389 or 442 of the Code of Civil Procedure. Appellant, however, concedes that the third causes of action are so connected with the second causes of action that their validity must turn upon the ruling as to such second causes of action.

We are impressed that the questions involved and presented by this appeal may be thus epitomized:

Firstly, may the owner of an automobile, whose liability, if any, for damages to plaintiff arises solely because of such ownership, rely upon her rights of subrogation so as to bring into the principal action the ones responsible to her under the statute, or must she await the outcome of the principal cause before asserting her rights against those to whom she gave permissive use of her automobile?

Secondly, what is the meaning of the term "operator" as used in section 402 of the California Vehicle Code?

And finally, what construction is to be given sections 389 and 442 of the Code of Civil Procedure in regard to when a cross-complaint may properly be filed under the provisions of the last named code sections?

[1] In so far as the first question is concerned, the trial court, by its judgment, decided that unless and until a recovery was first had against the owner of the involved automobile, no action could be maintained by such owner pursuant to the provisions of subdivision (d), section 402 of the Vehicle Code. In view of the language contained in the pertinent section, we do not see how a different interpretation can be arrived at. The wording of subdivision (d) is clear, concise and unequivocal. Ap-

plying to the words thereof their ordinary and logical meaning, according to the approved usage of the language, Sec. 16, Code Civ.Proc., it would seem impossible to ascribe to the words, *"In the event a recovery is had* under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights * * *." (emphasis added), any other meaning than that any right or cause of action in favor of such vehicle owner does not arise until "a recovery is had".

It is true, as contended by appellants, that both law and equity abhor a circuity of action, multiplicity of suits, and what is commonly referred to as "piecemeal litigation", but we are persuaded in the case at bar that whatever rights the subrogee-owner may have in this litigation do not arise under the clear wording of the statute until a recovery is had. In their present inchoate state, such rights cannot be litigated. Manifestly, until the rendition of a judgment in favor of the "person injured", such subrogee-owner's rights do not attain a reality. And, until they arise, they cannot be made the subject of litigation.

[2] We come now to a consideration of the legislative intent with regard to the rights of an owner as evidenced by the provisions of section 402 of the Vehicle Code. It is the contention of respondents that the language in subdivision (d) of the cited section restricts the rights to which the owner is subrogated to a recovery against the "operator" of the vehicle. While it is true the section reads that the owner may recover "from such operator the total amount of any judgment and costs recovered against such owner", we are not impressed with respondents' argument, because it is to be noted that subdivision (d) also provides that "such owner is subrogated to all the rights of the person injured or whose property has been injured". To us the word "all" means not only "any" right, or "every" right, but the entire inclusiveness of the word excludes no right whatever. What, therefore, are "all" of the rights of the plaintiffs to which the owner is subrogated? In the instant case, plaintiffs sued, as they had a right to do, not only defendant Caufield who was in actual control of the vehicle, but they joined as defendants Clough and Seaside Oil Company on the theory that Caufield was the agent of Clough and Seaside Oil Company, acting within the scope of his employment as such agent in delivering Mrs. Baldwin's automobile. If plaintiffs were successful in establishing such agency, then judgments against Caufield would have carried with them judgments against Clough and Seaside Oil Company. Were this to occur, then each plaintiff, as an "injured person" under the provisions of section 402 of the Vehicle Code, would be invested with the right to satisfy such judgments against either Caufield, Clough or Seaside Oil Company. We cannot conceive that in such a situation the legislature, after clothing the owner with subrogation to "all" the rights of the "injured person", intended that such subrogated rights might be satisfied only against the "operator" of the vehicle involved. Such a construction would lead to the strange and certainly unjust situation wherein an employer, to whom actual permissive use of another's automobile was entrusted, could escape liability to the subrogee-owner by the simple process of hiring an employee to drive the automobile. If, as the section provides, the owner is subrogated to "all rights" of "the person injured", then logically and of necessity it follows that included in such "rights" is the right to proceed against the defendant secondarily liable as well as the operator who is primarily liable. To hold otherwise would certainly deny to the subrogee-owner some of the "rights" belonging to "the person injured", thereby doing violence to the commonly accepted meaning of the language of the legislature in clothing the vehicle owner with "all" the rights of such "person injured".

[3, 4] Respondents call our attention to the amendment to section 402 of the Vehicle Code adopted in 1943, St.1943, p. 2808. As originally enacted, and as in force on April 24, 1941, the date of the accident here in question, subdivision (d) of section 402 read as follows:

> "In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights of the person injured or whose property has been injured and may recover from such operator the total amount of any judgment and costs recovered against such owner."

By the 1943 amendment, the following sentence was added to the above named subdivision:

> "If the bailee of an owner with the permission, express or implied, of the owner

permits another to operate the motor vehicle of the owner, then such bailee and such driver shall both be deemed operators of the vehicle of the owner within the meaning of subdivisions (c) and (d) of this section."

The adoption of the foregoing amendment, argue respondents, indicates a legislative intent that the recovery by a subrogee-owner could, prior to the amendment, be had only against the "operator", as that term is defined by section 70 of the Vehicle Code, St.1935, p. 98: that otherwise the amendment is meaningless. It is true that the cases hold that an amendment to a prior act amounts practically to a demonstration of legislative intent to change the preexisting law, but the presumption arising from such amendment, that it was intended to change the meaning of the statute, applies only when there is a material change contained in the language of the amended act. Loew's Inc., v. Byram, 11 Cal.2d 746, 750, 82 P.2d 1. In view of what we have heretofore said, it is at once apparent that in providing that in the event a recovery is had, the vehicle owner is subrogated to *all* of the rights of the person injured, the legislature intended to include such rights as the injured person had primarily against the actual "operator" of the vehicle and in addition thereto, such rights as the injured person had against others to whom liability was imputed by reason of the doctrine of respondeat superior or other secondary responsibility. When, therefore, in amending subdivision (d), section 402 of the Vehicle Code, the legislature did not disturb the word "all" as it referred to the owner's rights in the pre-existing law, it must be held that the amendment merely amplified or clarified what appears to us to have been the meaning of the section prior to the amendment, and that the language used in the amendment did not amount to a material change in the all inclusive rights possessed by the subrogee-owner under the statute as it existed prior to the 1943 amendment. In other words, we are constrained to hold that, under the pre-existing statute, the owner possessed the rights referred to in the subsequent 1943 amendment.

In view of our holding that the rights to which the vehicle owner is subrogated do not arise until and "in the event a recovery is had under the provisions of" section 402 of the Vehicle Code, it becomes unnecessary to consider or decide the question of whether a cross-complaint could properly be filed in the instant actions pursuant to the terms of section 389 and 442 of the Code of Civil Procedure.

For the foregoing reasons, the judgments from which these appeals were taken, are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.

In re MADISON'S ESTATE.

RILEY, State Controller, v. MADISON et al.*

Civ. 12629.

District Court of Appeal, First District, Division 2, California.

May 4, 1944.

Hearing Granted June 29, 1944.

1. Taxation 🔑856

The tax provided for by the Inheritance Tax Act is a "succession tax". St. 1935, p. 1266.

See Words and Phrases, Permanent Edition, for all other definitions of "Succession Tax".

2. Taxation 🔑879(1)

Where deceased trustor created irrevocable trusts for benefit of his children containing no reservations or restrictions in trustor's favor and containing spendthrift provisions, the "succession" occurred, for inheritance tax purposes, when trustor parted with title by delivering declarations of trust and properties therein enumerated. St.1935, p. 1268, § 2(3)(a, b).

See Words and Phrases, Permanent Edition, for all other definitions of "Succession".

3. Taxation 🔑879(1)

Evidence that deceased trustor created irrevocable trusts for benefit of his children when he was in good health, with declared purpose of relieving himself from the heavy burden of income taxes, was sufficient to sustain finding that transfers were not made in contemplation of death within inheritance tax statute. St.1935, p. 1268, § 2(3)(a, b).

* Subsequent opinion 159 P.2d 630.

4. Appeal and error ⚷996

When conflicting inferences may be drawn from facts, it is function of trier of facts to determine which inference is to be adopted, and appellate court should not substitute its inference for inference adopted by trial court.

5. Taxation ⚷879(1)

A transfer of property is subject to inheritance tax as having been made "in contemplation of death" only where transfer is immediately and directly prompted by expectation of death. St.1935, p. 1268, § 2(3)(a, b).

See Words and Phrases, Permanent Edition, for all other definitions of "In Contemplation of Death".

6. Taxation ⚷879(1)

Where deceased trustor created irrevocable trusts for benefit of his children, which were to terminate and corpora was to be delivered to beneficiaries on trustor's death, with provision therein that during trustor's lifetime an amount not exceeding $50,000, plus one-half of any addition to the corpora could be paid to beneficiaries with trustee's consent, and during trustor's life one of children was paid 20 per cent. of her trust fund and the other was paid 30 per cent., the transfers were not subject to inheritance tax as "intended to take effect in possession and enjoyment at or after death" of trustor. St. 1935, p. 1268, § 2(3)(a, b).

See Words and Phrases, Permanent Edition, for all other definitions of "Transfer Intended to Take Effect after Death".

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceeding in the matter of the estate of Frank D. Madison, deceased. From a judgment fixing the inheritance tax, Harry B. Riley, Controller of the State of California, appeals, opposed by Marshall P. Madison, executor, and others.

Affirmed.

Raymond G. La Noue, Inheritance Tax Atty., of Sacramento, and Arthur W. Brouillet, Deputy Inheritance Tax Atty., and Richard C. O'Connor, Asst. Deputy Inheritance Tax Atty., both of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, for respondents.

STURTEVANT Justice.

This is an appeal by the State Controller from a judgment fixing inheritance tax. Madison, an eminent lawyer, died July 30, 1941. In August 1935, decedent had created three trusts, one for each of his three children, each with a principal of about $100,000. Each of the trusts for the two daughters provided that the income was to be paid to the daughter-beneficiary during the life of the trustor. At his death, the trusts were to terminate and the corpora to be delivered to the beneficiaries. During the trustor's lifetime an amount not to exceed $50,000, plus one-half of any addition to the corpora, could be paid to the beneficiaries with the consent of the trustee. Considerable sums had thus been paid to each of the daughters prior to trustor's death. The son's trust was similar except that the income was accumulated. No amounts were paid to the son from the corpus. The trustor was trustee of the son's trust; the son was trustee of the other two trusts. Each trust contained spendthrift provisions. The declarations contained no reservations or restrictions of any kind or nature in favor of the trustor. Except as may be herein noted, each declaration was substantially in the same form as each of the other two.

The declaration in favor of the decedent's son, in so far as the contentions made by the respective parties, among others contained the following provisions:

"This indenture of trust, dated the 19th day of August, 1935, by and between Frank D. Madison, of the County of Marin, State of California, first party (hereinafter called Trustor), and said Frank D. Madison, second party (hereinafter called Trustee), Witnesseth:

"That the Trustor hereby transfers, assigns and delivers to the Trustee, and the Trustee hereby acknowledges the receipt of, the following personal property: (Naming numerous stocks and bonds) *but in trust, however,* for the following uses and purposes:

"This trust shall continue during the lifetime of the Trustor and, during the continuance thereof, the Trustee shall collect all the income, gains, issues and profits (hereinafter referred to as income) of the trust property, and such income shall be accumulated and added to the trust property during the lifetime of the Trustor's son, Marshall P. Madison beneficiary hereunder, and, upon his death, all of the income received thereafter shall be paid by said Trustee to those whom said Marshall P. Madison may have designated to take said income by his last will and testament, and any portion not so disposed of shall be paid by the Trustee to the children of said Marshall P. Madison in equal shares and their heirs.

"Upon the death of the Trustor, the trust hereby created shall cease and terminate, and all of the trust property shall go to and vest in the said Marshall P. Madison, if he shall survive the Trustor, but, if he shall predecease the Trustor, then upon the death of the latter all of the trust property shall go to and vest in those whom said Marshall P. Madison may have designated to take said trust property by his last will and testament, and any portion not so disposed of shall go to and vest in his children in equal shares and their heirs.

"The interest or interests of the beneficiaries of the trust herein provided for shall not be assignable, and/or shall not be subject to the claims of their creditors or of the creditors of any of them; said trust being hereby created with the intent and upon the condition that the income and benefits thereof shall be personally and exclusively enjoyed by the respective beneficiaries hereinabove named to receive the same.

"The Trustee hereunder shall have full power and authority to hold, manage, and control the trust estate herein provided for, and to receive the income, gains, issues and profits thereof; to sell, exchange or otherwise dispose of all or any part of the real or personal property of such trust estate for such consideration and upon such terms and conditions as said Trustee may, in his discretion, deem proper; and to invest and reinvest the trust property and the proceeds of any sales of the trust property, and all moneys or other property which shall come into the hands of said Trustee, as consideration or in exchange for the trust estate originally delivered to said Trustee, or any part thereof, shall become a part of the trust estate the same as if originally included therein. * * *

"This indenture and the trust and the estate and interests in property hereby created may not be amended or altered in any manner or way or to any extent or revoked, in whole or in part, by the Trustor, either alone or in conjunction with any other person, firm or corporation. * * *

"In the case of the inability or unwillingness of the said Frank D. Madison to act as Trustee hereunder, then the said Marshall P. Madison shall have the right to name and appoint his successor as Trustee.

"Said Frank D. Madison, Trustee hereunder, hereby accepts the trust hereby created and agrees to carry out the trust in accordance with the foregoing provisions.

"In witness whereof, as of the day and year first hereinabove written, the parties hereto have hereunto subscribed their names, respectively.

"F. D. Madison Trustor
"F. D. Madison Trustee"

At the time the declarations of trust were delivered, the securities mentioned therein were also delivered.

In a letter dated August 22, 1935, the decedent stated to his son Marshall his intentions in making said trust. He also stated that he was at that time in good health and had been for some months. The record is not clear whether said letter was admitted in evidence, however Mr. Madison took the stand as a witness and testified to the same facts. No witness was called to contradict him, in fact he was the only witness called. In giving his testimony Mr. Madison also adverted to a conversation he had with his father regarding the burden of tax paying: "He was speaking, or I might almost say complaining of the fact of the ever increasing income taxes, which were becoming larger and larger every year, and he was particularly speaking of the fact that a certain portion of his income upon which he was required to pay a very large tax was being turned over by him to my sisters, and he was thinking if there wouldn't be some way in which this tax—he could be relieved of the burden of the tax. * * * I suggested to him the possibility of getting up a trust and transferring to a trustee a substantial block of securities so that the income would go directly to my sisters, and would not go to my father, and this way his income burden could be relieved." Later the decedent adopted the plan suggested by the witness.

After the declarations were delivered the trustee pursuant to the terms of the trust paid to one of the beneficiaries, Mrs. Baker, 20% of the amount of her trust, and paid to Mrs. Martin, another beneficiary, 30% of the amount of her trust.

The applicable provisions of the California Inheritance Tax Act (Stats.1935 p. 1266) are:

"Sec. 2. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom, in trust or otherwise, to persons, * * * said taxes to be upon the market value of such property at the date of death of the decedent * * * in the following cases: * * *

"(a) In contemplation of the death of the grantor, vendor, assignor or donor, or,

"(b) Intended to take effect in possession or enjoyment at or after such death, or in which a life income or interest is reserved by the grantor, either expressly or impliedly, or by the grantee promising to make payments to or care for the grantor."

The appellant contends (1) that the transfers were intended to take effect in possession or enjoyment at the trustor's death; (2) that the evidence is conclusive that the transfers were made in contemplation of death. The respondents reply that both are questions of fact and that on the evidence before it the trial court made findings of fact in favor of respondents and against the appellant. Respondents call attention to Finding VI which in part is as follows: "That on August 19, 1935, at the time said trusts were created, the decedent was in good health, suffering from no sickness or physical disability of any kind, was actively engaged in the practice of the law, and spent a good portion of his recreational moments in the very vigorous sport of steelhead fishing on the Rogue River in Oregon." They also call attention to Finding VIII, which in part provides as follows: "That the statement contained in Article V of said Report of Inheritance Tax Appraiser that decedent made certain transfers in trust 'in contemplation of his death, and with the intent on the decedent's part that such transfers take effect in possession and/or enjoyment at or after his death' is untrue, and said statement and each part of it conjunctively and disjunctively is untrue, and it is also untrue 'that under the terms of each trust it was possible, during the decedent's lifetime, that the assets thereof would revert to the decedent's sole ownership.'" They also call attention to Finding IX, which is as follows: "That said trusts hereinabove referred to in the preceding paragraphs V, VI, VII, and VIII of these findings were not created with the intent on the decedent's part that such transfers would take effect in possession or enjoyment at or after his death but, on the contrary, the decedent executed said trusts and made the transfers necessary to create the same with the intention that said transfers take effect in possession and enjoyment immediately, and at the time of said transfers, towit, on the 19th day of August, 1935."

[1, 2] We think the respective contentions of the appellant are not sound and that the replies of the respondents are sound for the following reasons. The appellant claims said findings are not supported by the evidence and that the record presents only questions of law. In that connection he asserts that the "transfer" contemplated by the statute was the combination of facts arising upon the death of the trustor which operated to terminate the trusts—that then and not till then was a "transfer" made. That assertion is made in the teeth of the proof by making the additional claim that the proof on which said findings were made was so improbable as not to constitute any proof and that this court is bound to so hold and to ignore the findings of the trial court. It will be freely granted that in some cases a court of review may have a record before it in which the court can say that the proof is so improbable that a court will disregard it but the record before us is by no means such a record. No such vulnerable evidence is specifically quoted. We have found none. The record shows that the declaration uses the word "transfer" and recites facts showing it was a transfer. Each declaration showed on its face that the trustor did at that time pass to the trustees named for the respective beneficiaries the documents evidencing the properties named in said respective declarations and that from the instant of the delivery of said declarations the trustor, as such, parted with all his title thereto. The statute above quoted imposes a tax on "succession". In re Estate of Rath, 10 Cal.2d 399, 405, 75 P.2d 509, 115 A.L.R. 836. In applying the statute the question at once turns on when did the succession occur? Manifestly in the instant case it occurred when the trustor parted with his title, that is, when he delivered the declarations of trust and the

properties therein enumerated. Hunt v. Wicht, 174 Cal. 205, 208, 162 P. 639, L.R.A. 1917C, 961.

[3-5] The appellant's allegations that the transfers dated August 19, 1935, were made (1) in contemplation of death, and (2) were intended to take effect in possession and enjoyment at or after the death of the trustor were negatived by the findings. But the appellant claims the evidence was "improbable", and should be disregarded and that the trial court should have so found. Mr. Marshall Madison was the only witness who testified as to the decedent's intentions or motives. His testimony was clear, direct and positive. He was the son, partner, and companion of the trustor. The record shows no facts warranting any court in holding that the testimony of the witness was improbable and not worthy of belief. In this connection the appellant shows that there were two possible inferences involved—one in favor of the holding of the trial court and one against such holding. The appellant contends this court should draw its own inference on those facts, substitute its inference in the place of the inference adopted by the trial court, and hold otherwise. It may not do so. When conflicting inferences exist, it is the function of the trier of the facts, in this instance the trial court, to determine which inference is to be adopted. Spreckels v. State, 30 Cal.App. 363, 379, 158 P. 549; Reay v. Butler, 95 Cal. 206, 214, 30 P. 208; Dallman v. Frank, 1 Cal. App. 541, 82 P. 564; Huston v. Anderson, 145 Cal. 320, 78 P. 626. There is an abundance of evidence to the effect that the declarations of trust were not made in contemplation of death. The phrase "in contemplation of the death of the grantor, * * *" Stats.1935, p. 1266, sec. 2, sub. (3), par. (a), has been clearly defined. In Spreckels v. State of California, 30 Cal. App. 363, 369, 158 P. 549, 551, the court said: "A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death that the property so transferred becomes amenable to the burden. Or, as counsel for the respondents with singular aptness states the proposition: 'It is only when contemplation of death is the motive without which the conveyance would not be made that a transfer may be subjected to the tax.' That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer." Clearly the facts hereinabove set forth do not bring the instant case within said rule.

[6] As to the claim that the transfers were intended to take effect in possession or enjoyment at the date of the trustor's death, the appellant's case is still weaker. As shown above the transfers took effect from the date they were delivered. Thereafter the trustor retained no rights whatsoever. The corpus was held by the trustee as the agent of the beneficiaries. Being in writing the declarations show on their face that the trustor made no reservation and delivered the declarations with the intention that they should take effect in possession and enjoyment immediately. The declarations were so interpreted by all of the parties. During the life of the trustor one daughter was paid 20% of her trust fund and the other daughter was paid 30% of her trust fund. Moreover the share of the son was, during that period, duly accumulated according to the terms of the declaration made in his favor.

In closing the appellant states: "If the stamp of nontaxability is put on this type of transfer, the door is opened to widespread tax evasion. A man can transfer a large estate to a friendly trustee—say to his son—under the same trust provisions as those here; the beneficiaries being all of the donor's children. No legal or enforcible obligation is laid on the latter, beneficiaries or trustees, to make any reciprocal provision for the donor-father during his life." In effect the contention of the appellant is that unless gifts inter vivos are taxed, there is danger of fraud being committed against the state. That contention should have been addressed to the legislature. But in 1935 we had no statute imposing taxes on mere gifts.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

ALLEN et al. v. BOWRON, Mayor, et al.

Civ. 14351.

District Court of Appeal, Second District, Division 2, California.

May 9, 1944.

Rehearing Denied May 26, 1944.

Hearing Denied July 6, 1944.

1. Mandamus 🔑28

Mandamus will issue to compel a public officer to perform an act which it is his legal duty to perform but will not issue to force exercise of his discretion in a particular manner.

2. Mandamus 🔑100

The fixing of salaries of employees of city of Los Angeles calls for an exercise of discretion by council, the exercise of which cannot be controlled by mandamus.

3. Municipal corporations 🔑192

Los Angeles city council, in fixing salary of inspectors in department of building and safety under charter provision requiring payment of "prevailing wage" could properly consider that such inspectors were under civil service with permanent employment entitled to vacations with pay, sick leave and benefit of retirement system, and that similar employment in private industry during wartime is temporary and subject to fluctuation as to amount of compensation.

> See Words and Phrases, Permanent Edition, for all other definitions of "Prevailing Wage".

4. Mandamus 🔑100

Where Los Angeles city council in fact attempted to comply with charter provision requiring payment of prevailing wage in fixing salary of inspectors in department of building and safety, wisdom of council's exercise of discretion could not be considered in mandamus proceeding.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Mandamus by S. Allen and others against Fletcher Bowron, as Mayor of the City of Los Angeles, and others to compel defendant to pay plaintiffs, as city employees, an amount equal to prevailing salaries paid in private employment. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Arthur C. Fisher, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Wm. P. Mealey, Deputy City Atty., all of Los Angeles, for respondents.

W. J. WOOD, Justice.

The plaintiffs are employees of the city of Los Angeles working as building, plumbing and electrical inspectors in the Department of Building and Safety. In their petition they have named the mayor and the members of the City Council and various other officials of the city of Los Angeles and have asked that a writ of mandate issue ordering defendants to pay to those plaintiffs who are "inspectors" the sum of $325 per month and to those who are "senior building inspectors, assistant senior plumbing inspectors and chief electrical inspectors," the sum of $425 per month. Their petition is founded upon the claim that the sums demanded are in accordance with the prevailing salaries paid in private employment. Plaintiffs have appealed from the judgment entered in favor of defendants.

Section 425 of the charter of the city of Los Angeles, which according to the contention of plaintiffs gives them the right to a judgment, provides as follows: "Sec. 425. In fixing the compensation to be paid to persons in the city's employ, the Council and every other authority authorized to fix salaries or wages, shall, in each instance, provide a salary or wage at least equal to the prevailing salary or wage for the same quality of service rendered to private persons, firms or corporations under similar employment, in case such prevailing salary or wage can be ascertained."

In their petition plaintiffs alleged that they are receiving salaries varying from $200 per month to $250 per month and that the prevailing wage or salary for the same quality of services rendered to private persons, firms or corporations under similar employment can be readily ascertained and is from $325 to $425 per month. Defendants denied these allegations and alleged that the City Council of the city of Los Angeles has enacted an ordinance increasing the compensation of all officers and employees of the city whose salaries and wages are fixed by ordinance to the extent of $20 per month for every such officer or employee, and that in doing so they took into consideration the cost of living and the prevailing wage rates for the same quality of service rendered to private persons. Findings were made by the trial court in favor of defendants on all of these issues.

[1] The question whether the findings are supported by the evidence or whether, as claimed by plaintiffs, they are in large part mere conclusions, need not be given consideration, for we are satisfied that plaintiffs are seeking to control the exercise of the discretion which is reposed in the members of the City Council. It is fundamental that a public officer may be compelled by mandate proceedings to perform an act which it is his legal duty to perform, but the court in such proceedings may not control the exercise of discretion on the part of the officer and may not substitute its own discretion for the discretion vested in the officer. A writ of mandate will not issue to force the exercise of discretion in a particular manner. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784; Browning v. Dow, 60 Cal.App. 680, 213 P. 707; Inglin v. Hoppin, 156 Cal. 483, 105 P. 582.

[2, 3] The fixing of the salaries of the many employees of a large city, especially in a period of great emergency when conditions are subject to frequent change, undoubtedly calls for the exercise of a wise discretion. A number of new housing projects have been commenced or authorized by the government to provide living quarters for the many thousands of additional workers who have recently come to or are arriving in the city. The City Council in enacting the ordinance, and the trial court in making its findings, doubtless took into consideration the fact that plaintiffs are city employees under civil service with permanent employment, entitled to vacations with pay, sick leave and the benefit of the retirement system; that the employment of those claimed to be doing work similar to that of plaintiffs is not only temporary during war times but is subject to fluctuation as to the amount of compensation; and that the work of a building inspector in private employment is unlike that of plaintiffs, who, being public employees, are mainly called upon to see that the building codes are enforced.

[4] It is apparent that the City Council has in fact acted to comply with the cited charter provision, for in the preamble to the ordinance increasing the salaries of the city's employees, which was adopted on December 11, 1942, effective before the commencement of the present action, mention is made of the increased cost of living and of the fact that compensation paid by private employers has been substantially increased. In taking this action defendants performed the duty required of them and exercised the discretion reposed in them. Whether that discretion was exercised wisely or unwisely is not a question which the court is authorized to decide.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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64 Cal.App.2d 332

PHELPS v. LOOP et al.

Civ. 14346.

District Court of Appeal, Second District, Division 2, California.

May 11, 1944.

Hearing Denied July 6, 1944.

1. Homestead 🔑35

Where building occupied by a family is suitable for a home and is used for that purpose, the owner is not to be deprived of his homestead right merely because part of building is used for supplementing family income.

2. Homestead 🔑35

If very substantial business carried on by homesteader is for purpose of maintaining home, conduct of other activity does not defeat owner's right to designate property as homestead.

3. Homestead 🔑35

Where premises are bought for, and are actually occupied as, bona fide home of family, the head of family may select it as homestead even though incidentally a major portion of building may be used by him for deriving revenue.

4. Homestead 🔑35

Although only one apartment in a building is dedicated to residence purposes, if it is actually occupied by owner and if such occupancy is not merely incidental to business conducted there, the building and the land on which it is situated may be selected as a homestead.

5. Homestead ⚷57(3)

In action by judgment creditor to annul judgment debtors' homestead declaration, evidence sustained finding that property was acquired by judgment debtors to be used as a home.

6. Homestead ⚷35

Where building containing six double and three single apartments and nine light-housekeeping rooms was acquired by defendants to be used as home and primary use of building was for home by defendants who occupied one double apartment and occasionally one of light-housekeeping rooms and remainder of building was kept available for renting, the property could be selected as a homestead.

7. Homestead ⚷29

There is no formula by which to decide right of claimant to his homestead but each case must be determined according to the facts presented.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Mary E. Bryan Phelps against C. V. Loop and Ethel Loop to annul a homestead declaration of the defendants. From an adverse judgment, plaintiff appeals.

Affirmed.

See, also, 53 Cal.App.2d 541, 128 P.2d 63.

Irving E. Read, of Los Angeles, and Monroe & McInnis, of San Diego, for appellant.

Don F. Tyler and Chandler & Wright, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendants are husband and wife. They own and, subsequent to its acquisition, have occupied, lot 6, block 5, City Center Tract of Los Angeles County. Having notice that plaintiff as their judgment creditor intended to have execution levied upon the lot and its building to satisfy a judgment entered some eight years before, defendants filed their declaration on June 24, 1940, designating lot 6 as their homestead. Thereafter plaintiff filed this action alleging that such declaration should be annulled on the grounds that defendants incidentally occupy only one flat of the 18 apartments and flats of a building adapted to the business of hiring space to the public and that such flat is not susceptible of being set apart as a homestead.

The court found the facts as follows: Prior to acquiring lot 6 defendants owned an equity in a dwelling house consisting of three bedrooms on one acre of land in Canoga Park, of the same county; they exchanged the Canoga Park dwelling for an equity in lot 6; the house on lot 6 is a 35-year-old, three-story, wooden-frame building containing six double and three single apartments and nine light-housekeeping rooms; one of the double apartments and occasionally one of the light-housekeeping rooms are occupied by defendants as their home; the remainder of the house is kept available for renting; at the time of recording the declaration of homestead and subsequent thereto defendants resided on the property and used it as their dwelling house and home, which was their primary use of it; Mrs. Loop, as opportunity offered, rented apartments and rooms in order to help maintain the home; lot 6 is 50 by 125 feet; the building is not divisible in any way; it is the only home of defendants. From such facts the court concluded and adjudged that the declaration of homestead filed by defendants constitutes a valid and subsisting homestead on the premises.

Plaintiff assigns as error the holding of the trial court that defendants are entitled to a homestead exemption on an 18-flat apartment building. She contends that the premises are primarily adapted to and used as business property, and the mere fact that defendants make their home in a portion of the premises does not entitle them to declare the property as a homestead and thereby exempt it from execution.

[1-4] The weight of authority is directly at variance with appellant's contention. Where the building occupied by a family is suitable for a home and is used for that purpose, the owner is not to be deprived of his homestead rights merely because a part of the building is used for supplementing the family income. If it be determined that the very business carried on by the homesteader is for the purpose of maintaining the home, the fact of the

conduct of such other activity does not defeat the owner's right to designate the property in his declaration. Using a building so occupied, even chiefly for business purposes or renting a part of it, is not inconsistent with the homestead right. Where premises are acquired for, and are actually occupied as, the bona fide home of a family, the head may select it as a homestead even though incidentally a major portion of the building may be used by him for deriving revenue. His conduct of business there is an incidental and subordinate purpose. Under such circumstances the business is carried on to enable the family to maintain a home. Although only one apartment in a building is dedicated to residence purposes, yet if it is actually occupied by the owner and his family and if such occupancy is not merely incidental to a business conducted there, the building and the land on which it is situated may be selected as a homestead. McKay v. Gesford, 163 Cal. 243, 124 P. 1016, 41 L.R.A.,N.S., 303, Ann.Cas.1913E, 1253; Estate of Pickard, 169 Cal. 162, 146 P. 425; Heathman v. Holmes, 94 Cal. 291, 29 P. 404; Coca Cola Bottling Company v. Feliciano, 45 Cal.App.2d 680, 114 P.2d 604; Schmidt v. Denning, 117 Cal.App. 36, 3 P.2d 322; Vincenzini v. Fiorentini, 2 Cal.App.2d 739, 38 P.2d 876; Estate of Levy, 141 Cal. 646, 75 P. 301, 99 Am.St.Rep. 92.

[5, 6] The finding that the property was acquired to be used as a home is abundantly supported by the evidence. Defendants from the time of their entry have so occupied it continuously. They exchanged their equity in a modest dwelling for the equity in lot 6. According to plan by the diligence of the wife and the rentals obtained, the defendants have been enabled to soften the asperities of their struggle for subsistence while maintaining a home. The tranquility of society and the prevalence of a healthy social order are factors which must have been paramount in the legislative mind in ordaining the right of a family to hold and enjoy, without let or hindrance, the realty they have designated as their terrestrial abode. Under the findings, the primary use of the building by defendants is for their home. That they have bona fide so occupied the property at all times is uncontradicted.

[7] A review of the authorities cited by both parties demonstrates that there is no formula by which to decide the right of a claimant to his homestead. Each case must be determined according to the facts presented. McKay v. Gesford, supra. The findings here warrant the judgment. We cannot say that the findings were the result of arbitrary behavior.

The distinguishing features of the authorities cited by plaintiff readily appear. The claimants used their premises "primarily and principally as a hotel." Laughlin v. Wright, 63 Cal. 113. The claimant included in his declaration "land entirely disconnected from" the dwelling designated in the declaration. In re Crowey, 71 Cal. 300, 12 P. 230, 232. The claimant had not occupied "the premises for over ten years last past" but had rented them. Maloney v. Hefer, 75 Cal. 422, 17 P. 539, 7 Am.St.Rep. 180. The claimant included lots 4 and 5 in his declaration, whereas 89 feet of lot 4 was occupied by a business structure, was used for business and not at all for residence. In re Allen, 78 Cal. 293, 20 P. 679. Five lots were included in the declaration whereas only one lot was necessary to the enjoyment of the home. Guernsey v. Douglas, 171 Cal. 329, 153 P. 227. The declaration having included two lots was annulled as to lot 28 (a dance hall), since only lot 27 was necessary to the home. Lorenz v. Hunt, 91 Cal.App. 78, 266 P. 617. The declaration included two separate houses on two adjoining lots. Wagner v. Ulrich, 204 Cal. 452, 268 P. 629. The homestead was voided as to that part of a duplex which was occupied by a tenant. Tiernan v. His Creditors, 62 Cal. 286. The probate court declined to set aside as a homestead separate property of the widow's deceased husband. In re Noah, 73 Cal. 590, 15 P. 290, 2 Am.St.Rep. 834. The declaration designated a two story brick building which the claimant had constructed "for the purpose of conducting therein a general merchandise store and hotel." Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 79 Am.St.Rep. 118.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

64 Cal.App.2d 229

ECKMAN et al. v. ARNOLD TAXI CO. et al.

HARDWARE MUT. CASUALTY CO. v. SAME.

Civ. Nos. 14174, 14175.

District Court of Appeal, Second District, Division 1, California.

May 2, 1944.

1. Workmen's compensation ⟾2188

An employer or his insurer may bring an action against any person who may be sued by the recipient of workmen's compensation for damages resulting from injury or death of an employee. St.1937, p. 273, § 3850; St.1939, p. 2519, § 3852.

2. Workmen's compensation ⟾2190

Employer's insurer was entitled to sue taxicab company's liability insurer for death benefits paid under award of Industrial Accident Commission on account of death of employee through negligence of taxicab company. St.1937, p. 273, § 3850; St.1939, p. 2519, § 3852.

3. Workmen's compensation ⟾2189

Under the Workmen's Compensation Act an employer or his insurer is subrogated to the claim or right of action of the employee or any other person to whom a claim for compensation accrues against any person liable for damages as a result of the injury of the employee, or as result of his wrongful death, but the act is not to be construed as providing for double recovery of indemnity against the tort-feasor. St. 1937, pp. 273 to 275, §§ 3850 to 3862.

4. Subrogation ⟾1

To "subrogate" is to put into place of another, to substitute, and "subrogation" is the substitution of one for another as a creditor, the new creditor succeeding to the former's rights.

See Words and Phrases, Permanent Edition, for all other definitions of "Subrogate" and "Subrogation".

5. Workmen's compensation ⟾2238

Instructions that if taxicab company negligently caused death of one employed by another, employee's heirs were entitled to recover pecuniary loss sustained and employer's liability insurer was entitled to recover amount of compensation award were erroneous as permitting a double recovery. St.1937, pp. 273 to 275, §§ 3850 to 3862.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Dorothy Mae Eckman, by her guardian ad litem, Lillian A. Hammer, and others, against Arnold Taxi Company and others for wrongful death of Claude W. Eckman, who was killed when the motorcycle he was riding collided with a taxicab operated by the named defendant, and action by the Hardware Mutual Casualty Company against Arnold Taxi Company and others to recover death benefits paid on account of the death of Claude W. Eckman under award of Industrial Accident Commission, which actions were consolidated for trial. From a judgment for Dorothy Mae Eckman, by her guardian William A. Hammer, and others for $1,000, and from a judgment in favor of Hardware Mutual Casualty Company for $3,377.76, the defendants in each action appeal.

Judgments reversed, and causes remanded for new trial upon question of damages and the division thereof, in accordance with opinion.

Joseph A. Ball and Kenneth Sperry, both of Long Beach, for appellants.

R. Bruce Murchison and Carroll M. Counts, both of Los Angeles, and Marshall & Farnham, of Long Beach, for respondents.

DORAN, Justice.

The actions in which appeal has been taken herein grew out of the death of one Claude W. Eckman, who was killed when a motorcycle he was riding collided with a taxicab operated by defendant Arnold Taxi Company. Decedent left him surviving as his heirs, his wife, Dorothy Mae Eckman, and his father and mother, Charles H. Eckman and Edna M. Eckman. At the time of his death the decedent was engaged in the performance of duties in the business of his employer, and his heirs, on application, were awarded death benefits by order of the Industrial Accident Commission in the amount of $3,377.76. The wife of decedent then filed suit against the taxicab operator, the owner of the cab and the driver thereof to recover damages for the death of decedent. Decedent's father and mother joined as plaintiffs in this action at the time of trial, having first been joined by the wife as party defendants. The Hardware Mutual Casualty Company, insurance carrier for decedent's employer, filed a separate action to recover death benefits paid or to be paid by said carrier under the award of the Industrial Accident Commission. In this latter action the plaintiff named as defendants, the operator, the owner and the driver of the cab in question, and, in addition, the American Fidelity & Casualty Company, which company had insured the operator of the cab by a policy of liability and indemnity insurance required by the provisions of an ordinance of the City of Long Beach, in which city the cab in question was operated. The ordinance provided that "said policy shall indemnify said licensee, his successors or assigns and each and every passenger, or other person injured by or in the operation of such vehicle for hire, to be operated under said license, for any damage to the person or property of each such person for which said licensee, his successors or assigns would be liable in law; and provided that each and every person, or in case of his or her death, then his or her heirs, executors or administrators shall have the right to maintain an action for such damages upon such policy." After amendment of the complaint in this latter action, a general and special demurrer to the amended complaint was overruled. At the trial the defendant American Fidelity & Casualty Company objected to the introduction of any evidence against that defendant upon the ground that the complaint failed to state a cause of action. This objection was overruled. The action by the heirs was consolidated for trial with the action brought by the employer's insurance carrier. Trial was by jury and a verdict was rendered assessing damages in the sum of $3,377.76 in favor of the Hardware Mutual Casualty Company, and in the additional sum of $1,000 in favor of decedent's heirs. Separate judgments upon the verdict were entered in each action. The defendants in both actions have appealed from the judgments.

Appellant American Fidelity & Casualty Company contends that, as indemnitor of its co-defendants, it was not a proper party defendant. Appellants also contend that if the indemnitor was not a proper party defendant the other defendants were prejudicially affected by proof that an insurance company indemnified them for their acts. Appellants contend that the trial court permitted double recovery of damages for loss of earnings of decedent, and that the court erred in so doing. It is also contended that the court erred in refusing to give certain instructions requested by the defendants on the subject of contributory negligence.

[1, 2] Appellant American Fidelity & Casualty Company concedes that the heirs of decedent, or the executor or administrator of his estate, could have sued said appellant by reason of the provisions of the Long Beach ordinance above mentioned. However, appellant points out that the Hardware Mutual Casualty Company claims that it is entitled to sue under the provisions of the ordinance because of the subrogation rights given by section 3852 of the Labor Code, St.1939, p. 2519. Appellant argues in effect that since payments of death benefits under the pertinent provisions of the Labor Code are made on the basis of dependency of the claimant upon the deceased employee, the right of subrogation given the employer or his insurance carrier under the provisions of the Labor Code is a right of subrogation to the claim of a dependent only, and such right does not extend to claims of heirs or personal representatives of the deceased, as such heirs or representatives. However appellant's proposition may apply as a general rule, in the present case the heirs of the decedent received or were entitled to receive the death benefits awarded by the Industrial Accident Commission. Section 3852 of the Labor Code, read in connection with section 3850 thereof, St.1937, p. 273, clearly provides that a claim of death benefits under the Code does not affect the claim of the recipient of such benefits against *any* person other than the employer, nor does such claim of benefits affect the recipient's right of action for all damages proximately resulting from the death in question against *any* person, except the employer. Section 3852, supra, also provides that "any employer who pays, or becomes obligated to pay compensation, * * *, may *likewise* make a claim or bring an action against *such third person.*" (Italics added to quoted portion.) It is plain, therefore, that an employer, or his insurer (see sec. 3850, Labor Code), may by virtue of section 3852 of the Labor Code, bring an action against *any* person who may be sued, by the recipient of compensation, for damages proximately resulting from the injury or death of an employee. The heirs in the present case are concededly entitled to sue appellant American Fidelity & Casualty Company to recover damages for the alleged wrongful death of decedent. These heirs have received or are entitled to receive compen-

sation from respondent insurer for the death in question. It follows that respondent insurer may, by virtue of the right of subrogation given it under section 3852 of the Labor Code, likewise bring an action against said appellant; and the said appellant is a proper party in the situation here presented. Such being the case, the contention as to the prejudicial effect of proof of indemnification by an insurance company may be disregarded.

In the action between Hardware Mutual Casualty Company and the defendants, a stipulation was entered into with respect to the amount of the award of death benefits in favor of the heirs of decedent, as against the Hardware Mutual Casualty Company. In presenting the evidence on behalf of plaintiffs Dorothy Mae Eckman, Charles H. Eckman and Edna M. Eckman, as against all the defendants except the American Fidelity & Casualty Company, evidence as to the amount of decedent's earnings and the amount he contributed toward the support of his said heirs was introduced. As to the question of damages the court instructed the jury, in part, that if they found that plaintiffs were entitled to a verdict, the jury should award plaintiffs such sum as, under all the circumstances of the case, might be just compensation for the pecuniary loss plaintiffs had suffered by reason of the death of Claude Eckman. After instructing the jury that the amount of damage suffered by plaintiff Hardware Mutual Casualty Company, by reason of the award of death benefits, had been stipulated, the court then further instructed the jury upon this particular question as follows: "The only issue for you to determine with respect to plaintiff Hardware Mutual Casualty Company is whether these defendants are liable for this damage." The jury was instructed that if they found the defendants liable for such damage they should assess damages in favor of the said plaintiff in the stipulated sum. The jury returned the following verdict: "We, the jury in the above entitled action, find for the plaintiff, Hardware Mutual Casualty Company, a corporation, against the defendants, Arnold Taxi Company, Inc., a corporation, Virginia Garage Company, a corporation, Basil D. Stockwell and American Fidelity Casualty Company, a corporation, and assess the damages in the sum of $3377.76 and find for the plaintiffs, Dorothy Mae Eckman, Charles H. Eckman and Edna Mary Eckman, against the defendants, Arnold Taxi Company, Inc., a corporation, Virginia Garage Company, a corporation, and Basil D. Stockwell, and assess the damages in the additional sum of $1000.00." Separate judgments were entered, as already mentioned. It should be pointed out that the court's instruction upon the question of general damages, above referred to, was in such form as to indicate that it was intended to apply to the case of the heirs of decedent; and the jury was specifically instructed that in determining the pecuniary loss in question they might consider the financial support, if any, which each plaintiff would have received from the deceased except for his death. It thus appears from the record that the case was submitted to the jury upon instructions to the effect that in event of finding defendants liable for damages, plaintiff heirs were to be awarded such sum as would compensate for the entire pecuniary loss such plaintiffs had suffered by reason of decedent's death, and plaintiff insurer was to be awarded damages in the sum stipulated as the amount of death benefits awarded by the Industrial Accident Commission.

[3, 4] As already indicated, section 3852 of the Labor Code creates a right of subrogation in the employer or his insurer to the claim or right of action of the employee, or any other person to whom a claim for compensation accrues, against any person liable for damages as the result of the injury of the employee or as the result of his wrongful death. See: Fitzgerald v. Quinn, 131 Cal.App. 457, 460, 21 P.2d 656; Dighton v. Martin, 4 Cal.App.2d 401, 403, 41 P.2d 197; Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 269, 84 P.2d 313. To subrogate is to put in the place of another; to substitute. Specifically, subrogation is the substitution of one for another as a creditor, the new creditor succeeding to the former's rights. See Webster's New International Dictionary, 2d Edition, unabridged. Sections 3850 to 3862, inclusive, of the Labor Code, being Chapter 5, of Division 4, Part 1, thereof, and dealing with the right of subrogation aforesaid, are not to be construed as providing for double recovery of indemnity against a tort-feasor. State Comp. Ins. Fund v. Dalton, 13 Cal.App.2d 284, 288, 56 P.2d 962.

[5] Respondents state that all of the evidence offered and introduced by re-

spondent heirs was permitted without objection and that appellants cross-examined the witnesses. But the question here involved is not one of admissibility of evidence; nor is it merely one of segregation of damages. The question here presented is one involving the substantive right of the defendants in the case to protection against double indemnity for the damages caused by the wrongful death of decedent. While the damages assessed in favor of the respective plaintiffs might indicate that the jury, in assessing damages to the heirs, had taken into account the death benefits awarded as compensation, yet it is impossible upon the record to conclude that such was the case. In view of the instructions as given, to state that the amount of damages awarded the heirs represented merely the balance after deduction of the amount awarded the insurer, would be to indulge in pure speculation. It must be held, therefore, that the trial court erred to the prejudice of appellants in improperly instructing the jury upon the question of damages.

In view of the fact that the amount of the death benefit, for which respondent insurer was liable, was stipulated by the parties hereto, the only questions to be submitted to the jury were the liability of defendants for the death of decedent and the amount of the damages proximately caused to the plaintiff heirs thereby. The matter of the apportionment of the assessed damages as between the plaintiff heirs and the insurer was one for the determination of the trial judge in accord with the stipulation.

There is no merit in appellants' contention that the court erred in refusing certain instructions requested by the defendants. Appellants state that no other instructions were given to the jury which stated the identical principle of law involved in the instructions requested. The record reveals that the principle of law with respect to contributory negligence was effectively covered in several instructions given by the court.

For the reasons above given, the judgments from which this appeal is taken, are, and each of them is reversed; and the causes as consolidated are hereby remanded for a new trial upon the question of damages and the division thereof, in accordance with the views herein expressed.

YORK, P. J., and WHITE, J., concur.

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64 Cal.App.2d 217

CONROY v. PEREZ et al.

No. 12571.

District Court of Appeal, First District, Division 1, California.

May 2, 1944.

1. Appeal and error ⚿933(4)

Where plaintiff's motion for new trial after verdict for defendants was based on all statutory grounds but order granting motion did not specify ground thereof, it would be presumed that the new trial was not granted on ground of insufficiency of evidence.

2. Appeal and error ⚿933(4)

Where no affidavits were filed in support of plaintiff's motion for new trial, it would be presumed that the ground on which motion was granted was errors of law occurring at trial.

3. Appeal and error ⚿977(3)

The granting or denial of a new trial is a matter resting so largely in discretion of trial court that it will not be disturbed except upon manifest abuse, especially when the discretion is used in awarding a new trial which does not finally dispose of the matter.

4. Negligence ⚿1

Negligence is not an absolute term, but is a relative one, and in deciding whether a defendant has been negligent in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence, which existed prior to and at the time the alleged negligent act was committed.

5. Automobiles ⚿246(5)

In action for death of child who was crushed beneath wheels of a backing truck, instruction that in determining whether truck driver could have avoided accident by use of ordinary care, his conduct was to be measured by his means of ascertaining facts before the accident as shown by the evidence was erroneous.

6. Automobiles ⚿162(1)

The conduct of young children is unpredictable and one operating a motor vehicle should anticipate their thoughtlessness and impulsiveness.

7. Automobiles ⚷162(1)

The presence of children is in itself a warning to driver of motor vehicle requiring the exercise of care for their safety.

8. Automobiles ⚷162(1)

If evidence shows that driver of motor vehicle has knowledge of presence of children, he may be held to have been responsible for injury to child although it appears that he did not see the injured child in time to prevent injury.

9. Appeal and error ⚷978(1)

In action for death of child crushed beneath wheels of a backing truck, whether erroneous instruction that in determining whether truck driver could have avoided accident by use of ordinary care, his conduct was to be measured by his means of ascertaining facts before the accident as shown by the evidence was prejudicial was a question for trial court on motion for new trial.

10. Appeal and error ⚷933(4)

Where instruction was erroneous and trial court granted new trial, it was presumed that the trial court considered that the error was prejudicial and that it resulted in a miscarriage of justice, and its action would not be set aside on appeal.

11. Trial ⚷296(3)

In death action, error in instruction that in determining whether truck driver could have avoided accident by use of ordinary care his conduct was to be measured by his means of ascertaining facts before the accident as shown by the evidence was not cured by fact that other and correct instructions were given.

12. New trial ⚷39

In action for death of child, aged two years and eight months, crushed beneath wheels of a backing motor truck, trial court was justified in granting new trial on ground that because of age of child issue of its contributory negligence was improperly submitted to jury and consequently that it was error to instruct jury on that subject.

13. Negligence ⚷85(3), 136(29)

In case of a very young child, it will be conclusively presumed that child was incapable of foreseeing peril to which it was exposed and in such case question of contributory negligence should not be submitted to jury.

14. Negligence ⚷85(3)

A child of two years and eight months of age could not have sufficient capacity to be guilty of contributory negligence which would bar its parents' recovery for damages for its death.

15. Trial ⚷199

In action for death of child, aged two years and eight months, crushed beneath wheels of a backing motor truck, it was error to instruct jury on question of contributory negligence of the child.

16. New trial ⚷10

In action for death of child, aged two years and eight months, crushed beneath wheels of a backing motor truck, the fact that some of instructions on contributory negligence were proposed by plaintiff did not preclude trial court from granting a new trial because of error in giving instructions on contributory negligence.

17. New trial ⚷10

Where error appears in the record, the power of trial court to grant a new trial is not limited by conduct of parties in inviting such error.

18. Pleading ⚷240

Generally, mere leave to amend pleading does not in itself operate as an amendment, and if a formal amendment is not filed the issue is not properly pleaded.

19. Pleading ⚷420(3)

Where motion to amend pleading is made during trial and thereafter the case is tried as if amendment had been made, the parties by their actions are estopped and cannot later complain that no formal amendment was in fact made.

20. Negligence ⚷117

Defense of contributory negligence must be affirmatively pleaded.

21. New trial ⚷18, 39

In father's action for death of young child, where defendants charged contributory negligence on part of child and defendants' application, made just before defendants called their last witness, to amend so as to charge contributory negligence of the child's father was granted but formal amendment was not made, trial court was justified in granting new trial either upon ground that no issue of contributory negligence of the father had been pleaded and that therefore instructions given on that defense were improper or on ground that under all circumstances it was error for court to grant leave to amend at end of trial so as to bring in a new defense.

* * *

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Death action by Robert G. Conroy against Ricardo Perez and others. The jury returned a verdict for defendants, and judgment was entered accordingly. From an order granting plaintiff's motion for a new trial, the defendants appeal.

Affirmed.

Phillip Barnett and Robert L. Dreyfus, both of San Francisco, for appellants.

J. W. Jackson, of San Francisco, for respondent.

KNIGHT, Justice.

The defendants appeal from an order granting plaintiff's motion for a new trial in an action brought by plaintiff to recover damages for the death of his infant daughter, aged two years and eight months. She was crushed beneath the wheels of a truck operated by the defendant Perez and belonging to the other defendants, when Perez started backing up the truck without observing that the child was behind it.

The cause of action set forth in the complaint was based on allegations of negligence in the operation of the truck. The answer of the defendants denied the allegations of negligence, and as special defense set up contributory negligence on the part of the child. Just before the evidence was closed, the defendants, over plaintiff's objections, were granted leave to amend their answer so as to set up also contributory negligence on the part of the child's father; and instructions were given relating to that special defense. However, no amended pleading was ever filed, nor was the original answer amended of record pursuant to the leave granted. The jury returned a verdict in favor of the defendants, and judgment was entered accordingly.

[1, 2] The motion for new trial was based on all statutory grounds, but the order granting the motion did not specify the ground thereof. It must be conclusively presumed, therefore, that the new trial was not granted upon the ground of insufficiency of the evidence. Furthermore, since no affidavits were filed in support of the motion, it must be presumed that the ground upon which the motion was granted was errors of law occurring at the trial. Among those relied upon by respondent in support of the trial court's order is the giving of prejudicially erroneous instructions.

[3] The rule governing reviewing courts on appeals of this kind may be stated as follows: "The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter." 2 Cal.Jur. 905; Pettigrew v. O'Donnell, 32 Cal.App.2d 502, 90 P.2d 93. And where the subject of erroneous instructions is involved, it is held that a wide discretion should be allowed to the trial court and that the order granting the new trial must not be disturbed unless there appears to be an abuse of discretion. Pope v. Wenisch, 109 Cal.App. 608, 293 P. 622, citing Thompson v. California Const. Co., 148 Cal. 35, 82 P. 367; Associated Fruit Co. v. Marone, 68 Cal. App. 358, 229 P. 868; and 20 Cal.Jur. 140. In order to determine whether the court abused its discretion in the present case it will be necessary to view the instructions in the light of the facts established.

The accident happened on Sunday, August 17, 1941, about noontime, at the Sunnydale housing project on Sunnydale Avenue in San Francisco, in the vicinity of Visitacion Valley. The particular part of the project where the accident occurred consisted of a parking area about 60 feet wide and some 100 feet long, the entrance to which was on Sunnydale Avenue. The parking area was bordered by sidewalk on all sides; and to the north and west were the apartment buildings, in one of which apartments Conroy, the plaintiff, lived with his wife and child. The area was used by the tenants of the project both as a drive-in and to park their cars, and was also used by deliverymen and trucks, etc., and there is evidence showing that children played there. On the day of the accident a Mrs. Matteson, one of the tenants, planned to move. Two friends of hers, a Mr. Booth, and defendant Perez, who with his wife and child had been tenants of the apartments up to several weeks preceding the accident, arranged to rent a truck from defendant Evans Auto Truck Rental Co. and help Mrs. Matteson move. About noon Perez and Booth backed the truck into the parking area, Perez doing the driving, and he stopped near the entrance to Mrs. Matteson's apartment. There were several cars parked in the area. One was plaintiff's, which he was washing when the truck arrived, and while he was washing it the child was playing around the car. Another car belonged to one Weiler, who lived next door to Mrs. Matteson. It was parked in front of Mrs. Matteson's door, and Booth alighted from the truck and went in to ask Weiler to move his car. Perez remained with the truck and kept the engine running. Soon after the truck arrived Mrs. Matteson's two boys ran out and climbed on the truck and Perez told them to get off. Meanwhile two other boys named Rystad passed behind the truck twice. They lived in the apartments with their mother. Soon Weiler came out and moved his car, whereupon Perez started to back the truck up to Mrs. Matteson's door, and he backed it about eight feet when it struck the Conroy child.

Conroy saw the truck when it arrived at the parking area, but shortly afterwards he finished washing his car and went into his apartment, taking the child with him. He took her to the kitchen and gave her a drink of water, and left her in the living room downstairs, with the front door closed, while he went upstairs to change his clothes. His wife was upstairs also; but he had been up there only a few minutes when he heard a scream, and running out saw the child had been run over by the truck.

Perez denied having seen the Conroy child, or the two Rystad boys, but there is affirmative evidence showing their presence near the truck while Perez was waiting for Weiler to move his car. One of these witnesses so testifying was Mrs. Rystad. She testified that she was looking out her window and saw her boys cross the parking area to the opposite sidewalk; that the truck was there then, and her boys passed back of it; that the Conroy child was standing in back of the truck; that three or four minutes later she went out to call her children back, and the Conroy child was still back of the truck; that as her children came back they again passed back of the truck; that she observed the truck parked there for some fifteen minutes, and saw the Matteson children playing on it; that she was standing in her doorway when she saw the truck start to back up; that the driver did not look toward the back, and she screamed for him to stop as the Conroy child was still about two feet back of the truck; that she ran toward the truck, and the driver stopped the truck, but the child had been struck; that the truck had backed about eight feet before it stopped. She also testified that the backyards of the project were not finished, so the children were in the habit of playing in the parking area, and often left their toys there. One of Mrs. Rystad's boys also testified not only as to his own presence about the truck but also the presence of the Conroy child. In this respect he stated that after the truck had backed in and stopped he crossed behind it twice, and that on each occasion the Conroy child was behind it. Mrs. Perez, wife of the defendant Perez, and Mrs. Matteson testified that they were standing in the latter's doorway when the truck backed in; that Booth then went to ask Weiler to move his car, which Weiler did; that they saw the Matteson boys jump on the truck, and that Perez told them to get off; that when he started backing the truck, they saw the Conroy child running just a few feet behind the truck; and Mrs. Perez testified that she screamed, but it was too late.

There is a conflict of testimony as to Perez' movements after he arrived with the truck. Mrs. Rystad testified that he remained in the cab; that after Weiler moved his car, Perez started to back his truck slowly, without looking around or sounding his horn; that he was looking ahead all the time. On the other hand Perez, his wife and Mrs. Matteson testified that he got out of the truck to tell the Matteson boys to get off, and that before starting to back the truck he looked around toward the rear. Perez further testified that before starting to back he looked in the rear view mirror and back through the rear window of the cab. His statement, however, that he got out of the cab was completely at variance with the testimony given by him in his deposition. There, in response to a direct question, he stated that he "stayed in the truck all the time." His explanation for the contradictory testimony so given by him by deposition was that at that time he was nervous, and that since then he remembered "more clearly."

[4-8] Negligence is not an absolute term, but a relative one; and in deciding whether a defendant has been negligent in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence, which existed prior to and at the time the alleged negligent act was committed. The rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into and in a sense are part of the conduct in question. As will be seen from the statement of fact hereinabove set out, the determinative question the jury here was called upon to decide, in considering the issue of the driver's negligence, was whether in the light of all the existing circumstances and conditions shown by the evidence he exercised the care of a reasonably prudent person in backing up his truck. On this subject one of the instructions given to the jury was the following: "In determining whether Mr. Perez, the driver of the truck, could or could not have avoided the accident by the use of ordinary care on his part, I instruct you that his conduct is to be measured *by his means of ascertaining the facts and circumstances before* the accident as shown by the evidence. A person's conduct *before* an accident is not measured by the information that is acquired afterwards." (Italics added.) This is doubtless a misleading statement of the law. An instruction of similar import was given in the case of Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675, 677, wherein a child was killed by the alleged negligent operation of an automobile, and a judgment in favor of the defendants was reversed on the ground of erroneous instructions. With respect to the instruction there challenged the court said: "In determining defendants' alleged negligence, this instruction wrongfully limits the consideration of the jury to such evidence only as tends to show what actual knowledge of the danger of the situation the driver of the automobile had at the time of the accident. Negligence may be adequately shown by proof of the fact that the driver of an automobile failed to exercise that degree of vigilance in the operation of the vehicle which an ordinarily prudent person should have used under similar circumstances, even though it also appears that the driver had no actual knowledge of the danger. One is bound to exercise ordinary care to anticipate danger. This instruction is fatally defective for that reason. The prejudicial error of this instruction is not avoided by the fact that the jury was elsewhere correctly instructed * * *. The jury was here specifically directed that they were confined to the consideration of the actual knowledge of danger which was possessed by the driver of the machine, in determining the question of negligence. This is an incorrect statement of the law." The instruction here was even more erroneous for it was limited to defendant's actual knowledge of the danger *before* the accident. Admittedly he had no actual knowledge that the child was close by when he backed up; but the instruction fails to take into consideration that if he had exercised reasonable care he might have seen that the child was there, or that he should in the exercise of reasonable care have anticipated the danger from the fact that children habitually played there, and had in fact actually been playing on his truck so that he had to ask them to get away. As the courts have frequently said, it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties. Their conduct is unpredictable and one operating a motor vehicle should anticipate their thoughtlessness and impulsiveness. Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 23 P.2d 769. The presence of children is in itself a warning requiring the exercise of care for their safety. Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 275 P. 980. Moreover if the evidence shows that a driver has knowledge of the presence of children he may be held to have been responsible although it appears that he did not see the injured child in time to prevent the injury. See 2 Cal.Jur. Ten Yr. Supp. p. 454. This is especially true where the injury occurs in or about the child's home. Cambou v. Marty, 98 Cal.App. 598, 277 P. 365, 367. The court there said: "Any reasonable man can be charged with knowledge that a child is apt to be found at any place about the family yard. Charged with that knowledge it becomes his duty to use vigilance and care before setting in motion a dangerous instrumentality in that locality."

[9, 10] Whether the erroneous instruction was prejudicial was a question for the trial court on motion for new trial; and having granted the new trial, it must be presumed that the trial court considered that it was and that it resulted in a miscarriage of justice. As said in Pettigrew v. O'Donnell, supra, "It may be that the jury was misled by the instruction which the trial court gave and that a miscarriage of justice resulted from the giving of said instruction. The trial court was in a better position to determine that matter than we on appeal. The trial court believed that there had been a miscarriage of justice and made its order accordingly, and so long as the case presents an instance showing a reasonable or even fairly debatable justification for the order, such action will not be set aside on appeal." See also Nieves v. Vigolino, 135 Cal.App. 763, 27 P.2d 916; Pope v. Wenisch, supra; Dodds v. Gifford, 127 Cal.App. 629, 16 P. 2d 279.

[11] The mere fact that other and correct instructions were given does not cure the error, for as said in Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471, 475, "If the statement to the jury of an essential principle of law is materially incorrect, the error is not generally remedied by a correct declaration of the same principle in another instruction. [citing numerous authorities.] It is ordinarily impossible to determine which of the conflicting rules was followed by the jury."

[12-15] We are of the opinion also that the trial court was justified in granting a new trial upon the ground that because of the very young age of the deceased child the issue of its contributory negligence was improperly submitted to the jury, and consequently that it was error to instruct the jury on that subject. As said in 2 Cal.Jur. Ten Yr.Supp. p. 442, in the case of a very young child, it will be conclusively presumed, apparently, that the victim was incapable of foreseeing the peril to which he was exposed, and in such cases the question as to his "contributory negligence" may not be submitted to the jury. In Todd v. Orcutt, 42 Cal.App. 687, 183 P. 963, 964, it was said: "An infant may be so very young that, like an idiot or lunatic, no negligence may be legally imputed to him." And in Parra v. Cleaver, 110 Cal.App. 168, 294 P. 6, 7, after quoting this language from Todd v. Orcutt, it was said: "As Jose Parra was only sixteen months of age at the time of his injury and as there was no evidence indicating that he had sufficient mind or understanding to enable him to be guilty of contributory negligence, and as the record is barren of any evidence pointing to contributory negligence on his part, we cannot charge him with it." See also Gonzales v. Davis, 197 Cal. 256, 240 P. 16, wherein it was held in effect that a child of five could not be guilty of contributory negligence. While there is no precise age at which, as a matter of law, a child is to be held accountable for his actions, it is obvious that a child of two years and eight months of age could not have sufficient capacity to be guilty of contributory negligence which would bar its parents' recovery for damages for its death; and that it was error to have so instructed the jury.

[16, 17] Nor did the fact that some of the instructions on contributory negligence were proposed by plaintiff preclude the trial court from granting a new trial on this particular ground. In dealing with a similar situation in Springer v. Sodestrom, 54 Cal.App.2d 704, 129 P.2d 499, 500, the court said: "The plaintiffs themselves submitted instructions on the issue of contributory negligence, and the case was tried by both sides on the theory that the question of contributory negligence was an issue in the case, and as such, was a question of fact for the jury. Defendant contends that, since the plaintiffs proposed instructions on the issue of contributory negligence, they are therefore precluded from predicating error on the giving of such instructions. Collins v. Graves, 17 Cal.App.2d 288, 61 P.2d 1198; Ray v. Kennedy, 24 Cal.App.2d 583, 76 P.2d 147; Charves v. San Francisco-Oakland Terminal Rys., 44 Cal.App. 221, 186 P. 154; Gray v. Ellis, 164 Cal. 481, 129 P. 791. There can be no doubt that under some circumstances the offering of instructions on an issue constitutes a waiver, but that rule does not restrict the power of the trial court to grant a new trial. If error appears in the record, the power of the trial court to grant a new trial is not limited by the conduct of the parties in inviting such error. On an appeal from a judgment, defendant's position would be tenable, but not so when an appeal is from an order granting a new trial. Nieves v. Vigolino, 135 Cal.App. 763, 27 P.2d 916; Pope v. Wenisch, 109 Cal.App. 608, 293

P. 622; Weaver v. Shell Oil Co. of California, 129 Cal.App. 232, 18 P.2d 736. As was stated in Nieves v. Vigolino, supra, 135 Cal.App. at page 765, 27 P.2d at page 916, '* * * where the jury has been erroneously instructed and the trial court has determined that the error was prejudicial, we do not believe that it is precluded from granting a new trial merely because there may be said to be a waiver or an estoppel on the part of one of the parties. Weaver v. Shell Oil Co., [of California] supra. To hold otherwise would mean that the trial court, by reason of the action of the parties, would be powerless to correct what might be an obvious miscarriage of justice.' "

The third major ground upon which the trial court was justified in granting a new trial relates to the ruling granting defendants leave to amend the answer to set up a new special defense, to-wit, contributory negligence on the part of the child's father.

The application to amend was made just before defendants called their last witness. Until then the only charge of contributory negligence involved in the trial was directed against the deceased child. Such charge was embodied in a special defense, the allegations of which were "That the said Joyce Anne Conroy [the child] was careless and negligent in and about the matters set forth in the complaint * * * which carelessness and negligence were the proximate cause of the alleged damages, if any, and if any damage was sustained it was caused solely through the negligence and carelessness of the said Joyce Anne Conroy, and through no other cause"; and defendants asked that they be granted leave to amend those allegations by inserting the words "and plaintiff" after the words "Joyce Anne Conroy" and changing the verb "was" to "were." Plaintiff strenuously objected to the granting of such leave on several grounds, among them being that the application came too late; that if the amendment were allowed it would change the theory on which the case had been tried and would bring in a new defense which plaintiff at that time was not prepared to meet; furthermore, that he had prepared no instructions on such a defense. The leave was granted, and both parties proposed instructions on that issue, which the court gave; but defendants did not thereafter conform to the leave granted because no amended pleading of any kind was thereafter filed nor did they make any amendment of record. Thus, so far as the pleadings go, no issue of contributory negligence on the part of the father of the child was ever legally tendered.

[18-20] It is a general rule that mere leave to amend does not in itself operate as an amendment, and if a formal amendment is not filed the issue is not properly pleaded. Central Cal. Creditors' Ass'n v. Seeley, 91 Cal.App. 327, 267 P. 138; see cases collected in 49 C.J. p. 548, 549. It is true that where the motion to amend is made during the trial and thereafter the case is tried as if the amendment had been made, the parties by their actions are estopped and cannot later complain that no formal amendment was in fact made. Greenwood v. Greenwood, 112 Cal.App. 691, 297 P. 589. Here, however, it cannot be held that the cause was tried as if the amendment had been made because defendants did not make their application to amend until nearly the end of the trial. The nature of the amendment was not one to conform to the proof, but was one whereunder defendants sought to bring in an entirely new defense, which under well settled rules, to be considered by the jury at all, must be affirmatively pleaded.

[21] In the foregoing state of the record the trial court was justified in concluding that plaintiff was entitled to a new trial either upon the ground that no issue of contributory negligence on the part of the child's father had been pleaded, and that therefore the instructions given on that defense were improper; or upon the ground that under all the circumstances it was error for the court to grant leave to amend at the end of the trial so as to bring in a new defense.

For the several reasons above stated, it cannot reasonably be held that the trial court abused its discretion in granting a new trial. The order is affirmed.

PETERS, P. J., and WARD, J., concur.

64 Cal.App.2d 336

PEOPLE v. GORMLEY.

Crim. 3757.

District Court of Appeal, Second District, Division 2, California.

May 11, 1944.

Hearing Denied June 8, 1944.

1. Criminal law ⟹1115(1)

Where transcript of testimony received at defendant's preliminary hearing was not made part of record in superior court, point that such court erred in denying defendant's motion to set aside information on ground that defendant was committed without reasonable or probable cause may not be considered on appeal from judgments of conviction.

2. Criminal law ⟹393(1)

Where one accused of forgery wrote voluntarily on cards, introduced in evidence as exemplars of his handwriting taken in police station after his arrest, and no force or duress was used or promise of immunity given, he was not thereby compelled to be a witness against himself in violation of Constitution. Const. art. 1, § 13.

3. Criminal law ⟹400(8)

In forgery prosecution, testimony of officials of three banks, on which forged checks were drawn, was admissible to prove nonexistence of bank accounts in purported drawers' names, and it was unnecessary to bring into court all of such banks' records and books, showing their various customers' accounts, or to produce expert witness' testimony in order to establish such fact. Code Civ.Proc. § 1855(5).

4. Criminal law ⟹491(1)

In forgery prosecution, an exemplar of defendant's handwriting, taken when he was under arrest in sheriff's office on previous charge of forgery, was inadmissible, in absence of showing that expert witnesses needed specimens of defendant's handwriting in addition to those given at time of his arrest on present charges.

5. Criminal law ⟹1186(4)

In forgery prosecution, error in admitting in evidence an exemplar of defendant's handwriting, taken while he was under arrest in sheriff's office on previous charge of forgery, worked no miscarriage of justice requiring reversal of judgments of conviction on present charges, in absence of probability that different verdict would have been rendered. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

James J. Gormley was convicted of forgery, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant was accused of forgery in two informations, containing five and four counts each respectively. The informations having been consolidated for trial, defendant was convicted on all charges. He has appealed from the judgments of conviction and from the order denying his motions for a new trial.

During the late months of 1942 defendant gave nine checks to various merchants and individuals in the San Fernando Valley territory and received merchandise or cash for them. The checks, which were in small amounts, were drawn on three different banks. In most instances they were made payable to cash. All of the checks were dishonored by the banks for the reason that the purported drawers had no accounts in the banks. The names of the drawers, several in number, and the residences given were fictitious. Exemplars of the handwriting of defendant were obtained by the officers, and expert witnesses testified that in their opinions the writing on the exemplars was made by the same person who wrote the dishonored checks. When he was arrested defendant told the officers that he was "going to take care of those checks out in the Valley." He also said that the four checks purported to be signed by J. W. Murphy "were not his".

[1] Defendant complains of the ruling of the trial court denying his motion to set aside one of the informations, made on the ground that he had been committed without reasonable or probable cause. The transcript of the testimony received at the preliminary hearing was not made a part of the record in the superior court and therefore the point may not be considered at this time.

[2] The taking of the exemplars of defendant's handwriting in the police station after his arrest did not constitute a violation of his constitutional rights safeguarded by Sec. 13 of Article I of the Constitution of California. Defendant wrote voluntarily on the cards which were introduced in evidence. No force or duress was used and no promise of immunity given. He was not compelled to be a witness against himself. People v. Bundy, 168 Cal. 777, 781, 145 P. 537; People v. Whitaker, 127 Cal.App. 370, 373, 15 P.2d 883.

[3] The trial court did not err in permitting officials from the three banks to testify concerning the non-existence of bank accounts by the purported drawers of the various checks. It was unnecessary to bring into court all the records and books of the banks showing the accounts of the various customers in order to prove that the parties whose names purported to be signed upon the checks did not have accounts or credit with the banks. To meet situations like the present one the legislature enacted subdivision (5) of section 1855 of the Code of Civil Procedure, avoiding the necessity of bringing in voluminous records and enabling a party to prove in court "the general result of the whole". The testimony was negative in character and did not require the testimony of an expert witness to establish that the accounts did not exist. People v. Weaver, 96 Cal. App. 1, 10, 274 P. 361; People v. Kawano, 38 Cal.App. 612, 177 P. 174.

[4, 5] A more serious contention is made by defendant when he complains of the ruling of the trial court in permitting the use of an exemplar of his handwriting taken on November 15, 1933. On the last mentioned date defendant was under arrest in the sheriff's office of Los Angeles and there freely and voluntarily made a number of writings, including the alphabet, upon identification cards of the office. During the trial defendant testified that he had been arrested in Los Angeles in 1933 at the request of the San Bernardino authorities and that he was finally released because the district attorney of San Bernardino concluded that the post-dated check which he had given was in effect a promissory note. The trial court instructed the jury that the writing had been admitted in evidence for the limited purpose of serving as a specimen of defendant's handwriting and that the jury "should draw no inference whatsoever from anything that may be suggested to you by anything else on this card". Defendant argues that the introduction of the card of 1933 in evidence had the effect of prejudicing defendant in the eyes of the jury, who would naturally conclude that he had been in trouble with the police on a previous occasion in a matter similar to the one before the court. He asserts that the use of the exemplar was unnecessary because of the fact that the prosecutor had in his possession other exemplars which were taken upon the arrest of defendant on the present charges. Respondent relies upon the rule that evidence which is admissible need not be excluded because it may indicate guilt of other offenses and points out that the court properly limited the use of the writing in its instructions to the jury. Strong support for the position of defendant is found in People v. Van Cleave, 208 Cal. 295, 280 P. 983, 985. In that case the defendant was on trial on a charge of burglary and an expert witness testified that the thumb print found at the location of the burglary was the counterpart of a thumb print which he had taken of the defendant. Sometime later the prosecution offered in evidence finger prints upon a card found in the identification bureau of the police department and bearing the name of the defendant. An expert witness testified that a thumb print found on the card, which was made before the date of the burglary for which the defendant was being tried, was made by the same thumb which made the print found at the location of the burglary. In its opinion the court said that "the exhibit was offered merely because it was inspected by the finger print expert during the investigation which preceded appellant's arrest". It was held that the trial court erred in admitting the thumb print and the judgment was reversed because of this error and also because of the misconduct of the trial judge. It is noteworthy that although a majority of the court held that the judgment should be reversed notwithstanding the provisions of section 4½ of Article VI of the Constitution, two of the justices dissented on the ground that an analysis of the evidence did not establish that the case was a "close one" and that therefore there had not been a miscarriage of justice.

The case now before us may be distinguished from the Van Cleave case. The charge being forgery, it can be argued that an additional exemplar of defendant's handwriting was more needful in establishing the crime charged than was the additional thumb print in the Van Cleave case. In the case now under review the trial court limited the effect of the exemplar in its instruction to the jury but it does not appear from the opinion in the Van Cleave case that such a limiting instruction was given to the jury. Notwithstanding these distinguishing features, we are of the opinion that the trial court should have resolved the question of the admissibility of the 1933 exemplar in favor of defendant in the absence of a showing that the expert witnesses needed specimens of his handwriting in addition to those given at the time of his arrest on the present charges. We are satisfied, however, that it is not probable that a different verdict would have been rendered if the questioned exemplar had not been used. There has been no miscarriage of justice.

The judgments and the order denying a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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64 Cal.App.2d 346

HAYWARD LUMBER & INVESTMENT CO. v. FORD et al.

Civ. 3129.

District Court of Appeal, Fourth District, California.

May 13, 1944.

Hearing Denied July 10, 1944.

1. Mechanics' liens 🔑78

That owner of service station premises and adjoining drive-in restaurant premises purchased gravel for both to be spread by lessee of each did not necessarily make owner a "participating owner" so as to deprive him of right to file a nonresponsibility notice and claim exemption from materialman's lien for materials furnished lessee of restaurant and used in alterations made on restaurant building. Code Civ. Proc. § 1192.

See Words and Phrases, Permanent Edition, for all other definitions of "Participating Owner".

2. Mechanics' liens 🔑78

The object of a notice of nonresponsibility is to bring home to those who are expending labor or materials upon a building the fact that owner of land will not be responsible for such labor or materials. Code Civ.Proc. § 1192.

3. Appeal and error 🔑931(1)

All intendments are in favor of judgment appealed from and District Court of Appeal must accept as true all evidence tending to establish the correctness of findings as made.

4. Mechanics' liens 🔑281(3)

In action to foreclose lien for materials furnished lessee of drive-in restaurant and used in altering and improving restaurant building, evidence sustained finding that work of altering and improving leased premises was commenced before owner posted nonresponsibility notice so that it was not prematurely posted as respects exemption of premises from materialman's lien. Code Civ.Proc. § 1192.

5. Appeal and error 🔑169, 181

Generally, an appellate court will consider only such points or objections as were raised in trial court.

6. Mechanics' liens 🔑136(2)

A claim of lien should be of such a character as to sufficiently identify the property or improvements upon which it is claimed the lien should attach. Code Civ.Proc. § 1187.

7. Mechanics' liens 🔑134, 136(1)

Though imperfect attempt to describe in claim of lien the land sought to be charged may be rendered sufficient by other allegations therein, claim of lien must contain a statement of the facts which the statute prescribes for creation of a lien and must also contain a description of the property to be charged with lien. Code Civ. Proc. § 1187.

8. Mechanics' liens 🔑5

The statute prescribing time for filing a claim of lien and the contents thereof is remedial and is to be liberally construed. Code Civ.Proc. § 1187.

9. Appeal and error 🔑172(1)

Where action to foreclose lien for materials furnished lessee and used in altering and improving building on leased premises was tried on theory that plaintiff sought to hold the land for claimed lien and judgment by default against lessee for balance due for materials had become final and no additional relief was sought against lessee by way of lien upon any interest in leasehold, plaintiff could not for the first time on appeal claim a lien upon interest of lessee or upon the building in any event. Code Civ. Proc. §§ 1187, 1192.

10. Appeal and error ⚷171(1)

The theory upon which a case is tried in the court below must be adhered to on appeal.

11. Appeal and error ⚷1071(5)

Where evidence supported finding that nonresponsibility notice was filed by owner of land in proper time so that no lien attached to the property for materials furnished lessee, whether trial court found that materials furnished were actually used in construction work on leased premises became immaterial. Code Civ.Proc. § 1192.

12. Appeal and error ⚷1071(5)

Trial court's finding supported by sufficient evidence that landowner's notice of nonresponsibility for materials furnished lessee for use in alteration and improvement of building on leased premises was filed in proper time so that no lien attached to property justified portion of judgment appealed from denying materialman's lien and any errors in making or failing to make other findings complained of were not prejudicial to plaintiff. Code Civ.Proc. § 1192.

◆

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Hayward Lumber & Investment Company against James Ford and others to recover for materials furnished and to foreclose a materialman's lien therefor. From that portion of judgment denying its claimed lien, plaintiff appeals.

Judgment affirmed.

LeRoy B. Lorenz, of Los Angeles, for appellant.

Kendall & Howell, of Bakersfield, for respondents.

GRIFFIN, Justice.

Defendants and respondents Dr. Clarence B. Vigario and his wife, Caroline F. Vigario, reside in Bakersfield and own property in Delano. That property faces on Highway 99 with a 200-foot frontage. The north 120 feet thereof is used and leased out as a service station. On the south 80 feet was located a drive-in restaurant building which they leased to defendant James Ford, under date April 1, 1941. The lease contained a provision that no alterations were to be made "except by written consent of lessors", and that alterations and additions to said premises should, at the expiration of the lease, remain for the benefit of the lessors, unless otherwise provided. It also contained a provision that if any mechanics' or materialmen's liens be filed the lease would be subject to forfeiture. Defendant Ford took possession of the premises a few days before April 1st, 1941. Shortly thereafter, he phoned Dr. Vigario that he was going to do some work or improvements on the premises. Dr. Vigario testified that about the date of the lease he ordered some gravel, paid for it, and had it delivered to the property above mentioned with the understanding with defendant Ford and the service station operator that they were to spread the gravel and fill in certain low spots on their respective premises wherever required.

On April 14, 1941, Ford wrote Dr. Vigario a letter which reads in part:

"The title from Swift and Company, etc., has not as yet come through. I understand that the delay is caused because some of the papers must go to Swift's main office in Chicago. As soon as these are completed we will start making alterations. * * *

"After some thought and consideration, I believe that all of our interest would be best served by enlarging the place to twice its present capacity. This can be handled through an F. H. A. loan, through which I understand you are not obligated and it is not necessary for you to sign with me.

"I intended to see you prior to this time in regard to the matter and see what arrangements we could make and what details could be worked out. * * * It will also give us room for the kitchen and sufficient room for customers to walk in and out.

"We have *spred* gravel around the place and the service station man has gone to some pains to scatter it.

"I know that we could settle a number of things if we could only talk together so if you are in shape and so desire I will come down to suit your convenience."

Upon receipt of the letter Dr. Vigario, understanding that Ford had commenced work upon the property, consulted his attorney and was advised to post a notice of nonresponsibility if work had actually been commenced. A notice of nonresponsibility was thereupon prepared and executed. It recited the names of the owners of the premises; that the property had been leased by defendant Ford on April 1, 1941; that he was entitled to enter upon and occupy the property for the purpose of operating a drive-in restaurant; that the owners "have been advised" and therefore allege that "work of construction of alterations and remodeling and enlarging the drive-in restaurant building upon the premises is being carried on"; that the owners first obtained knowledge of said work of construction and performance of labor on the premises on the 16th day of April, 1941; "that ten days have not elapsed since they first obtained knowledge of such construction and labor * * *"; that the owners will not be responsible for the construction of or materials used, in the alterations, remodeling or enlarging of any building or structure of any kind or character upon said premises.

On April 19, 1941, Dr. Vigario visited the property. He testified that he then found evidence that Ford had commenced work upon it; that he then posted the notice and recorded a copy on April 21, 1941; that in addition thereto he notified one of the lumber companies in Delano, where he thought the defendant Ford was going to trade, of the posting of the notice.

The first point here involved is plaintiff's contention that the evidence does not support the trial court's finding that the work of altering and improving the leased premises had commenced prior to the posting of the nonresponsibility notice; that under section 1192 of the Code of Civil Procedure the notice was prematurely posted. We will therefore review the evidence on this subject.

Dr. Vigario testified in reference to work that had been started that when he posted the notice he saw that Ford "had had some of the things moved out of" a little shanty in the back, "* * * quite a bit of that stuff had been piled up in a pile * * * like shelving and trays and equipment that they used for that kind of business"; that in the center of the room "I believe, if I am not mistaken * * * a counter * * * was moved to allow a little more room"; "there was other things progressing about the place"; there was "something in the back and he had started on something, I don't just remember"; that "there is a partition between the kitchen and then the back counter and the front counter where people sit down to eat and the equipment on that, as I remember, had been dismantled"; that he thought that Ford was "up there looking around the place, getting gravel spread around, because they told me that that was going to be done and was being done, so when I went up there I looked around for the little details of that kind. I didn't make particular note of it. I did note he had started messing around inside"; that he presumed the gravel was spread around the place; that a "lot of holes there" had been filled in; that the service station took care of their own, they did their own work, and this fellow did his own work, Ford and some other workers"; that he paid for the gravel with the understanding that "they were to do the handling themselves".

The manager for plaintiff corporation testified that plaintiff sold defendant Ford materials on a running account; that on June 5, 1941, he sold the first material for the particular improvement here involved; that he was "quite certain" all material delivered there went on the job; that plaintiff's place of business is about one-half block from the improvement; that it sold Ford the material listed on the invoices in evidence; that the balance remaining due on Ford's account was $519.25, less a credit of $59 paid by Ford on April 1st, 1942; that Ford operated another cafe and also a grocery store in Delano; that during the time here in question plaintiff was selling materials to Ford, in a small quantity, for the grocery store job; that he observed the Vigario property often; that he didn't remember if any work had been going on there about April 14th; that he did not examine the property on June 5, 1941, the date of the first delivery, but did examine it from time to time until the alteration work was completed.

One workman testified that he was employed by Ford; that he went to work for him on May 17, 1941; that on that date, no construction work had been done in the place; that there was no building material on the lot; that he recognized some of the items on the invoices that he put into the building; that he quit that job on May 23rd and later returned on June 11th; that he worked for Ford on other jobs.

Other witnesses corroborated this testimony except one witness noticed that Mr.

Ford was on the premises about April 1st; that Ford had scattered gravel around and "there had been some work done there".

Defendant Ford failed to pay for the materials sold and delivered to him. Plaintiff filed a materialman's lien against the "premises" which was followed by this action to foreclose the lien. Ford defaulted and did not appear at the trial. He had, previous to the time of the purchases here made, gone through bankruptcy. This fact was known to plaintiff, who trusted him because he had paid them in full before he filed in the bankruptcy court. Plaintiff took a local paper which contained the notice of nonresponsibility which notice was filed in the recorder's office. The nonresponsibility notice was posted in a conspicuous place on the door which entered the building on which the alterations were being performed and it remained there while plaintiff was furnishing the materials.

[1] The spreading of the gravel by defendant Ford could be considered a part of the improvements of the premises and coincided with the alterations and preparation of the premises by the defendant Ford for his uses. The fact that the gravel was purchased by Dr. Vigario, for both the service station premises and the drive-in restaurant premises, which gravel was to be spread by Ford and the service station lessee at their expense, did not necessarily make Dr. Vigario a participating owner, as contended by plaintiff, citing Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal.App. 4, 108 P. 891, which would deprive him of the right to file a nonresponsibility notice for materials furnished by plaintiff and to claim the benefits of section 1192 of the Code of Civil Procedure. The evidence as to the work that had been actually started at the time of the posting of the notice was not entirely definite and the testimony of Dr. Vigario in reference thereto was somewhat uncertain. The trial court, however, believed the testimony as related. On this issue it found that the work on the alteration and improvement of the building had actually been commenced on and prior to the posting of the notice of nonresponsibility, and rendered judgment against Ford for $460.25 and denied plaintiff a lien. The appeal is from that portion of the judgment denying the lien.

[2-4] The object of a notice of nonresponsibility, as stated in English v. Olympic Auditorium, Inc., 217 Cal. 631, 637, 20 P.2d 946, 948, 87 A.L.R. 1281, is "to bring home to those who are expending labor or materials upon a building the fact that the owner of the land will not be responsible for such labor or materials." Having in mind the general rule that all intendments are in favor of the judgment and that this court must accept as true all evidence tending to establish the correctness of the findings as made, we are satisfied that there is sufficient evidence to uphold the conclusions of the trial court. Feckenscher v. Gamble, 12 Cal.2d 482, 492, 85 P.2d 885; Hickman v. Freiermuth, 21 Cal.App. 629, 132 P. 772; Simons Brick Co. v. Hetzel, 72 Cal.App. 1, 236 P. 357; English v. Olympic Auditorium, Inc., supra; Harmon Lumber Co. v. Brown, 165 Cal. 193, 131 P. 368; Hayward Lumber & Inv. Co. v. Orondo Mines, 34 Cal.App.2d 697, 94 P.2d 380.

It is next contended and argued for the first time on appeal that plaintiff was entitled to a lien upon the interest of the lessee and upon the building in any event. In support of this contention it cites English v. Olympic Auditorium, Inc., supra. This point was not urged nor argued before the trial court. Plaintiff's first amended complaint alleges that the Vigarios were the owners of the land described (the south 200 feet of block G); that Ford did remodeling of a restaurant building upon the "premises described"; that the whole of the parcel of real estate described is necessary for the convenient use and occupation of the said improvements; that defendants claim some interest in "said premises" inconsistent with the lien claim of plaintiff and prayed for a "personal judgment" against Ford and that said judgment be declared a lien upon "said property hereinabove described * * * together with its appurtenances * * * and/or in any part thereof."

The claim of materialman's lien filed by plaintiff sought a lien upon the "premises hereinafter described, for building materials furnished to James Ford for use in, and which were used in the alteration, addition to, or repair of a certain building or improvement upon the parcel of land, situated in the county of Kern * * * described as follows: the south 200 feet of block G" alleging that Clarence B. Vigario is the owner and the reputed owner of said premises.

It is quite apparent that the plaintiff was originally seeking a lien against Vigarios' entire 200-foot strip of land on which was located two separate and distinct improvements, namely, a service station and a restaurant. The form of lien substantiates this conclusion and does not claim a lien upon the restaurant building separate from the service station and separate from the land upon which it was located.

The case was tried upon the theory that the nonresponsibility notice was prematurely filed and that therefore there was a lien upon the land. Plaintiff's then attorney made no contention during the trial that plaintiff was or should be entitled to a lien against the restaurant building notwithstanding the fact that it may be found that the land itself was protected by the nonresponsibility notice. In fact, it clearly appears that all parties at the trial were agreed that if it were found that the nonresponsibility notice was filed in proper time plaintiff could obtain no lien against the Vigarios' property. We need but quote the statement of the trial judge directed to plaintiff's then attorney, at the conclusion of the case: "By the court: Apparently the issue here is as to whether notice of nonresponsibility was effective or not by reason, I assume the plaintiff's contention is, it was premature. Mr. Lyons: That's our contention, Your Honor. We refer you to Hayward Lumber & Inv. Co. v. Ross, 32 Cal.App.2d 455, 90 P.2d 135. By the Court: All right, we will submit it then." The case cited did not bear upon any question of lien upon improvements but only on the question of the posting and filing of a notice of nonresponsibility.

[5] A different attorney was thereafter employed to perfect the appeal from a portion of the judgment rendered in this case. The point is now presented for the first time on this appeal that the court erred in failing to declare a lien upon the restaurant building and the interest of the lessee in any event. It is a well established rule of law, with certain exceptions, that an appellate court will consider only such points or objections as were raised in the trial court, and this rule precludes a party from asserting on appeal claims to relief not asserted or asked for in the court below. Boot v. Boyd, 37 Cal.App. 545, 555, 174 P. 352; Rimmer v. Hotchkiss, 162 Cal. 385, 123 P. 256; Buck v. Canty, 162 Cal. 226, 121 P. 924; 2 Cal.Jur. 234, § 67. In this connection we should consider the pleadings and nature of the claim filed.

[6-10] A claim of lien should be of such a character as to sufficiently identify the property or improvement upon which it is claimed the lien should attach. Bishop v. Hayward Lumber & Investment Co., 19 Cal.App.2d 234, 65 P.2d 125; sec. 1187, Code Civ.Proc; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 P. 555. This has been said to be one of the most important requirements of the statute. Fernandez v. Burleson, 110 Cal. 164, 42 P. 566, 52 Am.St.Rep. 75. Although it has been held that in a claim of lien an imperfect attempt to describe the land sought to be charged may be aided and rendered sufficient by other allegations therein, the rule is that it must contain a statement of the facts which the statute prescribes for the creation of a lien and must also contain a description of the property to be charged with the lien. This statute is remedial, of course, and is to be liberally construed. Union Lumber Co. v. Simon, 150 Cal. 751, 757, 89 P. 1077, 1081. In view of the nature of the claim filed, the pleadings, the evidence, and counsel's statement in reply to the question propounded by the trial court, it might be well said that plaintiff was seeking to hold the land of the Vigarios for the claimed lien. The case was tried in the trial court on that theory. No request was made of that court to apportion any part of the property or to designate any particular improvement upon which a lien could be foreclosed. It is well settled that the theory upon which a case is tried in the court below must be adhered to on appeal. To permit a party who has tried his case wholly or in part upon a certain theory, which theory was acted upon by the trial court, to change his position and adopt a different theory on appeal would not only be unfair to the trial court but manifestly would be unjust to the opposing litigant. Merrill v. Kohlberg, 29 Cal.App. 382, 386, 155 P. 824.

Plaintiff took judgment by default against defendant Ford for the amount of the indebtedness. No additional relief was sought against him in the form of a lien upon any interest he might have in the leasehold property. The judgment against Ford has become final.

[11, 12] Since the evidence supports the finding that the nonresponsibility notice was filed in proper time and that no lien attached to the property, plaintiff's claim that the trial court failed to find that the

materials furnished were actually used in the construction work, becomes immaterial. Any errors in making or failing to make other findings complained of were not prejudicial to plaintiff. Buck v. Canty, supra.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; CURTIS, J., dissenting.

* * *

64 Cal.App.2d 266

VALLERA v. VALLERA et al.

Civ. 14393.

District Court of Appeal, Second District, Division 1, California.

May 5, 1944.

Hearing Denied June 29, 1944.

1. Appeal and error ⇨1201(6)

Where portion of judgment dealing with property rights in separate maintenance suit was reversed, there was no final judgment as to property rights and court could permit filing of amended complaint on such issue.

2. Judgment ⇨217

There can be but one "final judgment" in an action, and that is the one which in effect ends the suit in the court in which it was instituted and finally determines the rights of the parties in relation to the matter in controversy.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

3. Equity ⇨39(1)

Equity, once having jurisdiction of subject matter of action, will retain it so that complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy accomplished.

4. Limitation of actions ⇨127(8)

Where portion of judgment dealing with property rights in suit for separate maintenance was reversed, trial court properly permitted filing of amended complaint for recovery of wife's interest in joint earnings notwithstanding running of three-year limitation while suit was pending. Civ.Code, § 3529; Code Civ.Proc. § 338, subd. 3; § 452.

5. Appeal and error ⇨959(1)

An order authorizing filing of amended pleading will not be disturbed in absence of clear showing of abuse of discretion.

6. Appeal and error ⇨1041(2)

Where portion of judgment dealing with property rights in suit for separate maintenance had been reversed, permitting filing of amended complaint for recovery of wife's interest in joint earnings was not prejudicial to husband.

7. Pleading ⇨26

Form is subordinated to substance in pleading and practice in civil cases.

8. Appeal and error ⇨78(3)

Where portion of judgment dealing with property rights in suit for separate maintenance had been reversed, order permitting wife to file amended complaint for recovery of her share in joint earnings was not appealable.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Suit by Marian Vallera against Concezio Vallera, also known as Joe Vallera, defendant, and Lida Cappello, co-respondent, for separate maintenance. From an order granting leave to file a proposed amended complaint, defendant and co-respondent attempt to appeal.

Appeal dismissed.

Zagon, Aaron and Sandler and Robert Kingsley, all of Los Angeles, for appellants.

William Ellis Lady, of Los Angeles, for respondent.

WHITE, Justice.

This litigation was commenced on July 17, 1940, when plaintiff filed her complaint in the usual form, seeking a decree for separate maintenance. Defendant and co-respondent filed answers. The cause proceeded to trial, following which the court made and filed its findings of fact, conclusions of law and order for judgment. In accordance with such proceedings, judgment was formally and regularly entered by the trial court on April 29, 1941.

Because the language of the judgment is pertinent to a disposition of the issues raised on this appeal, we deem it necessary to here set forth the concluding part of such judgment, reading as follows:

"Ordered, adjudged and decreed that plaintiff take nothing by her said complaint;

"Further ordered, adjudged and decreed that plaintiff and defendant are not now, nor have they ever been, husband and wife;

"Further ordered, adjudged and decreed that there is no community property of plaintiff and defendant (that all property acquired by plaintiff and defendant herein since December 16, 1938, and prior to July 6, 1940, is held by plaintiff and defendant as tenants in common, each owning an undivided one-half thereof, except such property as either may have acquired by gift, devise, bequest or descent)."

An attempted appeal by plaintiff from said judgment was dismissed by Division Two of this Court on April 24, 1942. Vallera v. Vallera, 51 Cal.App.2d 776, 124 P.2d 863.

In the meantime, defendant herein perfected an appeal from that portion only of the judgment contained in the last paragraph thereof quoted above, and which purported to assign the plaintiff certain property rights. For purposes of convenience, we have enclosed in brackets that portion of the judgment from which defendant appealed.

On March 1, 1943, the portion of the judgment appealed from by the defendant was reversed by the Supreme Court. Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761.

Some months after the going down of the remittitur of the Supreme Court, plaintiff filed in the Superior Court a notice of motion for leave to file a proposed amended complaint, and on September 17, 1943, said court made and entered its order granting such motion and authorizing the filing of the proffered complaint. It is from such order that defendant prosecutes this appeal.

By her proposed amended complaint, plaintiff alleges that about the month of April, 1936, at which time she was a single woman, defendant represented to her that he was a single man and that she believed such representations. That during April, 1936, plaintiff and defendant "not only agreed to enter into a marriage with each other and become husband and wife but they agreed to live together as husband and wife and to pool their earnings and share equally in their joint accumulations". Then follows allegations to the effect that pursuant to the said agreement, the parties established a home and at all times thereafter, in the cities of Detroit, Michigan, and Los Angeles, California, lived together as husband and wife until about May 27, 1940. The amended complaint also set forth that pursuant to the aforesaid agreement, and by reason of their joint efforts, plaintiff and defendant accumulated considerable property, totaling in value between $75,000 and $100,000. After alleging that on May 27, 1940, defendant abandoned plaintiff and that by a judgment of the Superior Court it was decreed that at no time did the relationship of husband and wife exist between the parties, plaintiff pleads by her amended complaint for an accounting of the alleged joint earnings of the parties; and that she be awarded one-half thereof.

It is at once apparent that by her proposed amended complaint plaintiff seeks to set up a cause of action in conformity with that portion of the decision of the Supreme Court in the case of Vallera v. Vallera, supra, wherein, at page 685, of 21 Cal.2d, at page 763 of 134 P.2d, it is said:

"Plaintiff's lack of good faith in alleging the belief that she had entered into a valid marriage would not, however, preclude her from recovering property to which she would otherwise be entitled. If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property. Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884; Mitchell v. Fish, 97 Ark. 444, 134 S.W. 940, 36 L.R.A.,N.S., 838; see Feig v. Bank of Italy, etc., Ass'n, supra [218 Cal. 54, 21 P.2d 421]; Bracken v. Bracken, 52 S.D. 252, 256, 217 N.W. 192; Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43, 132 Am.St.Rep. 879. Even in the absence of an express agreement to that effect, the woman would be entitled to share in the property jointly accumulated, in the proportion that her funds contributed toward its acquisition. Hayworth v. Williams, supra; Delamour v. Roger, 7 La.Ann. 152."

[1] Appellant first contends that the proposed amended complaint is without legal sanction for the reason that, when

the remittitur of the Supreme Court was lodged in the trial court, that portion of the judgment not affected by the Supreme Court's decision had reached the stage of a final judgment; and that, except for the relief afforded in the furtherance of justice, by section 473 of the Code of Civil Procedure, to file an amended pleading prior to the entry of judgment, there is no statute in California allowing this to be done after a judgment has been rendered. Keller v. Keller, 132 Cal.App. 343, 22 P.2d 798. However, in the case just cited there was no issue at the trial concerning the issues raised by the proposed amended answer, nor was it contended that the belated application to file the amended pleading was made to conform to the evidence adduced at the trial. In the instant case, the property rights of the respective parties was an issue at the trial, and had plaintiff, when the court announced its conclusion that there was not and never had been a valid subsisting marriage between the parties, requested permission to introduce evidence that the parties had lived together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, and then asked for permission to file an amended complaint under the doctrine enunciated by the Supreme Court in Vallera v. Vallera, supra, that equity will protect the interest of each party to such an agreement in such property, there can be no doubt that the court in the exercise of its discretion could have permitted plaintiff to follow such a course. Burrows v. Burrows, 18 Cal.App.2d 275, 278, 63 P.2d 1135; and Valencia v. Shell Oil Co., Cal.Sup., 147 P.2d 558, approving holding in the first cited case. The decision of the Supreme Court reversed only that portion of the judgment dealing with the property rights of the parties and, we feel, thereby left such issue open for determination by the court in the instant action. Certainly after such reversal there was no final judgment as to the property rights of the parties although that was an issue presented by the pleadings and raised by the evidence. If there was such a judgment, it was vacated by the reversal. Such being the case, is not the court empowered, in the exercise of the discretion vested in it, to permit the filing of an appropriate pleading upon which such issue of property rights could be legally and justly determined? From its inception the cause of action with which we are here concerned was an equitable one. The property rights of the respective parties herein was an issue from the very commencement of this litigation. By reversing only that portion of the judgment that affected those property rights we are persuaded that such issue was left open for the further and correct determination thereof by the trial court. In fact, the Supreme Court, in its decision (Vallera v. Vallera, supra), explicitly states that: "If a man and woman live together as husband and wife under an agreement to pool their earnings * * *, equity will protect the interest of each in such property."

[2] There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it was instituted, and finally determines the rights of the parties in relation to the matter in controversy. No judgment or decree can be regarded as final, within the meaning of the statutes governing appeals, unless all issues of law and fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it.

[3, 4] Appellant, however, contends that such rights must be treated in a separate proceeding, which sets up a cause of action upon the theory enunciated by the Supreme Court and hereinabove referred to. And it is urged by appellant that the issues tendered by the proposed amended complaint set up a new and different cause of action; that the same is clearly barred by subdivision 3 of section 338 of the Code of Civil Procedure, since the respondent's rights, if any, in the property now demanded by her accrued not later than July 17, 1940, when the parties separated and discontinued their joint business enterprise, while the amended complaint was not offered for filing until September 20, 1943. With this claim on the part of appellant, we cannot agree. It is a familiar rule that equity once having jurisdiction of the subject matter of an action will retain it to the end that a complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy may be accomplished. Litigation by piecemeal is not looked upon favorably by equity, and therefore, whenever possible equity will dispose of the entire controversy between the parties, will grant complete relief, and whenever possible, will settle and determine all differences between the parties in the one action, thereby, as between the same parties and upon the same subject

matter, leaving nothing for further litigation. Sonnicksen v. Sonnicksen, 45 Cal. App.2d 46, 52, 113 P.2d 495. The issue of the respective property rights of the parties remaining undetermined after decision by the Supreme Court in Vallera v. Vallera, supra, the trial court was justified in retaining jurisdiction until all of the issues in the action should be determined, and all the differences between the parties arising in such action were settled. Union Oil Co. v. Reconstruction Oil Company, 20 Cal. App.2d 170, 183, 66 P.2d 1215. In adopting such procedure, the court was empowered to do complete justice by settling the entire case. "Equity regards that as done which ought to be done." 10 Cal.Jur. 505; sec. 3529 Civil Code.

[5, 6] Reposing, as it does, in the sound discretion of the court, an order authorizing the filing of an amended pleading will not be disturbed in the absence of a clear showing of an abuse of such judicial discretion. In judging of the validity of the court's order under the circumstances present herein, consideration should also be given to the question of whether there is a showing of prejudice to the opposite party occasioned by the action of the court in permitting the filing of the amended complaint. In the case at bar, we find no showing of any such prejudice.

[7] In the final analysis, the aims and objects of a trial are and should be to get at the truth. While formal requirements of pleading and practice cannot be dispensed with by the court, it can usually make such orders or grant such amendments as the case progresses as will tend to justly dispose of the issues presented upon their merits. Form is subordinated to substance in pleading and practice in civil cases. In passing upon the construction, or permitting the filing of amended pleadings, the court is justified in adopting a liberal attitude to the end that substantial justice may be attained upon the merits of a controversy. Sec. 452, Code of Civil Procedure.

Holding, as we do, that insofar as the property rights of the parties herein are concerned there was no final judgment at the time the court granted respondent's motion to file the proposed amended complaint, bearing in mind the liberal policy of the law in the matter of allowing amended pleadings to be filed, and finding no prejudice to substantial rights arising from the ruling of the trial court, we are not authorized to interfere with such ruling. The reversal of that part of the judgment affecting the respective property rights of the parties did not operate to deprive the court of the power to proceed to a final hearing of that issue, raised as it was by the pleadings in the case. Manifestly, further judicial action was essential upon such issue of property rights, to the end that a final determination might be had of all of the rights of the parties. Therefore, it cannot be said that there is a final judgment in this case as that term is known to the law, because *all* of the issues necessary to a determination of the rights of the parties have not been finally adjudicated.

[8] For the reasons herein stated, the attempted appeal, being from a non-appealable order, must be dismissed.

It is so ordered.

YORK, P. J., and DORAN, J., concur.

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64 Cal.App.2d 316

STOHL v. HORSTMANN, City Auditor (CITY OF OAKLAND, Intervener).

Civ. 12580.

District Court of Appeal, First District, Division 2, California.
May 11, 1944.

Rehearing Denied June 10, 1944.
Hearing Denied July 6, 1944.

1. Municipal corporations 🔑186(5)

The provisions of Oakland city charter that compensation of all city officers or employees under city manager's jurisdiction shall be fixed by council only with his recommendation and that officers and members of city police department shall receive annual salaries of not less than amounts therein stated authorizes council to fix salaries of police department members at minimum amounts so specified or greater amounts on city manager's recommendation, in absence of other charter provisions limiting such authorization. St.1931, p. 2659, § 32; St.1933, p. 3190, § 91.

2. Municipal corporations ⚷180(2), 184(5)

The Oakland city ordinance, providing that police department member in charge of city jail shall receive $25 per month in addition to salary attached to rank held by him, is not invalid as creating higher rank or grade in such department in violation of city charter and promoting patrolman in charge of jail to such rank or grade without examination in violation of charter civil service provisions. St.1933, pp. 3189, 3191, § 91, as amended by St.1943, p. 3321, § 91.

3. Municipal corporations ⚷162(1), 220(2)

Where city council is empowered to fix city officers' and employees' salaries, reasonable variations in salaries fixed for persons holding same rank will be upheld.

4. Municipal corporations ⚷128, 217(5)

A mere revocable assignment of city officer or employee to special duties in position designated by special title and carrying added compensation does not necessarily constitute promotion to higher rank or grade.

5. Officers ⚷9

It is not courts' function to construe uncertainties in civil service laws so as to prevent any degree of flexibility therein, but reasonable latitude consistent with letter and spirit of such laws should be allowed to those charged with promoting efficiency in various government departments.

6. Municipal corporations ⚷133, 217(5)

A mere increase in salary of city officer or employee does not ipso facto constitute a promotion to higher civil service grade, but increase must be beyond limit fixed for grade in which his office or position is classified to constitute promotion.

7. Municipal corporations ⚷186(5)

The Oakland city council's power to increase salaries of police department members within any rank or grade is limited only by rule of reasonableness, not by minimum salary fixed by city charter for next grade above that of member whose salary is increased, in absence of express charter provision fixing maximum salary for any grade. St.1931, p. 2659, § 32; St. 1933, p. 3190, § 91.

8. Municipal corporations ⚷184(5), 186(5)

The Oakland city charter amendment, providing that salary increase granted for any rank or grade in city police department shall apply to all officers or members in such rank or grade, was not a grant of power to council with respect to fixing of salaries, but a limitation on such power and implied recognition that mere revocable assignment of department member to duty in charge of city jail at some increase in salary did not ipso facto constitute promotion of such member to higher rank or grade in violation of charter. St.1933, p. 3190, § 91, as amended by St. 1943, p. 3321, § 91.

9. Municipal corporations ⚷186(5)

The Oakland city ordinance, providing for payment of $25 per month to police department member in charge of city jail in addition to salary attached to rank held by such member, is not invalid, as such ordinance is prospective in operation and does not provide for additional compensation for past services or increase in compensation during term of office.

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Proceeding by Gustav Stohl for a writ of mandate to compel Russell C. Horstmann, as Auditor of the City of Oakland, to draw warrants for salary due petitioner as a police patrolman in charge of the city jail under an ordinance of such city, which intervened. Judgment for petitioner, and respondent appeals.

Affirmed.

Markell C. Baer, of Oakland, for appellant.

Frank W. Creeley, C. Stanley Wood, and R. H. C. Proffitt, both of Oakland, for respondent.

F. Bert Fernhoff, Esq., City Atty., and John W. Collier, Asst. City Atty., both of Oakland, for intervener.

SPENCE, Justice.

Petitioner sought a writ of mandate to compel the respondent city auditor to draw warrants in petitioner's favor for all salary due or to become due to petitioner under Ordinance No. 1227, C. M. S. of the City of Oakland. The trial resulted in judgment in favor of petitioner, and from said judgment, respondent appeals. We will refer to the parties as petitioner and respondent throughout this discussion.

The material facts are undisputed. Petitioner has held for many years and still holds the rank of patrolman in the Oakland Police Department. In 1938 he was regularly assigned to duty in charge of the city jail. On November 26, 1940, the Oakland City Council duly enacted Ordinance No. 1227, C.M.S., the validity of which has been challenged by respondent. The full text of that ordinance is as follows:

"An Ordinance fixing the salary of the member of the Police Department assigned to duty in charge of the City Jail.

"Be it Ordained by the council of the City of Oakland as follows:

"Section 1. The member of the Police Department assigned to duty in charge of the City Jail, shall receive, in addition to the salary attached to the rank held by said member of the Police Department, the sum of $25.00 per month during such time as said member shall be assigned to said duty in charge of the City Jail.

"Section 2. This Ordinance shall take effect immediately."

Since the adoption of said ordinance petitioner has continued to be the member of the police department assigned to duty in charge of the city jail and has duly performed the duties prescribed by the rules governing the police department. The city council has regularly passed and allowed claims for petitioner's salary as authorized by said ordinance but the respondent auditor has refused and still refuses to approve said claims or to draw his warrants in favor of petitioner for the additional $25 per month or for any amount greater than the amount prescribed as the salary of patrolmen generally. The trial court held that the ordinance was valid and ordered respondent to draw warrants in accordance therewith.

Respondent's brief contains several headings which are directed to the contentions that the above mentioned ordinance is invalid, first, because it is claimed that petitioner has been promoted to a higher rank without compliance with the civil service provisions of the charter and, second, because it is claimed that the payment of additional compensation to petitioner is violative of public policy. The consideration of these contentions requires reference to the charter provisions.

[1] The City of Oakland is governed by a freeholders' charter, which was amended in 1931 to provide for a city manager form of government. Stat.1931, p. 2636. The members of the police department are under the jurisdiction of the city manager.

Section 32 of the charter provided: "The compensation of all City officers, officials or employees not fixed in this Charter shall be fixed by the Council, * * * provided, that the compensation of all officers, officials or employees, under the jurisdiction of the City Manager shall be fixed by the Council only with his recommendation * * *."

Section 91 of the charter provided:

"The officers and members of the police department shall receive annual compensations comprising their salaries of not less than the amounts hereinafter set forth, to wit:

Chief of Police	$5,400.00
Captain of Inspectors	4,200.00
Captains of Police, each	3,600.00
Lieutenants, each	3,000.00
Inspectors, each	2,760.00
Assistant Inspectors, each	2,640.00
Sergeants, each	2,640.00
Corporals, each	2,580.00
Patrolmen, first year of employment, each	2,160.00
Patrolmen, second year of employment, each	2,280.00
Patrolmen, third year of employment, each	2,400.00"

It will be noted that the charter did not fix the salaries of the members of the police department but merely declared that such salaries should be "not less than" certain specified amounts. In other words, the charter specified the minimum amounts but did not specify the maximum amounts. A reading of the above quoted portions of said sections 32 and 91 leads to the conclusion that the council, upon recommendations of the city manager, was authorized to fix the salaries of the members of the police department at the amounts specified as minimum amounts in section 91 of the charter or at amounts greater than the minimum amounts so specified, unless there were other provisions of the charter limiting such authorization.

[2] In addition to the general civil service provisions of the charter which were made applicable to the police department, it was further provided in said section 91 that "No rank or grade other than those herein specified shall be created in said department." Stat.1933, pp. 3189, 3191.

It is this last mentioned provision which is particularly stressed by respondent who argues that the ordinance above mentioned had the effect of creating another and "higher rank or grade" in the police department in violation of the charter provision. Respondent points to the increased salary, to the nature of the duties prescribed by the rules, and to the title of "Chief Jailer" which is found in the rules. Respondent therefore argues that the facts show that petitioner, a patrolman, has been promoted to a higher rank or grade without compliance with the general civil service provisions of the charter. A degree of plausibility is found in respondent's arguments but the authorities hereinafter cited do not sustain said arguments but, on the contrary, support the judgment entered by the trial court. Before considering said authorities, it is appropriate to refer to certain facts concerning the organization of the police department and to certain amendments to the charter which were adopted during the pendency of this proceeding.

Under the authority of the charter, rules were adopted relating to the organization and functioning of the police department. The applicable rules were published under the title "Manual, Instruction and Rule Book, Second Printing, April, 1937, Oakland Police Department." These rules provided for numerous special assignments within the ranks or grades established by the charter. Some of such assignments were as follows: "Desk Sergeant", "Traffic Patrol Sergeant", "Motorcycle Sergeant", "Patrolman-Cruiser", "Patrolman-Traffic-Post", "Patrolman-Motorcycle", "Patrol Wagon, Ambulance and Special Motor Drivers and Attendants", "Garage Superintendent", and "Property Clerk". Under the heading of "Miscellaneous Assignments" is also found the title "Chief Jailer". In all cases, the duties of those designated for such assignments were specifically set forth. These rules were promulgated by the city manager pursuant to the authority granted by the charter and neither the city council, the civil service board nor any other body or person created or attempted to create in the police department any permanent rank or grade in the civil service other than the ranks and grades specified in section 91 of the charter.

In 1943, an amendment to section 91 of the charter was adopted. St.1943, p. 3321. No material change was made in the provision prohibiting the creation of other ranks or grades in the department, the amended provision reading "* * * and no rank or grade other than those herein specified shall be created or exist in the said Department". A significant addition was made by the 1943 amendment to said section, however, in the following language: "Any increases in salary or compensation granted for any rank or grade shall apply to all officers or members in such rank or grade; provided, however, that the City Council shall have power to provide compensation in addition to that hereinabove provided for, for the following members of the Police Department: Members of the Department assigned or detailed as motorcycle officers, Lieutenants of Police assigned or detailed to duty under the direction of the Captain of Inspectors, and the member of the Department assigned or detailed for duty in charge of the City Jail."

We find nothing in the charter, either before or after the 1943 amendment thereof, which prohibited the assignment of members of the police department to special duties in positions bearing titles which were specified in the rules but were not enumerated as "ranks or grades" in section 91 of the charter. Respondent so concedes for he states in his brief, "Until the adoption of Ordinance No. 1227 C.M.S., the detailing or assigning members of the police department in charge of the city jail involved merely matters of administrative practice in the police department and was proper." But respondent contends that after the adoption of said ordinance providing for additional salary, there was such combination of additional compensation together with special duties and special title as to constitute "an unlawful attempt to create a rank or grade forbidden by the charter" and an unlawful attempt to promote petitioner to that rank without examination. In our opinion, the authorities do not sustain respondent's contention under the facts presented in this case.

[3, 4] It appears settled that where a city council is empowered to fix salaries, reasonable variations in the salaries fixed for persons holding the same rank will be upheld. Banks v. Civil Service Commission, 10 Cal.2d 435, 74 P.2d 741. It has also been clearly indicated that a mere revocable assignment to special duties in a position designated by a special title and carrying added compensation does not

necessarily constitute a promotion to another rank or grade. Monahan v. Department of Water and Power, 48 Cal.App.2d 746, 120 P.2d 730; State v. Civil Service Comm., 8 Wash.2d 498, 112 P.2d 987, 134 A.L.R. 1100; People v. Girvin, 227 N.Y. 392, 125 N.E. 587. In Monahan v. Department of Water & Power, supra, some of those holding the rank or grade of "journeymen linemen" had been assigned as "troublemen" at increased salaries. In State v. Civil Service Comm., supra, some of those holding the rank or grade of "patrolmen" had been assigned as "plainclothes men" or "detectives" at increased salaries. In People v. Girvin, supra, some of those holding the rank or grade of "patrolmen" had been assigned as "detective sergeants" at increased salaries. In none of said cases was it held that such revocable assignments to special duties at increased salaries constituted promotions to another rank or grade. As was said by the court in the Girvin case, 125 N.E. at page 588, "The distinction is still one between permanent positions and temporary assignments. * * * They were patrolmen detailed to duty as detectives. They were confirmed in the rights which were already theirs, and in no others." And in Monahan v. Department of Water and Power, supra, the court cited People v. Girvin, supra, and said at page 753, of 48 Cal.App.2d, at page 733 of 120 P.2d, "They are confirmed by civil service rules in their classification as linemen, and in no others."

The foregoing authorities may be contrasted with Schieffelin v. O'Brien, 243 N.Y. 151, 153 N.E. 31, 32, in which there was "created" a new office in the police department to be filled by an "officer to be known as superintendent of buildings, to be selected from among the members of the uniformed force by the police commissioner, who * * * shall not be removed or dismissed except in the manner prescribed for other members of the force * * *". A police lieutenant, receiving an annual salary of $3,300 per annum, was thereafter selected by the police commissioner as superintendent of buildings with an annual salary of $5,000 without civil service examination. The appointment was held invalid in an opinion written by Mr. Justice Cardozo, who had also been the author of the opinion in People v. Girvin, supra. The Girvin case was held distinguishable, the court saying at page 32 of 153 N.E. with reference to the facts before it, "The office being thus created, the incumbent is protected in his enjoyment of it by the provision that he shall not be removed or dismissed, except in the same manner as other members of the force. We cannot reconcile a tenure thus secured with the tenure of one who holds by virtue of a revocable assignment."

In the light of the above mentioned authorities and others, respondent concedes that "Salary, duties, title and such elements, taken alone, do not constitute the test of the status of a position or its relation to other positions". But respondent argues, "It is the grouping or combination of such factors which must be considered. And in the petitioner's case, we have all the necessary factors present in a remarkable array establishing that a promotion has been effected in every sense of the word." In other words, respondent contends that the facts before us necessarily show that a new rank or grade has been created and that petitioner has been promoted thereto. We do not believe that this contention may be sustained.

[5] We do not wish to be understood as holding that the city council has or had unlimited power to provide for additional compensation for those assigned to special duties in the police department or any other department of the City of Oakland. It is not difficult to conceive of situations in which the nature of the special duties and the amount provided by way of increased compensation would be such as to compel the conclusion that a new rank or grade had been created and that the fundamental principles of civil service had been violated by assignments of persons to such special duties at increased salaries without complying with the civil service provisions of the charter relating to promotions. But while a certain degree of inflexibility is necessary in all civil service laws, it is not the function of the courts to construe uncertainties in such laws so as to prevent any degree of flexibility and thereby "to put governmental executives in a strait jacket." Monahan v. Department of Water and Power, 48 Cal.App.2d 746, 753, 120 P.2d 730. Reasonable latitude consistent with the letter and spirit of the civil service provisions should be allowed to those charged with the duty of promoting efficiency in the various departments of government.

[6] Several authorities arising under the civil service laws of New York are cited by the parties. Those cases, however, were apparently governed by the provision of the New York civil service law, quoted in People v. Tully, 108 App.Div. 345, 95 N.Y.S. 916, 919, 1153, which required that promotions should be based on merit and competition and that "an increase in the salary or other compensation of any person holding an office or position * * * beyond the limit fixed for the grade in which such office or position is classified shall be deemed a promotion." As was said in the case last cited, "A mere increase in salary does not, ipso facto, constitute a promotion; it must be beyond the limit fixed for the grade." See also Murray v. Water Board, 88 Misc. 625, 151 N.Y.S. 419. This distinction is recognized in Friedman v. Kern, 171 Misc. 332, 13 N.Y.S.2d 163, at page 165, a case cited by respondent, where the court said, "An increase in salary *beyond the maximum of the grade* is a promotion for which an appropriate competitive examination is required wherever practicable." (Emphasis ours.)

[7] As above indicated, there was no maximum salary fixed for any grade in the police department, the charter merely specifying the minimum for each grade and vesting the power in the city council to fix all salaries. Ordinance No. 1227 C.M.S., increasing petitioner's salary by $25 per month while he was assigned to duty in charge of the city jail, could not be declared invalid under the rule of the New York cases, assuming such rule to be applicable in this jurisdiction, as said ordinance did not provide for an increase of petitioner's salary beyond any limit fixed for the grade of patrolman. But respondent argues that the minimum for the next higher grade must be deemed to be the maximum for the lower grade and that there was therefore an increase of petitioner's salary beyond the limit fixed for the grade of patrolmen. No authority is cited for this proposition and we know of none. In the absence of any express provision fixing a maximum for any grade, we do not believe the power of the city council to increase salaries within any rank or grade was limited by any rule other than the rule of reasonableness. It has not been suggested that the increase of $25 per month in petitioner's salary was an unreasonable increase but, on the contrary, respondent's statement of the duties imposed upon the person assigned to duty in charge of the city jail leads to the conclusion that the increase was entirely reasonable.

[8] The parties further argue at some length concerning the proper implications to be drawn from the adoption of the above quoted 1943 amendment to section 91 of the charter. Said amendment provided that any salary increase granted for any rank or grade, with certain exceptions, should apply to all members in such rank or grade. Respondent treats said amendment as a grant of power to the city council with respect to the fixing of salaries while petitioner treats said amendment as a limitation on such power. In our opinion, petitioner's construction of said amendment is clearly correct. We have heretofore expressed the view that prior to the adoption of said amendment, the city council had the power, limited however by the rule of reasonableness, to make salary increases within any rank or grade without making such increases applicable to all members of such rank or grade. That power, with certain exceptions, was denied to the council by the 1943 amendment. But we believe that the most significant feature of said amendment is that it impliedly gave recognition to the fact that both before and after the adoption thereof the mere revocable assignment, at some increase in salary, of a member of the police department to duty in charge of the city jail did not ipso facto constitute a promotion to a higher rank or grade.

[9] Respondent's further contention that without regard to the civil service provisions of the charter, the payment of additional compensation under the ordinance would be "violative of public policy and the law" appears to be likewise without merit. The ordinance was prospective in its operation and did not purport to provide for additional compensation for past services or to provide for a prohibited increase in compensation during a term of office as was the case in many of the authorities cited by respondent. The cases hereinabove cited are ample authority for sustaining the legality of the ordinance even when considered in connection with the civil service provisions of the charter.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

64 Cal.App.2d 364

NOSSER v. McAULIFF.

Civ. 2675.

District Court of Appeal, Fourth District, California.

May 15, 1944.

1. Appeal and error ⟹1008(1)

Whether a written instrument, granting the right to take possession of a mine and to remove ore therefrom with obligation to pay certain royalties, and with an option to purchase the mine, constituted a sale of mine within a memorandum providing that plaintiff should receive certain wages in event the mine was sold, was a question of fact for trial court.

2. Master and servant ⟹80(9)

A finding that a written instrument, granting the right to take possession of a mine and to remove ore therefrom, with the obligation to pay certain royalties, and with an option to purchase the mine, did not constitute a "sale" of the mine within the meaning of a memorandum providing for certain wages for plaintiff in event the mine was sold, was supported by the evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by James B. Nosser, Jr., as administrator, against P. W. McAuliff for services of Charles Swanson as the caretaker of mining property. From a judgment for defendant, plaintiff appeals. At the death of Charles Swanson, named plaintiff was substituted as appellant.

Judgment affirmed.

Wagy & Hulsy, of Bakersfield, and H. R. Collins, of Los Angeles, for appellant.

Arthur J. Edwards, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to recover for services alleged to have been performed as a caretaker of a mining property under a memorandum dated March 9, 1936, which provided that the plaintiff, Charles Swanson, should receive certain wages "in event the mine is sold."

The action was begun on November 26, 1937. It was contended that a written instrument entitled "Bond-Lease" dated April 24, 1937, constituted a sale of the mine within the meaning of the memorandum. Under this instrument Arthur O. Borks and Nick Lippolis were given the right to take possession of the property and to remove ore therefrom, with the obligation to pay certain royalties. On a previous appeal (Swanson v. McAuliff, 40 Cal.App.2d 456, 104 P.2d 858), this court held that this instrument constituted merely an option to purchase the property and the judgment was reversed since it appeared that, while the holders of the option had taken possession of the property and later given it up, there was no evidence that they had agreed to purchase or had become bound to pay for it.

On a retrial of the action an attempt was made to prove that the parties to the option agreement of April 24, 1937, had considered their arrangement as an actual sale of the property. The court found in all respects in favor of the defendant and a judgment was entered on February 18, 1941, from which the plaintiff appealed. Thereafter, the plaintiff died and the administrator of his estate has been substituted as the appellant herein.

It is first contended that the language used in a portion of the instrument dated April 24, 1937, shows that that instrument was "an agreement of sale, pure and simple." This contention overlooks other and controlling portions of that instrument and is without merit for the reasons pointed out on the prior appeal. It is next urged that the court erred in making findings to the effect that the mine in question had not been sold by the respondent, and that nothing was due from the respondent to the original appellant, it being claimed that certain evidence indicates that the respondent intended that his transaction with Borks and Lippolis should constitute a sale of the mine. In support of this contention it is pointed out that the respondent testified that he had negotiated with various people, including Borks and Lippolis, relative to a sale of the mine; that Borks and Lippolis filed an affidavit of work done on this mine, during the time they were in possession, in which they recited that they were the owners thereof; that Borks testified that on one occasion, in the presence of the respondent, he had told Mr. Swanson that the mine had been sold and that $300 had been paid as a first payment; and that Swanson testified that on one occasion the respondent told him that he had sold the mine.

[1, 2] Even if it could be assumed that this testimony was sufficient to show that a sale of the mine had taken place, within the meaning of the memorandum agreement, there would still remain a conflict in the evidence. It does not appear that the respondent ever read the work affidavit or knew that it contained a statement that Borks and Lippolis were owners of the mine. While the respondent admitted that he had received some $300 from Borks and Lippolis, he testified that this was paid as royalties, and the option agreement provided for the payment of royalties which were to be applied on the purchase price if the option to purchase should be exercised. The respondent denied that he had told Mr. Swanson, or anyone else, that Borks and Lippolis were the owners of the mine and denied the material parts of the testimony relied upon by the appellant. He further testified to the effect that he had never sold the property in question and that he was still trying to sell it. In any event, the question was one of fact for the trial court and the material findings are supported by the evidence.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

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64 Cal.App.2d 304

RAMOS v. PACHECO.

Civ. 14330.

District Court of Appeal, Second District, Division 2, California.

May 9, 1944.

1. Cancellation of Instruments 🔑37(2)

Complaint alleging that plaintiff who had lived with defendant as his wife for several years, by defendant's false representations was induced to sign contract and execute deeds conveying to defendant her interest in realty sufficiently excused delay of nearly two years in suing to rescind transaction.

2. Appeal and error 🔑171(3)

Where case proceeds on hypothesis that an issue has been raised and findings are made on such issue, the complaint becomes immaterial and judgment on the findings will be upheld.

3. Appeal and error 🔑1071(1)

A finding will not be overthrown on appeal merely because it is more specific than allegation in pleading.

4. Cancellation of Instruments 🔑47

Evidence that plaintiff, who had lived for several years with defendant as his wife, was induced to execute contract and deeds conveying to defendant her half interest in realty by defendant's false representations that she was not entitled to property, that contract would legitimize their child, that plaintiff was suffering from nervous shock and feared defendant would take child from her, and believed defendant's representations to be true, supported finding that plaintiff's delay of nearly two years before suing for rescission was justified.

5. Contracts 🔑94(7)
Deeds 🔑70(3)

The alleged act of defendant in having plaintiff, who had lived with defendant for several years as his wife and who was an inexperienced, credulous woman, accompany defendant and his attorney to a courtroom where they falsely pretended to gain judge's approval of their proposed method of legitimizing plaintiff's child, was a misrepresentation of fact and not of law, entitling plaintiff to sue to rescind written contract so obtained and deeds conveying to defendant her interests in realty, particularly where plaintiff had previously had no independent legal advice.

6. Contracts 🔑94(7)

Where confidential relationship exists between two parties, misrepresentations of law may constitute such fraud as to avoid contracts made by them, particularly where oppressor obtains an unconscionable advantage of his victim.

7. Partnership 🔑53

Evidence that parties, while living together as husband and wife, agreed in writing that in consideration of plaintiff's services to defendant's grocery business plaintiff should receive 20 per cent of the net profits and a salary, and that subsequently it was orally agreed that neither should draw moneys from business except for common living expenses and that all profits should be invested in realty held in joint tenancy and that parties thereafter carried out agreement as modified for several years, sufficiently established partnership. Civ.Code, § 683.

8. Partnership ⚷22

The word "partnership" need not appear in a contract drawn for purpose of creating that status, but it is the transactions consummated that establish relationship. Civ.Code, § 683.

9. Partnership ⚷20

It is not essential to creation of a partnership that parties have knowledge of legal effect of their acts. Civ.Code, § 683.

10. Partnership ⚷70

The fact that plaintiff who lived with defendant as his wife and who was his partner in grocery business, because of defendant's abuse, feared defendant and desired to be freed from her anxieties and fears, did not cause confidential relationship growing out of the partnership to cease to exist or erase defendant's obligation to deal with plaintiff in highest good faith.

11. Gifts ⚷47(3)

The execution by a woman of a contract without independent advice in favor of a person in her confidence whereby she confers a gift of value on such person is presumptively fraudulent and voidable at her instance.

12. Contracts ⚷99(3)
Deeds ⚷211(3)

In action to rescind contract and deeds conveying plaintiff's half interest in realty to defendant with whom plaintiff had lived for several years as his wife for defendant's fraudulent representations, evidence sustained finding that plaintiff entered into transaction without independent legal advice.

13. Contracts ⚷94(1)

A single fraudulent misrepresentation is sufficient to void execution of a contract. Civ.Code, § 1572, subd. 4.

14. Contracts ⚷99(3)
Deeds ⚷211(3)

In action to rescind contract and deeds conveying plaintiff's half interest in realty to defendant with whom she had lived as his wife for several years because of defendant's fraudulent representations, evidence sustained finding that defendant made such false representations and that such representations were the immediate motivating force causing plaintiff to execute instruments. Civ.Code, § 1572, subd. 4.

15. Contracts ⚷95(5)
Deeds ⚷71

Where plaintiff executed contract and conveyed her half interest in realty to defendant with whom she had lived for several years as his wife because of defendant's false representations that plaintiff was subject to criminal prosecution for holding property under an assumed name because she was not in fact married to defendant, defendant's threats constituted "duress", actionable without previous formal rescission.

See Words and Phrases, Permanent Edition, for all other definitions of "Duress".

16. Contracts ⚷97(2)
Deeds ⚷75

Where contract and deeds conveying plaintiff's half interest in realty to defendant with whom she had lived for several years as his wife were allegedly executed as result of defendant's fraudulent representations the fact that about two years later plaintiff mortgaged certain realty acquired under the contract did not establish ratification, under circumstances.

17. Trusts ⚷95

Defendant who obtains conveyance of plaintiff's interest in realty by fraudulent representations was invested in equity with character of a trustee.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Estela Ramos, also known as Estella Pacheco, against Fererico Pacheco to enforce the rescission of a written contract. Judgment for plaintiff, and defendant appeals.

Affirmed.

Barry Sullivan, of Los Angeles, for respondent.

Bruno Newman and Alexander L. Oster, both of Los Angeles, for appellant.

MOORE, Presiding Judge.

Respondent instituted this action to enforce the rescission of a written contract executed by herself and appellant on November 18, 1940. Judgment was entered in her favor on findings favorable to respondent on all of the material issues. Appellant now attacks the judgment on the ground that the second count of the complaint is insufficient and that the findings are not supported.

On the 8th of March, 1934, while appellant was operating El Charo Grocery in the city of Los Angeles, and living with respondent as his wife, he agreed by a writing with respondent that in consideration of her entire services to the grocery she should receive 20 per cent of the net profits and a salary of $10 per week. Pursuant to their contract appellant added the sum of $1,200 to his invested capital of $3,216.61 and both parties devoted their total time and energies to the development of the business. The partnership continued until December 1, 1940, when by reason of respondent's treatment by appellant she discontinued her appearances there. In the meantime other events transpired. By oral agreement they soon abandoned their initial understanding. Thenceforth, no moneys should be withdrawn in excess of their living expenses and all profits should be invested in real property in joint tenancy or equal shares. Also they lived together in an apartment at the store as husband and wife, which illicit relationship is immaterial to the consideration of the issues here involved except insofar as it may have served as proof of the confidential relationship and of her fear of him, both of which were found to exist. Such intimacy continued until respondent moved to other quarters. Her child, Lillian Pacheco, was born in 1936.

From the profits earned by the partnership four parcels of improved realty were acquired, to wit, adjacent lots 1 and 4 on Whittier Boulevard; a third parcel on Matthew Street and a fourth on Beswick. After respondent had removed from the apartment at the grocery she was ill in mind and in body. She grieved on account of the treatment she suffered at the hands of appellant from 1935 until she established a new home. After she was advised by her physician to leave the grocery appellant falsely accused her of living with another man. His cruelties then became violent and so continued until June, 1940, when she was compelled to leave him. In the following November appellant employed an attorney to prepare three deeds whereby respondent should convey to appellant her one-half interest in the real properties. By reason of the years of intimate life together, the dominating influence which appellant had gained over respondent, and by reason of her fear of him, she became the easy prey to his demands when he undertook to induce her to execute the contract and the deeds which he had prepared. To achieve his purpose, he told her that she was his common law wife; that as such she had no standing in California; that she had no right to anything or to the property; that the signing of the contract which he presented would legitimatize Lillian; that she could not claim the real properties for the reason that the titles were vested in Estella Pacheco, who she was not; that it was a crime to hold property in an assumed name. Upon demand of appellant, respondent accompanied him and his counsel to a courtroom. After an inaudible conversation with the judge the attorney said, "Everything is all right." From such statement respondent understood the effect of the proposed contract was that Lillian would become legitimate. By reason of her eagerness to legitimatize her child, and by reason of her fear of appellant and of his influence over her, and because of her illness, she executed the deeds conveying the Whittier Boulevard and the Matthew Street properties to appellant. The contract which they signed provided for the conveyance to her of the Beswick property, and for the payment to respondent of monthly sums for the child's support, although it omitted reference to her custody. During the two following years by reason of his threats to take Lillian away from respondent the unfortunate woman was kept in constant fear and dread of Pacheco.

It was not until September, 1942, that respondent consulted an attorney from whom she learned the utter falsity of the statements of appellant. He advised her that neither the contract she had signed, nor her appearance in the courtroom of the judge, legitimatized her child. Thereupon she served an appropriate notice of rescission offered to restore and demanded that appellant reconvey to her the interest which she had transferred to him in November, 1940.

Upon appellant's refusal to rescind, this action was filed. Pursuant to proof made and facts found, the court determined that a partnership and a confidential relationship of the parties existed; that by reason of his acts and statements and because of sickness and grief suffered by respondent, appellant had defrauded her; that all the deeds executed by the parties in November, 1940, should be cancelled; that an accounting between the parties should be made by restoring to respondent her half interest in all the properties, her share of all profits of the grocery and her portion of all revenues of the real properties jointly owned. Accordingly the deeds were annulled and an accounting was determined which left appellant still indebted to respondent in the sum of $3,351. Judgment was entered accordingly.

[1] It is contended that the court erred in overruling the general demurrer to the second cause of action which sounds in fraud. It is argued that since it contains no allegations fairly excusing the two years' delay in commencing suit after the alleged fraud, it is fatally insufficient. The facts alleged sufficiently excuse the delay: (1) she was a sick woman, under the doctor's care, suffering a nervous shock; (2) she continuously feared appellant would take her child from her; (3) she still believed the representations of appellant.

[2, 3] But for another reason such contention cannot prevail. The case was tried upon the theory that appropriate allegations were before the court excusing respondent's delay. At the trial, defendant conceded there was no issue on the question of laches. Where a case proceeds upon the hypothesis that an issue has been raised and findings are made upon such issue, the complaint becomes immaterial and judgment on the findings will be upheld. Boro v. Ruzich, 58 Cal.App.2d 535, 540, 137 P.2d 51; Sanders v. Magill, 9 Cal.2d 145, 153, 70 P.2d 159. A finding is not to be overthrown merely because it is more specific than the allegation.

[4] The evidence abundantly supports the finding that the delay of respondent in seeking rescission was justified by reason of the conditions found to exist. 12 Cal.Jur. p. 799; Bennett v. Lane Mortgage Co., 19 Cal.App.2d 515, 65 P.2d 953; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L.R.A.,N.S., 125; Lataillade v. Orena, 91 Cal. 565, 27 P. 924, 25 Am.St.Rep. 219. The authorities cited by appellant (Clanton v. Clanton, 52 Cal. App.2d 550, 126 P.2d 639; Campbell v. Title Ins., etc., Co., 121 Cal.App. 374, 9 P.2d 264) are not in point for the reason that each involved a situation where a long delay occurred after discovery of the fraud, no satisfactory excuse for delay was pleaded or proved, and there was no confidential relationship between the parties during the season of delay. In the Clanton case "not even the slightest effort was made to excuse delay." [52 Cal.App.2d 550, 126 P.2d 643.] In Mrs. Campbell's case she was entitled to rescission in no event. She made no attempt to rescind for nine months after discovery of the fraud, during which she continued in default on her contract of purchase.

[5] The insufficiency of the complaint is grounded upon the further contention that the alleged misrepresentations concerned matters of law and are therefore not actionable. The answer to that claim is threefold. (1) The legal opinions with reference to the November contract do not comprise the only misrepresentations or the only alleged grounds for equitable relief. (2) The act of appellant in having an inexperienced, credulous woman accompany him and his attorney to a courtroom where they pretended to gain the approval by the judge of their proposed method of legitimatizing her child was a misrepresentation of fact. (3) Respondent had no previous, independent legal advice. In addition to the foregoing it is alleged: (a) That appellant paid nothing for the contract or the conveyances; (b) that at the time of executing the instruments respondent was sick in body and in mind and grieved because of the cruel treatment inflicted upon her in requiring her to work fourteen hours a day; (c) that she was under the doctor's care and suffering from a nervous shock to such extent that she became hysterical at night.

[6] Where a confidential relationship exists between two parties, misrepresentations of law may constitute such a fraud as to avoid contracts made by them and particularly where the oppressor "has had superior means of information * * * and thereby obtains an unconscionable advantage of another who * * * has

not been in a situation to become informed." White v. Harrigan, 77 Okl. 123, 186 P. 224, 228, 9 A.L.R. 1041; 17 C.J.S., Contracts, § 158, p. 511. Especially is this so where the defrauded party is weakened by sickness and grief at the time advantage of her is taken.

[7-9] It is contended that the finding of the creation of a partnership by the agreement of 1934 is not supported by the evidence. That instrument definitely provided for a portion of the net profits to go to respondent in addition to her salary. The subsequent substitution of the arrangement for neither to draw moneys from the business except to the extent of their common living expenses and for all profits to be invested in real property to be held in joint tenancy indicated an even more definite purpose to establish a partnership. This modification was followed by the actual investment of the profits from the business in the four parcels of realty with the title of each in joint tenancy. Moreover, the testimony of respondent was that while she drew no money she lived with appellant, who paid all of her expenses. Their living together, their working together for long hours daily, and their joint investment of all savings in properties in equal ownership supply sufficient proof of a partnership without the necessity of using that word in their agreements. It is unnecessary that the word "partnership" appear in a contract drawn for the purpose of creating that status. It is the transactions consummated that establish the relationship. Doan v. Dyer, 9 Cir., 286 F. 339. Not even a knowledge of the legal effect of their acts on the part of the partners themselves is essential to the creation of a partnership. Westcott v. Gilman, 170 Cal. 562, 150 P. 777, Ann.Cas. 1916E, 437. That it was intended for respondent to have a fifty per cent interest in the partnership is evidenced by the facts that they lived and cohabited together, that they worked together at the same tasks, and that they so invested their moneys as to evidence an intention to share equally in the profits of the enterprise. Sec. 683, Civil Code.

[10] The contention that by reason of respondent's fear of Pacheco the confidential relationship ceased to exist is to ignore facts found and principles established. While she believed his representations, even more she feared the consequences of his threats. The mere wish of respondent to be freed from her anxieties and fears did not erase appellant's obligation to deal with her in the highest good faith. This he was obliged to do by reason of the partnership relation. San Francisco Iron & Metal Co. v. American Milling & Industrial Co., 115 Cal.App. 238, 248, 1 P.2d 1008.

[11, 12] The next assignment is that the finding that appellant employed attorney Watson and gained his advice is not supported by the facts. Appellant testified that he took the deeds to the attorney and on the same day told respondent at her home that he had consulted counsel and that it was time to come to an agreement with respect to their properties; that he later accompanied her to the attorney's office, read and signed the contract which had already been prepared. Not only did appellant gain the advantage of a knowledge of the law as applied to his own situation, but in addition thereto he learned of the advantages to accrue to himself (1) by representing to respondent what the law is not; (2) by having the aid and presence of the attorney in inspiring a belief in the truth of his representations; and (3) by obtaining respondent's signature to the writings. The execution of a contract without independent advice by a woman in favor of a person in her confidence whereby she confers a gift of value upon such person is presumptively fraudulent and is therefore voidable at her instance. Piercy v. Piercy, 18 Cal.App. 751, 124 P. 561.

[13-15] Appellant's contention that the findings of his several acts and his misrepresentations to respondent are not supported by the evidence is to fly in the face of the accepted testimony of respondent. It is equally well established that his representations were the immediate motivating force which caused respondent to execute the instruments. Each statement he made was false. A single fraudulent misrepresentation is sufficient to void the execution of a contract. Sec. 1572, subd. 4, Civ. Code; Graham v. Smither, 53 Cal.App.2d 701, 127 P.2d 1024. Withal, his misrepresentations were not the only sinister influence he practiced to achieve his aim. His act of conducting respondent and his own counsel to a courtroom in order to gain the ostensible approval by the judge of the promised effect of the contract was reprehensible. Not only did respondent fear harm to herself at his hands and a possible prosecution for holding property under an assumed name, but she knew of no means by which to legitimatize her

daughter other than by the course appellant had contrived. Such threats constituted a duress, actionable without previous formal rescission. Millsap v. National Funding Corporation of California, 57 Cal. App.2d 772, 781, 135 P.2d 407.

[16, 17] Finally, the contention that respondent ratified the contract by mortgaging the Beswick Street property in July, 1942, is without support. Whether a ratification takes place as the result of dealing with the property acquired by means of a fraud must be determined in each case from its own facts. The circumstances in proof do not warrant the conclusion that respondent ratified her agreement of 1940 by her act in mortgaging the Beswick Street place in 1942. She was the owner of one-half interest in the four real properties valued at $17,283 in October, 1940. By the contract appellant took three, valued at $12,240. In addition to these properties, prior to the trial, he collected profits from the grocery in the sum of $5,910. Also, he had collected revenues from the three properties in the sum of $3,175. Thus he had the grocery and $18,150 he had garnered from the partnership business while respondent had nothing but the Beswick Street home valued at $5,000. In view of the partnership, appellant was at all times indebted to respondent in a sum far in excess of one-half of the $2,000 she had received from her mortgage. Therefore no detriment could possibly have resulted to appellant by judicial adjustment of the accounts without requiring respondent to pay one-half of the balance due on her mortgage or to restore the Beswick property clear of debt to joint ownership. Gatje v. Armstrong, 145 Cal. 370, 374, 78 P. 872. As the author of the fraud equity invested him with the character of a trustee. He held one-half interest in all the properties in trust for respondent. Whatever share he had in the $2,000 was offset against the greater sums he owed her. Gatje v. Armstrong, supra. That offset was included in the computation of the court in deriving the sum of $3,351 as the balance due respondent after cancelling all of the conveyances. Its duty was to do complete justice by adjusting the accounts between the parties.

Judgment affirmed.

McCOMB and W. J. WOOD, JJ., concur in the judgment.

In re LUND'S ESTATE.

LUND v. LUND. *

Civ. 12679.

District Court of Appeal, First District,
Division 2, California.

May 11, 1944.

Hearing Granted July 6, 1944.

1. Bastards 🔑**10, 100**

The statutes present a general legislative scheme for establishing status and right of inheritance of children born out of wedlock, and no one of them contains any language indicating the legislative intent to confine their scope to periods of minority. Civ.Code, §§ 215, 228, 230; Probate Code, § 255.

2. Bastards 🔑**13**

Effect of acts of father in two foreign states in publicly acknowledging son born out of wedlock to be his son must be determined by law of the state in which such acts were performed.

3. Bastards 🔑**100**

Minnesota statute providing that illegitimate children acknowledged by father shall be considered as heirs, and New Mexico statute providing that illegitimate children shall inherit from father whenever they have been recognized by him as his children, are merely statutes of succession similar in effect to California Probate Code section 255. Rev.Laws Minn. 1905, § 3650; 1941 Comp.N.M. § 31-118; Probate Code, § 255.

4. Bastards 🔑**11, 100**

Legislature has power to make a bastard legitimate for all purposes or to a limited extent and to declare him capable of inheriting, either generally, or to a limited extent.

5. Bastards 🔑**100**

When statute of succession prescribes area of right of inheritance, status of illegitimate child is not changed for other purposes.

6. Bastards 🔑**13**

Unless law of forum where suit involving question of recognition provides otherwise, the law of the state of domicile of father at time of birth of illegitimate child or at time of the act of acknowledgment by father relied on controls.

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* Subsequent opinion 159 P.2d 643.

7. Bastards 🔑13

When acts of acknowledgment are relied on as fixing status of illegitimate child, law of domicile of father at time of performance of the act should control.

8. Bastards 🔑13

One born out of wedlock in a foreign country in which his father was domiciled did not gain status of legitimacy in California by acts of acknowledgment in Minnesota or New Mexico where parties at one time lived, though, under the laws of such states, the illegitimate might have been entitled to inherit property situated in such states, where no act of acknowledgment occurred in California after the father became domiciled there. Rev.Laws Minn. 1905, § 3650; 1941 Comp.N.M. § 31-118; Civ.Code, § 230.

◆

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Petition for determination of heirship by Bert A. Lund against Frank Lund, individually and as guardian of the estate of Blanche Imel, incompetent, and as administrator with the will annexed of the estate of Andrew Lund, deceased. The petition was denied, and petitioner appeals.

Affirmed.

Robert E. Hatch, of San Francisco, and Giannini, Callahan & Giannini, of San Jose, for appellant.

Simeon E. Sheffey, of San Francisco, for respondent.

NOURSE, Presiding Justice.

A petition for determination of heirship was denied and the petitioner has appealed upon a settled statement under rule 7 of the Rules on Appeal. From this statement it appears that the petition was heard and determined upon a stipulation as to the facts to which petitioner would testify and that no other evidence oral or written was taken. In this form the typewritten record of ten pages presents everything needed for a determination of the issues on the appeal.

From this it appears that the petitioner was born in Norway the son of decedent on June 24, 1883, and that his father and mother were at no time husband and wife. The father came to Minnesota, married another, and had two children. In 1904 petitioner, at the request of the father and his wife, came to Minnesota, was publicly recognized by the father, and was received into the family as a son. In 1906 the family moved to New Mexico, the petitioner continued to live as a member of the family, and was publicly acknowledged as a son of decedent. It does not appear when decedent became a resident of California, and it does not appear whether petitioner is now or ever has been domiciled in this state.

The controversy rests upon the interpretation to be given section 230 of the Civil Code and section 255 of the Probate Code. These read: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption."

"Every illegitimate child is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of the parent's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession."

The leading case involving these sections is Blythe v. Ayres, 96 Cal. 532, 31 P. 915, 19 L.R.A. 40, where the supreme court held that a child born out of wedlock in England of a father domiciled in California was entitled to succeed to the estate of the father because both code sections had been complied with. At the outset here it should be noted that there is no contention that the paternity was acknowledged in writing and hence no contention that the petitioner was entitled to inherit under section 255 of the Probate Code. It should also be noted that the Civil Code section relates to the status of the illegitimate child and provides for its legitimation "for all purposes," whereas the section of the Probate

Code is a statute of succession or inheritance only.

In the early common law a bastard was said to be nullius filius, the child of nobody. It had no father, and, in some instances, had no mother. This harsh rule was one of necessity for the protection of the succession to the crown and of the baronial estates. Instances were had where a bastard child was declared legitimate by legislative act, but the truth of parentage was not an essential factor in the parliamentary declaration. As the states drifted from the strict rules of the common law, statutes were enacted taking a more liberal view of these relations and providing for the legitimation by subsequent marriage of the parents, acknowledging acts of the father, and court process. Vernier, American Family Laws, Vol. IV, p. 158 et seq. Some of these statutes provide for a change in the status of the bastard which makes him legitimate "for all purposes." Others, and the great majority, merely fix the right of inheritance, either to a limited extent, or fully and on an equal basis with that of a natural child born in wedlock.

We are concerned here with the laws of our own state and those of Minnesota and New Mexico. One of the questions involved is whether the laws of either of these two latter states effect legitimation for all purposes or for limited purposes of inheritance. We are not concerned with the laws of bastardy which relate generally to the obligation of support and maintenance. There is also presented the correlated question whether the Civil Code section relates to adults as well as to minors.

Section 230 of the Civil Code declares that: "The foregoing provisions of this chapter do not apply to such an adoption." One of the "provisions" of the chapter is that: "Any *minor* child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter." Section 221. In Re Pico's Estate, 52 Cal. 84, the court held that since section 230 appeared in the chapter relating to adoption, and since section 221 limited the proceedings to minors, the acts of legitimation referred to in section 230 must occur during the minority of the minor child. The last sentence of section 230 declaring that the "foregoing provisions of this chapter" should not apply to the section were said to refer "only to the procedure by which the adoption may be effected." Though the case has not been expressly overruled it has been uniformly criticised by the courts and text writers and is not supported by any authority or reason. Blythe v. Ayres, 96 Cal. 532, 31 P. 915, 19 L.R.A. 40; Wolf v. Gall, 32 Cal.App. 286, 163 P. 346, 350; Vernier, American Family Laws, Vol. IV, p. 179; 29 Cal.Law Rev. p. 187. The ruling has been called "unfortunate" because it rejects the whole purpose of the concluding sentence exempting all the provisions of the section from all the previous "provisions" of the chapter relating to adoption. To hold that the legislature referred only to the procedural provision and not to the substantive provisions is to read into the section something which was not enacted by the legislature. In the later case of Blythe v. Ayres, supra, the supreme court cast a disapproving doubt upon this reasoning when it said that section 230 was not a statute of "adoption" at all, but that it was merely a statute of "legitimation", saying (96 Cal. at page 559, 31 P. at page 916, 19 L.R.A. 40):

> "Before passing to the merits of the discussion, we pause a moment to say that the verb 'adopts,' as used in section 230, is used in the sense of 'legitimates,' and that the acts of the father of an illegitimate child, if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption, properly considered, refers to persons who are strangers in blood; legitimation, to persons where the blood relation exists. See law dictionaries,—Bouvier, Black, Anderson, and Rapalje. This is the distinguishing feature between adoption and legitimation, as recognized by all the standard law writers of the day who have written upon the subject; and, for the reason that the text writers and the decisions of courts to which we shall look for light and counsel treat the subject as a question of legitimation, we shall view the matter from that standpoint.
>
> "The section is broad in its terms. It contains no limitations or conditions, and, to the extent of the power vested in the legislature of the state, applies to all illegitimates, wherever located, and wherever born. The legislature has not seen fit to make any exception to its operation, and, as was said by Chief Justice Taney, in Brewer's [Lessee] v. Blougher, 14 Pet. 178 [10 L.Ed. 408], when considering a quite

similar provision of a statute: 'In the case before us, the words are general, and include all persons who come within the description of illegitimate children; and when the legislature speaks in general terms of children of that description, without making any exceptions, we are bound to suppose they design to include the whole class.' "

In Wolf v. Gall, supra, the district court of appeal rejected the claim that adult children were not legitimatized by the subsequent marriage of their parents under section 215 of the Civil Code. The court said that the rule of Estate of Pico was not applicable because section 215 did not appear in the chapter on adoption. We may assume that for the same reason it would be held that section 1387 of the Civil Code (now sec. 255, Probate Code), relating to the rights of illegitimate children to succession, would also apply to children legitimatized after their majority.

[1] It is important to note that the code sections recognize a distinction in the status of the adopted child, and the child legitimatized by sections 230 and 255. This is found in the provisions declaring the effect of the several sections. Thus when a child is adopted under sections 221 et seq. of the Civil Code the adopting parent and the child thereupon "sustain towards each other the legal relation of parent and child." Section 228. One legitimatized under section 230 is deemed legitimate "for all purposes * * * from the time of its birth." One legitimatized under section 255 of the Probate Code is permitted to inherit to a limited extent but is not deemed "legitimate" unless the procedure outlined in sections 215 or 230 of the Civil Code has been followed. All these sections present a general legislative scheme for establishing the status and the right of inheritance of children born out of wedlock, and no one of them contains any language indicating a legislative intent to confine their scope to the period of minority.

[2] The record here discloses that in the year 1906 the father of petitioner moved his family to New Mexico, that petitioner continued to remain a member of the household, and was there publicly acknowledged by his father to be his son. In both the states of Minnesota and New Mexico the appellant was publicly acknowledged by the father and taken into the family as a son in the manner provided in section 230 of our Civil Code, but not in the manner provided in section 255 of the Probate Code. The effect of these acts in the two foreign states must be determined by the law of the state in which they were performed.

During the period in which the parties resided in Minnesota the statutes of Minnesota, 1894 Probate Code, Title 3, section 4473, provided that: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, acknowledge himself to be the father of such child * * *." A revision in 1905—section 3650—is worded differently, but has the same effect. We have found nothing in the laws of that state comparable to section 230 of our Civil Code which provides procedure for legitimation "for all purposes." At the time of their residence in New Mexico the law of New Mexico provided that illegitimate children "shall inherit from the father whenever they have been recognized by him as his children, but such recognition must have been general and notorious, or else in writing." See 31-118 N.M.Statutes, 1941 Ann. The language of the original section making an exception when the father left legitimate children was eliminated by the amendment of 1915. This section was considered and applied in Re Gossett's Estate, 46 N.M. 344, 129 P.2d 56, 142 A.L.R. 1441, where reliance was placed on the earlier case of State v. Chavez, 42 N.M. 569, 82 P.2d 900. These authorities recognize the difference between statutes of legitimation for purposes of inheritance and legitimation for all purposes.

[3-5] It is apparent that these statutes are merely statutes of succession, similar, in effect, to section 255 of our Probate Code. They are not statutes of legitimation changing the status of the individual. Those states which provide for legitimation by marriage of the parents or by public acknowledgment similar to our Civil Code sections generally recognize the child as legitimate "for all purposes." Vernier, American Family Laws Vol. IV, sec. 246. But this is the result only when the statute relates to the status of the individual. The power of the legislature to make a bastard legitimate for all purposes, or to a limited extent, is universally recognized, as well as the power to declare him capable of inheriting, either generally or to a limited extent. 7 Am.Jur. p. 667. Hence, when the statute of succession prescribes

the area of the right of inheritance the status of the illegitimate child is not changed for other purposes.

Here the petitioner rests his cause upon the claim that there was a compliance with the terms of section 230 of the Civil Code. There is no contention that there was a compliance with the terms of section 255 of the Probate Code as there is no evidence of an acknowledgment in writing as required by that section.

In Ross v. Ross, 129 Mass. 243, 246, 37 Am.Rep. 321, it is said: "It is a general principle, that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicil; and that this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired * * *."

[6] There is a conflict of authority as to what law controls where specified legitimating acts are relied on—the law of the domicile of the father, that of the domicile of the child, or that where the legitimating acts took place. The general rule is that, unless the law of the forum where the suit involving the question of recognition provides otherwise, the law of the state of domicile of the father at the time of the birth of the child or at the time of the act relied on controls. Restatement Conflict of Laws, secs. 139, 140; 7 Am.Jur. p. 661; The Yale Law Journal, Vol. 46, pp. 1049 et seq.; 73 Am.Law Rep. pp. 956 et seq. Our supreme court in Blythe v. Ayres, supra, 561, accepted the principle that the law of the domicile of the father was controlling but declined to rule whether the law in force at the time of birth or that in force at the time of the legitimating act should control, since the parties came within both restrictions. Eddie v. Eddie, 8 N.D. 376, 79 N.W. 856, 73 Am.St.Rep. 765, is authority for the rule that legitimating acts done in a foreign country, which did not recognize them as such, did not change the status of the illegitimate child when the father moved into the state of North Dakota. The principle of the decision is that the law of that State providing for legitimating by subsequent acts did not apply where the father was a non-resident both at the time of the birth of the child and of the legitimating acts.

[7] Authorities which appear to be to the contrary relate to statutes prescribing the right of succession as distinguished from those fixing the status of the parties. Hall v. Gabbert, 213 Ill. 208, 72 N.E. 806; In re Wehr's Estate, 96 Mont. 245, 29 P.2d 836. But the weight of authority is that, when acts of acknowledgment are relied on as fixing the status of the child, the law of the domicile of the father at the time of the performance of the act controls. 73 A.L.R. p. 956. The principle is well stated in Pfeifer v. Wright, 10 Cir., 41 F.2d 464, 466, 73 A.L.R. 932, where the Circuit Court of Appeals said: "Laws of the domicile of the father at the time he acts determine the effect of his acts and if his acts are such as to effectuate legitimation as declared by those laws, the status of the child is thereby changed from illegitimate to legitimate. That status, when once changed, is said to be indelible, and is to be accepted in other jurisdictions for the purposes of descent of real property and the distribution of personal property of the father." Numerous cases are there cited to the same rule.

[8] Our conclusions from the foregoing are that the petitioner having been born out of wedlock in a foreign country in which his father was domiciled did not gain the status of legitimacy by the acts of acknowledgment occurring in either Minnesota or New Mexico, though, under the laws of those states, he might have been entitled to inherit property left by the father and situated in those states, that no act of acknowledgment having been done, either in the State of California, or while the father was domiciled here, the petitioner did not become legitimate "for all purposes" under the terms of section 230 of the Civil Code; that if, while the father was domiciled in this state, the legitimating acts specified in the code section occurred, either here or elsewhere, the petitioner's rights would be settled by that section. But there is no proof covering these two essential facts—the time when the father became domiciled in California, and whether any legitimating acts specified in the code section were done thereafter.

The order is affirmed.

STURTEVANT and SPENCE, JJ., concur.

64 Cal.App.2d 298

LEVIN v. LEVIN.

Civ. 14443.

District Court of Appeal, Second District, Division 1, California.
May 9, 1944.

1. Appeal and error 🔑607(1), 627(2)

An appeal was dismissible for failure to file notice to clerk to prepare transcript as required by statute and for failure to file transcript as required by court rule. Code Civ.Proc. § 953a; Rules on Appeal for the Supreme Court and District Courts of Appeal, rule 5(a).

2. Army and navy 🔑34

Where wife was a member of armed forces when her divorce action was adjudicated, and she filed notice of appeal when she was receiving $50 per month and took no further steps until almost six months later when former husband moved to dismiss the appeal, her motion for stay of proceedings under Soldiers' and Sailors' Civil Relief Act until such time as she could obtain furlough on ground that her financial ability to prosecute the appeal had been materially affected, would be denied. Code Civ.Proc. § 953a; Soldiers' and Sailors' Civil Relief Act of 1940, § 201, as amended, 50 U.S.C.A.Appendix, § 521.

Appeal from Superior Court, Los Angeles County.

Suit for divorce by Myrtle Levin against Alexander Levin, wherein defendant filed a cross-complaint for divorce. From an interlocutory judgment of divorce the plaintiff appeals, and the defendant moves to dismiss the appeal, and in opposition to the motion to dismiss, the plaintiff moves to stay the proceedings until the plaintiff could obtain a furlough or leave of absence from the United States Marine Corps.

Plaintiff's motion for stay denied and defendant's motion to dismiss appeal granted and appeal dismissed.

Joseph T. Enright and Mose Katzev, both of Los Angeles, for appellant.

Joseph L. Altagen, of Los Angeles, for respondent.

YORK, Presiding Justice.

Defendant Alexander Levin has made a motion in this court to dismiss the appeal of plaintiff Myrtle Levin from an interlocutory judgment of divorce in favor of the latter, on the ground "That no notice to clerk to prepare transcript under section 953a, C.C.P. has been filed, and no transcript is on file herein, as required by Rule 5, Subdivision A, of Part 2 of Rules on Appeal of this Honorable Court." Plaintiff, in opposition to said motion to dismiss, has moved this court "to stay the proceedings herein until such time as appellant can obtain a furlough, or leave of absence, from the United States Marine Corps, upon the grounds as follows: That her financial ability to prosecute this appeal and to pay an alleged community debt, to prevent the sale of household furniture, has been materially affected by her military service, all as shown by the affidavit in support hereof."

In support of and attached to defendant's notice of motion to dismiss appeal is the certificate of the Clerk of the Superior Court of Los Angeles County from which it appears that plaintiff, Myrtle Levin, on December 2, 1942, filed her complaint for divorce on the ground of cruelty, wherein she prayed for an interlocutory decree of divorce, and for all of the community property, attorney's fees and costs; that on February 9, 1943, defendant husband filed a cross-complaint for divorce alleging extreme cruelty and asked for a fair division of the community property; that on June 25, 1943, an interlocutory decree of divorce was entered which adjudged that plaintiff was entitled to a divorce from defendant and ordered that "the furniture be sold and the proceeds applied on the community debt of $488.00, any balance to be equally divided between plaintiff and defendant." It also appears from said certificate that notice of entry of judgment was filed and served on defendant's attorney on July 16, 1943, and on August 26, 1943, plaintiff filed her notice of appeal from the judgment of June 25th. "That no notice of intention to move for a new trial has been filed. That no notice to clerk to prepare transcript under section 953a, C. C. P. has been filed, and accordingly there is no transcript on file thereunder."

Section 953a of the Code of Civil Procedure requires that the notice requesting a transcript of the testimony offered at the trial "must be filed within ten (10) days after the filing of the notice of appeal", with the clerk of the court from whose judgment said appeal is taken. Rule 5(a) of Rules on Appeal for the Supreme Court and District Courts of Appeal requires that an appellant within 10 days after filing his notice of appeal shall serve on respondent and file with the clerk his notice designating the papers or records which shall comprise the clerk's transcript.

[1] Under the authority of Scully v. Rosanoff, 40 Cal.App.2d 249, 104 P.2d 706; Green v. Ellis, 42 Cal.App.2d 208, 108 P.2d 732; and Isett v. Frees, 25 Cal.App.2d 466, 77 P.2d 873, wherein motions to dismiss appeals were granted because neither a reporter's nor a clerk's transcript had been filed in this or in the superior court within the time prescribed by law, it appears that the instant motion to dismiss the appeal should be granted unless appellant is entitled to relief upon her motion to stay proceedings made pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 54 Stat. 1178, 50 U.S.C.A. Appendix, § 501 et seq.

Section 201 of the Act, 50 U.S.C.A. Appendix, Sec. 521 provides: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Respondent's memorandum in support of his motion to dismiss the appeal herein recites that appellant Myrtle Levin was sworn in as a member of the United States Marine Corps Reserve, Women's Division, on May 6, 1943, and that when the divorce action was heard on June 18, 1943, said appellant was present with her counsel, and was awarded a decree of divorce.

Appellant in an affidavit sworn to by her on February 18, 1944, made to support her notice of motion to stay proceedings herein, avers that she was sworn in as a member of the United States Marine Corps Reserve on May 6, 1943, and on July 29, 1943, she was ordered to and did report for active duty at a camp on the eastern seaboard of the United States and ever since has been in active duty as a member of said Marine Corps; that prior to her membership in the Armed Forces she was steadily employed as a secretary at a salary of $140 per month; that upon being assigned to active duty she was paid $50 per month; that on December 21, 1943, she was commissioned a corporal with a monthly salary of $66; "that she has at the present time less than $25.00 and is without means to prosecute the appeal involved in the proceedings in which this affidavit is being filed, nor has she sufficient money to bid at the sale of the household furniture which was found by the trial court to be community property and ordered sold." Appellant's counsel in their memorandum in support of motion to stay proceedings state that the cost of preparing a transcript on appeal will be $65 to $70, and that this amount, "in addition to the Clerk's fees for filing the transcript on appeal, is in excess of the amount of money now in the possession of the appellant, and therefore this proceeding should be stayed for at least six months, on account of appellant's financial condition, since she is a member of the 'Armed Forces'."

The only authority cited by appellant to uphold her motion for stay of proceedings is that of Jamaica Savings Bank v. Bryan, 175 Misc. 978, 25 N.Y.S.2d 17, 19, an action to foreclose a mortgage, in which the following statement is made: "Of course, the fact that a defendant is in military service is not a defense to an action under the Soldiers' and Sailors' Civil Relief Act of 1940, 54 U.S. Stat. at Large, p. 1178, 50 U.S.C.A. Appendix, §§ 501-585. That act by no means contemplates that persons able to meet their obligations may set up the act in bar to prevent creditors from pursuing their remedies. It does mean that soldiers and sailors in the service who are handicapped by reason of their military service, either in making valid defenses to an action or in meeting their financial obligations, shall have the protection of the court to prevent prejudice to their rights by reason of such service." In the cited case, because there was absolutely nothing before the court upon which it could base an opinion to the effect that defendant's ability to conduct his defense was materially affected by his military service, the court decided that it should take proof in the matter, after which it would determine whether a stay should be granted. Thereafter, in a further opinion (176 Misc. 215, 25 N.Y.S.2d 641) it was held that there was no basis for a stay of proceedings where military drills were held twice a week and military service did not materially affect ability to conduct defense to the action, no evidence having been adduced that defendant had a defense.

Subdivision (1) of section 302 of the Act under consideration specifically provides for either a stay of proceedings or such other disposition as may be equitable to conserve the interests of all parties in those cases involving "obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of military service and still so owned by him which obligations originated prior to such person's period of military service. * * * Unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service." Thus, it can be seen that even in cases arising under section 302, Sec. 532, 50 U.S.C.A. Appendix, defendant's right to a stay is strictly limited and is subject to the discretion of the court in which such application is made.

In the instant case, it appears that the movant, Myrtle Levin, instituted the action for divorce, and was a member of the armed forces when the matter came on for trial, at which time a judgment was rendered in her favor; that she filed her notice of appeal therefrom on August 26, 1943, when she was receiving a monthly stipend of $50 as a member of the Marine Corps, and that she took no further steps to prosecute her appeal until, almost six months having elapsed, her former husband, respondent herein, made his motion to dismiss said appeal.

In our search for enlightenment on the subject under consideration, we have discovered that the cases as a whole involve motions made by defendants in the trial court on the ground that they are unable to properly conduct their defense while engaged in the war effort. However, respondent has cited Briner v. Briner, 60 Cal.App.2d 473, 476, 140 P.2d 995, 997, the only case called to the attention of this court in which a motion was made similar to that made herein, to-wit: to stay proceedings on appeal under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, supra. In the cited case it was the husband who sought the stay because of his inability to conduct his defense to his wife's appeal from a judgment rendered in the husband's favor. In that case the court denied the motion holding that "* * * the matters alleged by respondent in this case do not show that his ability to conduct his defense to this appeal is materially affected by reason of his military service. The presence of respondent in this court is unnecessary, and even assuming that his financial condition is as alleged by him, he is in no different position than any other litigant who may, by reason of a limited income, find it difficult or inconvenient to meet the expenses incident to an appeal. * * * We are cited to no cases in which proceedings on appeal have been stayed under the Soldiers' and Sailors' Civil Relief Act. In Rosenthal v. Smith, Ohio App., 42 N.E.2d 464, a motion to dismiss an appeal on the ground that appellant had failed to comply with the rules of the court requiring the filing of assignments of error, briefs, etc., within fifty days after notice of appeal, was resisted by counsel for appellant who represented to the court that appellant was in the armed forces and that counsel had been unable to contact him. The court said: 'The Soldiers' and Sailors' Civil Relief Act of 1940 * * * does not accord the benefits thereof to a person in the military service who is represented by legal counsel. Nothing appears in the memorandum to the effect that counsel for appellant was not authorized to act for and on behalf of him as to all requisites incident to the appeal, including the filing of the briefs, etc. * * *.' And the motion to dismiss was granted."

[2] Under the facts presented by the record before this court, appellant's ability to conduct her appeal is not materially affected by reason of her military service.

For the reasons stated, appellant Myrtle Levin's motion for stay of proceedings is denied, and respondent Alexander Levin's motion to dismiss the appeal is granted. The appeal is therefore dismissed.

DORAN and WHITE, JJ., concur.

64 Cal.App.2d 326

LEVIN v. MARTIN et al.

Civ. 14309.

District Court of Appeal, Second District, Division 1, California.

May 11, 1944.

1. Automobiles ⚷245(72)

In action by pedestrian for personal injuries sustained while crossing street at intersection in dim out when struck by automobile, pedestrian's contributory negligence was for jury. Vehicle Code, § 562, St.1935, p. 188.

2. Automobiles ⚷245(6)

In action by pedestrian for injuries sustained while crossing street at intersection in dim out when struck by automobile making a wide right-hand turn in high gear, motorist's negligence was for jury.

3. Appeal and error ⚷989, 996

Where the verdict is attacked as unsupported, the appellate court can only determine whether there is any substantial evidence which will support the verdict and, where two or more inferences can be reasonably deduced from the facts, the reviewing court cannot substitute its deductions for those of the trial court.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by John Levin against Margaret Estelle Martin, Marion A. Martin, and others, for injuries sustained in automobile accident. From a judgment for plaintiff, Margaret E. Martin, by and through her guardian ad litem, Percy T. Martin, and Marion A. Martin, by and through her guardian ad litem, Percy T. Martin, appeal.

Affirmed.

Nourse & Jones, of Los Angeles, for appellants.

Samuel J. Nordorf, of Long Beach, Darwin H. Wolford, of Beverly Hills, C. J. McGovern, of Long Beach, and Henry F. Walker, of Los Angeles (Russell H. Pray, of Long Beach, of counsel), for respondent.

YORK, Presiding Justice.

From a judgment in favor of plaintiff, defendants prosecute this appeal, contending that the evidence (1) shows that plaintiff was guilty of contributory negligence as a matter of law; (2) fails to show any negligence on the part of defendants, and is therefore insufficient to support said judgment.

The accident resulting in the instant litigation occurred around seven o'clock in the morning of December 24, 1942, at the intersection of Locust Avenue and Fourth Street in the City of Long Beach. A copy of the map of the intersection used at the trial herein is not included in the record; consequently, some of the testimony, which refers to certain points on said map without further explanation, is more or less unintelligible and unenlightening.

Locust Avenue runs north and south, Fourth Street, east and west, and they intersect at right angles, each street being fifty feet wide with curbing, parkway and sidewalks. The pedestrian crosswalk across Locust on the south side of Fourth Street is sixteen feet in width. At the time of the accident, said intersection was included in a "dim out" zone, it was raining slightly and the visibility was poor. Respondent was on his way to work, walking in a westerly direction on the south sidewalk of Fourth Street approaching Locust Avenue, it being his intention to continue westward on Fourth Street across Locust to Pine Avenue, the next street west of Locust. When respondent reached the easterly curb line of Locust Avenue, he stopped, looked to his right (north), to his left (south), and ahead (west, the direction from which appellant was approaching). Seeing no traffic, he walked straight ahead and had advanced only a few steps in his progress across Locust, not reaching the center thereof, when he was struck by appellant Margaret E. Martin, who was driving an automobile owned by her sister, appellant Marion A. Martin. Respondent lost consciousness momentarily, and when he revived he was lying on the pavement "just where about the stop mark is", with a man bending over him. He attempted to rise but was unable to do so, having sustained a fracture of his right leg just below the knee, and bruises on the right side of his face and over his eye. He was removed to the steps of a church located at the southwest corner of the intersection. He testified that he was not wearing glasses, had walked in dim outs before, knew he was in a dim out area and that automobiles were equipped with dim out lights, and that he was able to see such dim out lights as they came toward him in the street, but did not see appellants' car at all; that he did not know what struck him and did not know whether he was thrown by the automobile or not. On cross-examination respondent was questioned with respect to a deposition which he made before the trial in which he was asked:

"When you came to, where were you lying on the street? A. Well, somewhere in the street near the crossing.

"Q. How far south of the crossing were you when you came to? A. I really couldn't say.

"Q. Were you as much as 15 feet? A. It would be very difficult for me to designate the exact spot.

"Q. I understand that, but would you say you were between 15 and 30 feet? Would that be a fair estimate? A. Yes, sir, approximately that.

"Q. Now there's no question about that, is there? I mean that's your best recollection? A. Yes."

Respondent acknowledged that he so testified, but stated "That 15 and 30 feet was your (the attorney's) idea, not mine." To this counsel replied: "Maybe it was my idea. I'll confess to it at this time, but tell me please, here, when you read your deposition over, you didn't change those answers?" Respondent admitted he made no changes in the deposition.

At the time of the collision, appellant Margaret E. Martin was driving her sister's automobile in an easterly direction on the south side of Fourth Street, about four feet from the center of the street, at a speed of from 8 to 10 miles per hour. She was approaching Locust Avenue in the opposite direction from that in which respondent was walking. In order to proceed south on Locust, appellant driver prepared to make a right-hand turn at the intersection in question, and "moved in" considerably from the center of the street; then, slowing down to about 6 or 8 miles per hour, she made a wide turn around the corner. After appellant was headed due south on Locust, something collided with her automobile, according to her own testimony, whereupon she stopped immediately and discovered respondent "lying right by my front fender". When she stopped, her car was about four feet from the west curb of Locust Avenue. She did not blow the horn or give any warning signal, was in high gear as she turned the corner, and did not notice anyone in the intersection. This witness drew a line on the map used at the trial herein showing the course her car took around the corner in question, and she made a mark indicating the position of her car when she felt the impact with respondent, which point it was stipulated by counsel for both parties was "16 feet * * * from the curbing down to the stop line." Appellants' car was not damaged.

The witness Drake, who was walking south on the east side of Locust at a point 150 or 200 feet north of its intersection with Fourth Street, testified: "I happened to be looking down towards the corner of Fourth and Locust. I noticed this car pull up to the corner, going east on Fourth, and they made a stop, pulled up very slowly and made a stop, a hesitating stop, and then started around the corner, and in turning the corner they made a rather wide swing, and just after passing the intersection, I heard an impact, such as a car running over a cardboard box or something, and I saw a man fall in front of the headlights of the car * * * At the time I heard the impact, the automobile came to a stop then * * * it just made a wide turn, but was on its own side of the street"; that respondent's body was lying "about even with the church steps", a distance of about 25 or 28 feet south of the corner.

Sergeant of Police Jessing, who investigated the accident, took the statements of the witness Drake and the driver of the car, appellant Margaret E. Martin, who "pointed out the spot at which they said the accident occurred." Using that as a starting point, said witness measured the distance therefrom to the south curb of Fourth Street, and found that: "The location of the impact was 34 feet south of the south curb of Fourth Street, and 20 feet east of the west curb of Locust." Police Officer Woelthausen, who assisted Sergeant Jessing in making the measurements at the scene of the collision, corroborated the latter's testimony, and in addition testified that they measured the pedestrian lane on the south curb line of Fourth Street and that it was sixteen feet wide.

[1] Appellants urge that respondent was guilty of contributory negligence as a matter of law, because (1) he violated sec-

tion 562 of the Vehicle Code, St.1935, p. 188, in that it is shown by the evidence that he crossed the street outside of a crosswalk and failed to yield the right of way to appellant; also (2) because he failed to exercise ordinary care in the manner in which he crossed said street.

An examination of the evidence which is hereinbefore set out in narrative form, reveals that respondent when he reached the intersection looked to his right, to his left as well as ahead, and then walked straight ahead until he was struck and knocked unconscious by appellants' automobile. Respondent's description of the collision placed him in the crosswalk a few feet east of the center line of Locust Avenue at the time he was struck, and the jury was justified in making an implied finding to that effect. Even though appellant Margaret E. Martin gave positive testimony that she stopped the car immediately when she felt the impact between her car and respondent's body, it is logical to believe that respondent may have been carried a few feet by the left front fender and was dropped therefrom as appellant brought the car to a stop. At any rate, there is enough conflict presented by the evidence on the issue of contributory negligence to make it a question of fact for the determination of the jury.

The rule applied to a situation analogous to that here presented is stated in Young v. Tassop, 47 Cal.App.2d 557, 562, 118 P.2d 371, 374, quoting from White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086, as follows: "'There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury.'"

In the instant case, respondent did look in all directions before leaving the curbing, saw no lights of approaching cars and heard no horns or other warning signals. By so doing, he took some precaution for his own safety and the question whether he exercised due care was one for the jury.

It is also contended that the judgment herein must be reversed because of a total lack of evidence that appellant Margaret E. Martin, the driver of the automobile, was guilty of any negligence proximately causing respondent's injuries. In this connection, it is argued that in the dim out conditions existing at the time in question respondent had a better opportunity to see and observe the approach of appellant than the latter had to see and observe respondent.

[2, 3] However, it is clear from the record that, although she decreased her speed to a very moderate rate, said appellant did not stop but made her right-hand turn in high gear, making a wide swing into the intersection at a point where she should have anticipated the presence of pedestrians. It thus appears that sufficient evidence was produced from which the jury was justified in inferring that appellant driver was negligent in her operation of the car in the dim out area. As was so aptly stated in the recent case, Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689, 690: "'It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184.) * * * The critical word in the definition is '*substantial*'; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence that is overwhelming in its persuasiveness but which may appear relatively unsubstantial —if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve the doubt in

favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical. Upon such view of the law we cannot hold that any essential finding in this case is unsupported."

In the instant case the jury brought in its verdict in favor of respondent thereby impliedly finding that appellant Margaret E. Martin, the driver of the car, was negligent, and that there was no contributory negligence on the part of respondent pedestrian. There were questions of fact for the jury and its findings thereon being supported by the evidence, are binding on this court. Bamber v. Belprez, 15 Cal.App.2d 110, 113, 58 P.2d 1325.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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64 Cal.App.2d 367

OILWELL CHEMICAL & MATERIALS CO. v. PETROLEUM SUPPLY CO.

Civ. 3314.

District Court of Appeal, Fourth District, California.

May 15, 1944.

1. Corporations 🔑153

The statute providing for recovery from shareholder of any "dividend" not authorized covers any division of profits or capital of a corporation not made in accordance with corporation law of the state and included distribution of capital between stockholders who informally agreed thereto. Civ.Code, § 364.

See Words and Phrases, Permanent Edition, for all other definitions of "Dividend".

2. Corporations 🔑152

The term "dividend" is not limited to earnings of corporation's stock, but implies a portion of a fund divided among several others, and the term carries with it the idea of a division of a fund owned by several parties and is an aliquot portion of the estate of the common owners.

3. Corporations 🔑153

Where principal corporate creditor took over corporation and continued it in business and corporation was not adjudged insolvent or bankrupt within one year after receipt of wrongful dividend by shareholder, no action could be maintained against shareholder. Civ.Code, § 364.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action for money had and received by Oilwell Chemical & Materials Company against Petroleum Supply Company. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Stanley Pedder and Kenneth Ferguson, both of San Francisco, for appellant.

Calvin H. Conron, Jr., of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment in an action for money had and received. Defendant denied the material allegations of the complaint and pleaded the bar of subdivision one of section 339 of the Code of Civil Procedure and of section 364 of the Civil Code.

On January 18, 1939, Frank Goldman and Sam Self incorporated the plaintiff, Oilwell Chemical and Materials Company, with Sam Self as president, Frank Goldman as vice president and treasurer, and J. W. Heard, Jr., their attorney, as secretary and member of the board of directors. Goldman and Self each subscribed for ten shares of the capital stock which were issued to them on March 29, 1939, upon their paying $200 to the company. On March 30, 1939, Goldman transferred his stock to the defendant corporation of which he was the manager.

Plaintiff corporation was under the direct and active management of Goldman and Self until June 26, 1940, when they, with J. W. Heard, Jr., resigned and were succeeded by officers and directors selected by S. L. Abbott who did business under the name of S. L. Abbott Company. Defendant corporation guaranteed plaintiff's indebtedness to S. L. Abbott Company.

Plaintiff, under the management of Goldman and Self, actively engaged in business in 1939 and until about May, 1940. Its accounts were kept by a bookkeeper who submitted monthly trial balances to the two directors. These trial balances showed the following surplus or undivided profits:

October 31, 1939	$7228.68
November 30, 1939	1628.47
December 31, 1939	991.41
January 31, 1940	31.85

They showed the following deficits:

February 28, 1940	$ 833.96
March 31, 1940	1906.94
April 30, 1940	3349.01

Plaintiff was indebted to S. L. Abbott Company in a considerable amount and could not pay this bill. Early in May, 1940, Abbott pressed for payment and took possession of the books and records of plaintiff and negotiated for a settlement. This resulted in a contract dated June 26, 1940. Self and defendant transferred their stock to Abbott who then became the sole stockholder of plaintiff. Self was employed by plaintiff at a fixed salary and a share of the profits made. Abbott released defendant from its guarantee of the account of plaintiff. Thereafter plaintiff continued in business under control of a board of directors and officers selected by Abbott. At no time was plaintiff adjudged insolvent or bankrupt but was apparently doing business under the control of the officers and directors selected by Abbott, at the time of the trial of this action in March, 1943.

When the income tax returns for plaintiff were prepared in March, 1940, showing the business done in 1939, certain adjustments were made in the figures shown in the trial balances so that instead of showing a surplus of $991.41 on December 31, 1939, there was shown an actual loss or deficit of $3041.21 on that date.

In October, 1939, Self needed money. He and Goldman agreed that Self could withdraw some of the profits or surplus from the treasury of plaintiff, provided an equal amount was paid to defendant, the other stockholder. The withdrawals were made by the common consent of the two men who were the sole stockholders. These withdrawals were not authorized at any directors or stockholders meeting. Defendant was paid the following amounts:

In October, 1939	$ 700.00
November, 1939	1150.00
December, 1939	1020.81.

These payments to defendant were entered on the books of plaintiff as dividends, under the heading, "Petroleum Supply Company Dividend Account", and those made to Self, under the heading, "Sam Self Dividend Account".

These withdrawals were continued in 1940. Defendant received the following amounts:

January, 1940	$500.00
February, 1940	200.00
March, 1940	274.80
April, 1940	593.87, of

which sum $359.29 was returned to plaintiff making the total withdrawals by defendant in 1940, $1209.38.

These withdrawals by defendant and Self in 1940 were not carried on the books as dividends but as commissions, though no claim is made that any such commissions were earned. There is evidence to the effect that they were so carried because of an uncertainty as to whether it would be better for income tax purposes to class them as dividends or commissions. Counsel for plaintiff maintains, and we think correctly so, that they cannot be regarded differently from those withdrawals made in 1939. None of them were authorized at any directors or stockholders meeting, but only by common consent of the two stockholders of plaintiff. The evidence seems to indicate that with the possible exception of the withdrawals made in October, 1939, none of them were made from surplus or profits but were in reality disbursements of the capital assets of plaintiff and were made in violation of the provisions of section 346 of the Civil Code. For the purpose of this opinion we will assume, without holding, that none of the withdrawals were made from profits or surplus but were taken from capital in accordance with the contention of plaintiff.

Speaking very generally, dividends may be declared by the board of directors only out of profits or surplus. Sec. 346, Civil Code. It is only under circumstances not appearing here that they may be declared and paid out of capital.

Since the adoption of the codes in 1872, and up to the time of the passage of the General Corporation Law in 1931 (Stats.

1931, p. 1762), section 309 of the Civil Code made those directors of a corporation disbursing corporate capital jointly and severally liable for any wilful or negligent violation of the provisions of the first paragraph of the section which prohibited payment of dividends from any other funds than surplus profits with certain exceptions not important here. The liability ran to the shareholders of the corporation, or, in case of insolvency, to its receiver, liquidator or trustee in bankruptcy to the full amount of any loss sustained by the shareholders or creditors by reason of any such unauthorized dividend, withdrawal or distribution. It is held that the corporation may bring such action. Southern Cal. Home Builders v. Young, 45 Cal.App. 679, 188 P. 586. The right of contribution was given against directors and against any shareholder knowingly receiving or accepting such distribution.

This section was a modification of the common law rule as applied in many jurisdictions. Instructive discussions of the development and the varied application of this rule are to be found in 13 American Jurisprudence, page 750, et seq., 55 A.L.R. p. 98, et seq., 76 A.L.R. p. 893, et seq., 109 A.L.R. p. 1393, et seq., and L.R.A.1917C, 403, et seq.

When the general corporation law was passed, section 309 of the Civil Code in a completely modified form was enacted as section 364 of that code. Stats.1931, p. 1816. As then enacted it provided as follows:

"Any shareholder who knowingly receives any dividend or distribution of assets not authorized by this title shall be individually liable to the corporation for the amount so received by him, with interest from date of receipt, in the event that the corporation is unable to meet its debts and liabilities as they mature. Any two or more shareholders may be sued in the same action."

This section was amended (Stats.1933, pp. 1358, 1397) to read as follows:

"Any shareholder or owner of shares who receives any dividend not authorized by this title with knowledge of facts indicating the impropriety thereof shall be liable to the corporation or to its receiver, liquidator or trustee in bankruptcy for the amount so received by him with interest thereon at seven per cent per annum until paid in the event that the corporation is adjudged insolvent or bankrupt in any action or proceeding begun within one year after the receipt of such dividend. Any number of shareholders may be sued in the same action."

Subsequent amendments have not materially changed the purport of the section.

This action was brought to recover the withdrawals paid to defendant. As those withdrawals were admittedly paid to defendant, and as we have assumed that all of them were from capital and therefore not authorized by the provisions of the Civil Code, we need only consider the plea of the bar of the statutes of limitations made in the answer of defendant. The record discloses that the plea of the bar of subdivision one of section 339 of the Code of Civil Procedure is not available to defendant so we must consider the limitation on the right of action contained in section 364 of the Civil Code. In this connection it should be observed that the section, as originally passed in 1931, contained no condition nor time limitation of any kind on the right of action. That provision was added in 1933, and we must presume that it was the intention of the legislature to accomplish just what its plain language implied. Clearly, this limits the action of the corporation, its receiver, liquidator or trustee in bankruptcy against the shareholder to recover an unauthorized dividend paid him, to those cases in which the corporation has been adjudged insolvent or bankrupt within one year after the shareholder has received the unlawful payment. In the instant case the corporation has not been adjudged insolvent or bankrupt but was doing business under the control of S. L. Abbott, its principal creditor in 1940, at the time this action was tried in March, 1943. It is therefore apparent that if the withdrawals paid to defendant in 1939 and 1940, be classed as dividends, as that term is used in section 364 of the Civil Code, plaintiff has failed to establish its right to recovery under the plain language of the section as there has been no adjudication of insolvency or bankruptcy which that section makes a prerequisite to an action of this kind to recover unauthorized dividends.

Not only has there been no adjudication of insolvency or bankruptcy within one year after the unauthorized payments, but Abbott, the principal creditor, took over the corporation and continued it in business under his own management in the apparent hope of making profits for himself in excess of the amounts he could have recovered from the stockholders receiving the unlawful withdrawals. If these withdrawals were dividends, as the term is used in section 364 of the Civil Code, Abbott had two courses open to him when he took over the corporation in June, 1940. He could have had the corporation adjudged insolvent or bankrupt and instituted an action to recover the unauthorized withdrawals or he could have continued the corporation in business with the expectation of recouping his losses, which were then apparent, and of making additional profits for himself. He chose the latter course. Thus the important question presented is whether or not the unauthorized withdrawals paid defendant were dividends as that term is used in the code section. We have been cited to no reported California case, nor have we been able to find one, construing section 364 of the Civil Code.

Counsel for plaintiff argues that the word "dividend" is well defined in the law; that a dividend must be declared by formal action of the board of directors of a corporation; that it can only be paid from profits and not out of capital, except under circumstances not appearing here; that as the withdrawals in question here were not authorized by the board of directors and were not paid from profits but from capital, those withdrawals may not be classified as dividends; that as section 364 of the Civil Code only purports to limit actions to recover unauthorized dividends, and as the payments made to defendant were not dividends, the limitations of the section cannot apply to this action.

[1] This argument overlooks the true purpose of the section. Where dividends are regularly and legally declared by the board of directors of a solvent corporation and are legally paid out of profits, no action to recover them lies against the stockholder regularly receiving them. The matter of the declaration and payment of such dividends is one of internal administration of the corporation. Their payment amounts to a division among and a distribution to the stockholders of a fund that in reality belongs to them. By its clear terms section 364 of the Civil Code does not purport to legislate concerning such dividends lawfully declared and paid out of profits but is only concerned with a "dividend not authorized by this title" of the Civil Code. This must refer to division of profits or capital of a corporation not made in accordance with the corporation law of the State. This certainly would include distribution of capital among stockholders under the circumstances here presented because such distribution is not only not authorized but is expressly prohibited by the Civil Code.

[2] While the word "dividend" often is used to refer to the payment of a portion of the profit of a corporation to its stockholders, in equal amounts according to the number of shares of stock of a certain class owned by each of them, it has other meanings. In People v. White, 85 Cal.App. 241, 259 P. 76, 81, it was said:

> "The term 'dividend' is not limited in its significance to the earnings of corporation stock, but is one of quite general meaning. 'Both in common and legal parlance, the term implies a portion of a fund divided among several others. * * * The term carries with it the idea of a division of a fund owned by several parties, and the dividend is the aliquot portion of the estate of the common owners.' 18 Corpus Juris, 1406; In re Fielding, D.C., 96 F. [800], 801."

While there is no uniformity of opinion on this question in the various jurisdictions of this country, there is eminent authority holding that where the stockholders of a corporation agree upon a distribution of its profits among all of the stockholders, such a distribution is a dividend even though the law requiring that the dividend be declared by formal action of the board of directors was not observed. See, Hartley v. Pioneer Iron Works, 181 N.Y. 73, 73 N.E. 576; Barryman v. Bankers' Life Ins. Co., 117 App.Div. 730, 102 N.Y.S. 695; Barnes v. Spencer & Barnes Co., 162 Mich. 509, 127 N.W. 752, 139 Am.St.Rep. 587; Breslin v. Fries-Breslin Co., 70 N.J.L. 274, 58 A. 313; Spencer v. Lowe, 8 Cir., 198 F. 961; Thiry v. Banner Window Glass Co., 81 W.Va. 39, 93 S.E. 958, L.R.A.1918B, 1048; Freeman v. Rogers White Lime Co., 138 Ark. 312, 211 S.W. 146; Central of Georgia R. Co. v. Central Trust Co. of N. Y., 135 Ga. 472, 69 S.E. 708; In re Wilson's Estate, 85 Or. 604, 167 P. 580; Grants Pass Hdw. Co. v. Calvert, 71 Or. 103, 142 P. 569; Nichols v. Olympia Veneer Co., Inc., 139 Wash. 305, 246 P. 941, 48 A.L.R. 504.

[3] In view of the foregoing authorities and what seems to be the clear mean-

ing of section 364 of the Civil Code we have reached the conclusion that the phrase "dividends not authorized by this title" refers to dividends not lawfully declared and also to illegal distribution of capital to stockholders such as we have here. This being so, the principal creditor of plaintiff having taken over the corporation and having continued it in business, and the corporation not having been "adjudged insolvent or bankrupt in any action or proceeding begun within one year after the receipt of such dividend", the plaintiff cannot maintain this action and cannot recover the withdrawals from defendant.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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64 Cal.App.2d Supp. 925

PEOPLE v. COMMONS.

Cr. A. 2002.

Appellate Department, Superior Court,
Los Angeles County, California.
May 5, 1944.

1. Weapons 🔑10

Statutory provision relating to carrying concealed weapons upon person or in vehicle is limited to the "concealed" carrying of the weapon it describes. Gen.Laws 1937, Act 1970, § 5.

2. Municipal corporations 🔑592(2)

An ordinance which prohibits the same acts which are forbidden by state law is void to extent that it duplicates state law.

3. Municipal corporations 🔑639(1)

Where complaint, under ordinance, charged possession in automobile of revolver capable of being concealed on the person, without a permit, but complaint did not allege that weapon was concealed, complaint did not charge violation of state law prohibiting carrying of concealed weapons and no violation of state law which conflicted with the ordinance was charged. Gen.Laws 1937, Act 1970, § 5.

4. Municipal corporations 🔑592(1)

Ordinance, prohibiting carrying of dangerous weapons without having a permit issued by authorized governmental authority, does not conflict with state law as prohibiting what the state law authorizes. Gen.Laws 1937, Act 1970, § 8.

5. Municipal corporations 🔑592(1)

Where state law fully occupies particular field of legislation, a local ordinance attempting to impose additional regulation in such field will be regarded as conflicting with the state law and for that reason void, even though particular regulation set forth in ordinance does not directly duplicate or otherwise directly conflict with any express provision of state law.

6. Municipal corporations 🔑592(1)

Whether Legislature has undertaken to occupy exclusively a given field of legislation so as to preclude ordinances on the subject must be determined upon analysis of statute and of facts upon which it was intended to operate, and mere fact that state law contains detailed regulations of subject does not establish intent to occupy entire field.

7. Municipal corporations 🔑592(1)

State law relating to carrying concealed weapons was not intended to occupy whole field so as to make invalid a city ordinance prohibiting the carrying of dangerous weapons, since the state law contains no provision amounting to affirmative permission of acts not prohibited, and mere lack of prohibition of such acts cannot be construed as permission thereof. Gen.Laws 1937, Act 1970.

8. Municipal corporations 🔑111(4)

If different parts of ordinance are severable and independent, and provisions which are constitutional are capable of being carried into effect after void part has been eliminated and it is clear from ordinance that intent was to enact such provisions irrespective of the others, the unconstitutional provisions will be disregarded and ordinance read as if such provisions were not there.

9. Municipal corporations 🔑111(4)

Where invalid portions of ordinance are so connected with rest of ordinance as to be inseparable, the entire ordinance must fall.

10. Municipal corporations ⇨111(4)

Entire ordinance of Los Angeles relating to dangerous weapons and prohibiting the possessing in an automobile of a dangerous or deadly weapon was not invalid because certain provisions overlapped the state law, it being obvious that council would have passed the prohibition aimed only at those matters within its legislative reach. Gen.Laws 1937, Act 1970.

11. Constitutional law ⇨258

Ordinance of Los Angeles relating to carrying dangerous weapons does not violate Fourteenth Amendment because containing no ascertainable standard of guilt because of use of words "a dangerous or deadly weapon" in describing weapons, there being no lack of certainty in such language. Gen.Laws 1937, Act 1970, §§ 1, 2; Civ.Code, § 3538; U.S.C.A.Const. Amend. 14.

12. Constitutional law ⇨258

Reference, in Los Angeles ordinance prohibiting carrying of dangerous weapons, to any dangerous or deadly weapon within meaning of any law of state restricting use thereof, introduced no uncertainty into the ordinance so as to make ordinance violate the Fourteenth Amendment, since that is certain which can be made certain and all persons are charged with knowledge of the law. Gen.Laws 1937, Act 1970, §§ 1, 2; Civ.Code, § 3538; U.S.C.A.Const. Amend. 14.

13. Constitutional law ⇨258

Los Angeles ordinance relating to carrying weapons was not void as creating uncertainty by exception of weapon carried pursuant to a valid permit issued by a duly authorized governmental authority. Gen. Laws 1937, Act 1970, §§ 1, 2; Civ.Code, § 3538; U.S.C.A.Const. Amend. 14.

14. Municipal corporations ⇨594(2)

Exception, in Los Angeles ordinance prohibiting carrying of dangerous weapons, of an ordinary rifle or shotgun lawfully carried for purposes of hunting or other lawful sport, is sufficiently certain for legislative purposes, since reference to existing law furnishes sufficient key to meaning of "lawful" and "lawfully", and the word "ordinary" signifies according to established order, accustomed, common, customary, normal, usual, and does not render ordinance uncertain.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary".

15. Municipal corporations ⇨594(2)

Exception, in Los Angeles ordinance prohibiting carrying of dangerous weapons, of ordinary tools and equipment carried in good faith for uses of honest work or for purposes of legitimate sport or recreation, did not render ordinance so uncertain as to make it void, the word "legitimate" as used meaning simply lawful.

See Words and Phrases, Permanent Edition, for all other definitions of "Legitimate".

16. Municipal corporations ⇨639(1)

Complaint charging violation of ordinance prohibiting carrying of dangerous weapons was not defective because not negativing provision that the restriction should not be deemed to prohibit the carrying of ordinary tools or equipment, since such provision is in nature of an exception rather than part of definition of offense and need not be negatived.

17. Indictment and information ⇨111(1, 3)

Exceptions and provisions in a law are to be negatived in the pleading only where they are descriptive of the offense or define it, and, where they afford matter of excuse merely, they are to be relied on in defense.

18. Criminal law ⇨1144(19)

Statements in defendant's brief on appeal could not be presumed true in face of trial court's finding to the contrary.

19. Municipal corporations ⇨639(1)

If defendant violated state law rather than ordinance which he was charged with violating, conviction would not be proper on complaint charging violation of ordinance.

20. Criminal law ⇨1190

Reversal of order arresting judgment in criminal case would return case to condition in which it was before order was made.

◆

Appeal from Municipal Court of City of Los Angeles; Arthur S. Guerin, Judge.

David N. Commons was charged with the violation of an ordinance, and, from an order arresting judgment, the People of the State of California appeal.

Reversed and cause remanded.

Ray L. Chesebro, City Atty., of Los Angeles, Donald M. Redwine, Asst. City Atty., of Hollywood, and John L. Bland, Deputy City Atty., of Los Angeles, for appellant.

Charles J. Katz and Selma Mikels Bachelis, both of Los Angeles, for respondent.

SHAW, Presiding Judge.

This is an appeal by the People from an order arresting judgment in a criminal case in the Municipal Court. By the terms of section 1452 of the Penal Code, a motion for such an order may be "founded on any substantial defect in the complaint." The grounds of the motion here were that the city ordinance which defendant was charged with violating was unconstitutional and void for various reasons, and that the complaint was defective in failing to negative certain exceptions contained in the ordinance.

The complaint herein alleged that the defendant, in violation of subdivision (e) of section 55.05 of an ordinance of the City of Los Angeles, commonly known as the Los Angeles Municipal Code, had "in his possession in an automobile, a dangerous and deadly weapon, towit, .38 Colt Revolver, a fire-arm capable of being concealed on the person, without then and there having a permit issued by authorized governmental authority authorizing him so to do". Section 55.05, which the defendant is thus charged with violating, begins in subdivision (a) with this definition: "'Dangerous or deadly weapon' includes, but is not limited to: any dirk or dagger; any knife with a blade three inches or more in length, and any snap-blade or spring-blade knife, regardless of the length of the blade; any ice pick or similar sharp stabbing tool; any straight-edge razor or any razor blade fitted to a handle; any dangerous or deadly weapon within the meaning of any law of this State restricting the use thereof; and any cutting, stabbing or bludgeoning weapon or device capable of inflicting grievous bodily harm; and any firearm other than (1) one carried pursuant to a valid permit, issued by a duly authorized governmental authority, or (2) an ordinary rifle or shotgun lawfully carried for purposes of hunting or other lawful sport." Then follow, in subdivisions (b), (c) and (d), prohibitions aimed at any person who, while carrying any such weapon concealed on his person, loafs or loiters upon any public street, hides or lurks on the premises of another, engages in any fight or disorderly conduct, or loiters about any place where intoxicating liquors are sold. Finally, subdivision (e) reads as follows: "It shall be unlawful for any person to have in his possession, in any automobile, any dangerous or deadly weapon, but this restriction shall not be deemed to prohibit the carrying of ordinary tools or equipment carried in good faith for uses of honest work, trade or business, or for the purpose of legitimate sport or recreation."

[1] Defendant contends that this ordinance is unconstitutional because it is in conflict with the state law, known, though not officially designated, as the "Dangerous Weapons' Control Law of 1923" (Stats. 1923, p. 695, as amended, Deering's Gen. Laws, 1937 Ed., Act 1970). This law makes it unlawful for any person (excepting certain law enforcement officers) to manufacture, sell or possess any blackjack, slingshot, billy, sandclub, sandbag or metal knuckles, or to carry concealed on his person any dirk or dagger, or certain explosives (section 1), declares that no alien, no person convicted of a felony, and no narcotic addict shall own or have in his possession any pistol, revolver or other firearm capable of being concealed upon the person, that is, having a barrel less than 12 inches long (section 2), imposes additional punishment upon persons committing felonies while armed with any weapon mentioned in section 1 (section 3), and denies such persons probation (section 4). It also declares that the unlawful concealed carrying of any dirk, dagger or firearm capable of being concealed upon the person is a nuisance and makes provision for destruction of weapons so carried (section 7). Provision is also made for the issuance of licenses to carry firearms concealed (section 8), for the registration and report of sales of firearms capable of being concealed on the person (section 9), and for licensing dealers therein (sections 11 and 12). Sales of firearms capable of concealment upon the person to persons forbidden to have them are also prohibited (section 10). In thus stating the foregoing parts of the statute, we are not attempting absolute precision, or putting a definite construction upon them, but mean only to characterize them with sufficient accuracy for the pur-

poses of the discussion following. Defendant's claim of a conflict between the ordinance and this statute is particularly based on section 5 of the statute, which, so far as important here, reads as follows: "Except as otherwise provided in this act, it shall be unlawful for any person within this state to carry concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person without having a license to carry such firearm as hereinafter provided in section eight hereof. Any person who violates the provisions of this section shall be guilty of a misdemeanor, and if he has been convicted previously of any felony, or of any crime made punishable by this act, he is guilty of a felony." The portion of section 5 just quoted, insofar as it relates to vehicles, as well as persons, is limited to the concealed carrying of the weapons described. People v. Frost, 1932, 125 Cal. App.Supp. 794, 12 P.2d 1096.

[2, 3] There are several modes by which a local ordinance may come into conflict with a state law. First, the ordinance may prohibit the same acts which are forbidden by the state law, in which case the ordinance is void to the extent that it duplicates the state enactment. (In re Sic, 1887, 73 Cal. 142, 14 P. 405; In re Mingo, 1923, 190 Cal. 769, 771, 214 P. 850; Pipoly v. Benson, 1942, 20 Cal.2d 366, 370, 125 P.2d 482, 147 A.L.R. 515; In re Portnoy, 1942, 21 Cal.2d 237, 240, 131 P.2d 1. It is obvious here that the provisions of subdivision (e) of section 55.05 of the Los Angeles Municipal Code, and those of section 5 of the state law, do overlap to some extent, when applied to the subject matter of this case. Both have the effect of prohibiting the concealed carrying in an automobile of revolvers such as defendant had. But the complaint here does not allege that the weapon was concealed, and hence no violation of the state law or of the part of the ordinance which overlaps and so directly conflicts with it is charged.

[4] Second, a conflict may exist between law and ordinance because one prohibits what the other authorizes. (Ex parte Daniels, 1920, 183 Cal. 636, 643, 192 P. 442, 21 A.L.R. 1172; In re Iverson, 1926, 199 Cal. 582, 587, 250 P. 681.) It is claimed that a conflict of this sort exists here because of the respective exceptions contained in law and ordinance, which are not identical. But, except as hereinafter stated, neither law nor ordinance contains any provision in any way authorizing or declaring lawful the acts which are specified in any exception thereto. As to such acts, the situation is simply that they are not prohibited by the enactment containing the exception. Consequently, a prohibition of such excepted acts contained in the other enactment does not conflict with the enactment in which the exception appears. This statement must be qualified with respect to firearms for carrying which a license is obtained under section 8 of the state law, for that law does authorize the carrying of firearms under such licenses. But the ordinance excepts from its prohibitions, by the terms of subdivision (a), above quoted, firearms "carried pursuant to a valid permit issued by a duly authorized governmental authority". Hence, there is no conflict between the law and the ordinance in this matter.

[5, 6] Third, a state law may fully occupy a particular field of legislation so that there is no room for local regulation, in which case a local ordinance attempting to impose any additional regulation in that field will be regarded as conflicting with the state law, and for that reason void, even though the particular regulation set forth in the ordinance does not directly duplicate or otherwise directly conflict with any express provision of the state law. (Pipoly v. Benson, supra, 1942, 20 Cal.2d 366, 371, 125 P.2d 482, 147 A.L.R. 515; Natural Milk, etc., Ass'n v. San Francisco, 1942, 20 Cal.2d 101, 109, 124 P.2d 25; Ex parte Daniels, supra, 1920, 183 Cal. 636, 643, 192 P. 442, 21 A.L.R. 1172; In re Iverson, supra, 1926, 199 Cal. 582, 586, 250 P. 681.) "Whether the Legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate." (In re Iverson, supra, quoted with approval in Natural Milk, etc., Ass'n v. San Francisco, supra, 20 Cal.2d at page 110, 124 P.2d at page 30.) In the present case, the state law contains no declaration, either by way of disclaimer of an intent to occupy the whole field, such as the court found in the statutes considered in Re Iverson, supra; In re Simmons, 1926, 199 Cal.

590, 593, 250 P. 684, 685; and Natural Milk, etc., Ass'n v. San Francisco, supra, 20 Cal.2d at page 111, 124 P.2d at page 31, or by way of expression of such an intent, as did the statute construed in Ex parte Daniels, supra. The mere fact that a state law contains detailed and comprehensive regulations of a subject does not, of itself, establish the intent of the legislature to occupy the entire field to the exclusion of local legislation. (In re Iverson, supra, 199 Cal. at page 589, 250 P. 681; In re Simmons, supra.) This principle is implicit, though not expressly declared, in Natural Milk, etc., Ass'n v. San Francisco, supra, where it was contended that the provisions of the state Agricultural Code regulating the sale of milk, completely occupied the field, and a city ordinance making further provision on the subject was therefore in conflict with it, but the ordinance was upheld although, as the court said, the code "contains a comprehensive plan" for regulating the sale of milk. (See also In re Hoffman, 1909, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75, for a similar situation.)

[7] On an analysis of the state law here in question, we find no indication of an intent to occupy the whole field. It is almost wholly concerned with the carrying of weapons concealed on the person. The only weapons which it does not expressly characterize as capable of such concealment are those mentioned in sections 1 and 13, and they are such as are usually in fact capable thereof. Section 2 prohibits the carrying by some persons of firearms capable of being concealed upon the person, whether actually so concealed or not, but this prohibition is limited to classes of persons constituting but a small portion of the entire population of the state. Sections 3 and 4 seek to discourage those committing felonies from carrying certain weapons, whether concealed or not, by imposing greater punishment on them and denying them probation if they do so. But the main impact of this statute upon the general public is by section 5, to which also defendant attributes the conflict claimed to exist between law and ordinance, and that section deals only with the concealed carrying of the weapons described in it. The same is true of section 1 insofar as it relates to dirks, daggers, and certain explosive substances. Thus the state law leaves unregulated the carrying of firearms, dirks, daggers, and certain explosive substances by the general public, if they are not concealed upon the person. The act contains no provision, such as was found in Ex parte Daniels, supra, 1920, 183 Cal. 636, 643, 192 P. 442, 21 A.L.R. 1172, amounting to an affirmative permission of acts not prohibited; nor can the mere lack of a prohibition of such acts be construed as a permission thereof. (See In re Hoffman, supra, 1909, 155 Cal. 114, 118, 99 P. 517, 132 Am.St.Rep. 75; In re Iverson, supra, 1926, 199 Cal. 582, 589, 250 P. 681.)

Defendant presses upon us the argument that there is need for uniform regulation of this subject throughout the state, contending that persons traveling from one part of the state to another and carrying firearms with them may be much harassed and hampered in the bearing of arms, if they may find differing local regulations in each community through which they pass, and citing Ex parte Daniels, supra, 183 Cal. at page 645, 192 P. 442, 21 A.L.R. 1172, where similar objections to local regulation of the speed of automobiles were mentioned. But those matters were discussed there in the consideration of the question whether the establishment of a fixed speed limit by ordinance conflicted with the state law's prohibition of any unreasonable speed, not with reference to the question whether the state law occupied the entire field, and we cannot see that they have any bearing on the latter question. But if they had, they might be countered here by the suggestion that the need for the regulation or prohibition of the carrying of deadly weapons, even though not concealed, may be much greater in large cities, where multitudes of people congregate, than in the country districts or thinly settled communities, where there is much less opportunity and temptation to commit crimes of violence for which such weapons may be used. "The state in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs) upon the people of the state, urban and rural, but it may often, and does often, happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities, so that it becomes proper, and even necessary, for municipalities to add to state regulations provisions adapted to their special requirements." (In re Hoffman, supra, 1909, 155 Cal. 114, 118, 99 P. 517, 519, 132 Am.St.Rep. 75.)

[8-10] An ordinance may contain provisions which are invalid, either because of conflict with state law or for any other reason, and other provisions which appear to be valid, and in such case the question arises whether the good may be separated from the bad and allowed to stand. Sometimes the legislative body declares its intent, by a severability clause, that each part of its enactment stand or fall on its own merits, regardless of the others, and considerable weight is given to such a clause (Bacon Service Corp. v. Huss, 1926, 199 Cal. 21, 35, 248 P. 235). Here we find no such legislative declaration, but even without it, "if the different parts of the statute are severable and independent of each other, and the provisions which are within the constitutional power of the Legislature are capable of being carried into effect after the void part has been eliminated, and it is clear from the statute itself that it was the intent of the Legislature to enact these provisions irrespective of the others, the unconstitutional provisions will be disregarded and the statute read as if these provisions were not there." (Hale v. McGettigan, 1896, 114 Cal. 112, 119, 45 P. 1049, quoted with approval in Bacon Service Corp. v. Huss, supra, 199 Cal. at page 33, 248 P. at page 240.) "On the contrary, however, where the invalid portions of the statute are so connected with the rest of the statute as to be inseparable, it is clear that the entire act must fall." (In re Portnoy, supra, 1942, 21 Cal.2d 237, 242, 131 P.2d 1, 3.) Considering the ordinance in question with these rules in mind, it becomes clear that it was the intent of the legislative body—the city council—to enact the valid parts of the ordinance irrespective of the others. The intent of the council obviously was to prohibit all carrying of the described weapons, whether concealed or unconcealed, with the exceptions it stated. This prohibition is defeated, as far as concealed weapons are concerned, merely because the state law prohibits the carrying thereof. Thus such carrying is prohibited, as the council intended, but not by its own ordinance, and by the combined operation of law and ordinance substantially everything which the council intended to prohibit is prohibited. The same considerations apply to the overlapping of the statute and the ordinance as they affect the unconcealed carrying of certain weapons by the persons mentioned in section 2 of the statute. Under these circumstances, the conclusion is obvious that the council would have passed a prohibition aimed only at those matters within its legislative reach even if it had realized that a part of those it attempted to list were beyond its reach.

Neither do we see any difficulty in carrying into effect the provisions of the ordinance as applied only to those matters covered by the valid parts of the ordinance. The fact that the ordinance is so framed that its entire prohibition, including both the valid and the invalid parts thereof, is stated by the same words, does not necessarily show that the valid part is inseparable from the invalid, as will appear from consideration of the ordinances upheld in Re Murphy, 1900, 128 Cal. 29, 60 P. 465; In re Hoffman, supra, 1909, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75; In re Iverson, supra, 1926, 199 Cal. 582, 250 P. 681, and In re Simmons, supra, 1926, 199 Cal. 590, 250 P. 684. The ordinance in the Murphy case contained a general prohibition of games of chance played for money, and was attacked on the ground that it conflicted with section 330 of the Penal Code, which prohibited certain games of the same kind. The court said, "It may be that the ordinance includes all that is denounced by the statute, and it may also be that it includes much more", and upheld the ordinance as to games not mentioned in the statute. In the Hoffman case, the ordinance prohibited the sale of milk containing less than 3.5 per cent of butter fat, while the state law prohibited the sale of milk having less than 3 per cent of butter fat. Here the words of the ordinance purported to prohibit everything prohibited by the statute but it was declared to be an additional regulation and upheld. In re Iverson, supra, compared a city ordinance prohibiting the sale of more than 8 ounces of intoxicating liquor on a prescription with the provision of the Wright Act prohibiting the sale of more than 16 ounces in that manner, and In re Simmons, supra, confronted a city ordinance prohibiting possession of liquor containing more than one-third of one per cent of alcohol with the provision of the Wright Act prohibiting the possession of liquor containing more than one-half of one per cent of alcohol. In each case, the prohibition of the ordinance, as framed, would cover everything prohibited by the statute, and more, yet in each case the ordinance was upheld as a valid regulation of the matters not covered by the statute. On this point, defendant cites and relies on In re Portnoy, supra, 1942, 21 Cal.2d 237, 242, 131 P.2d 1, where it was held that the valid parts of a section of an ordinance were "so inseparably connected" with the invalid parts that it was "impossible to sustain any part of the section". As a reason for this conclusion, the court stated: "* * * the question of a conflict between the ordinance and the Penal Code depends upon which combination of the various individuals and activities specified is involved in a particular case. Nothing less than a complete rewriting of this section could make it consistent with the provisions of the Penal Code and accomplish its true function as supplementary legislation." But the ordinance there in question was, as the court suggests, complicated and the disentanglement of valid from invalid provisions was difficult. Here we see no such difficulty. It is necessary simply to exclude from the operation of the ordinance provisions here involved the concealed carrying of dirks, daggers and the weapons described in section 5 of the state law, any carrying of concealed firearms by the persons described in section 2 thereof and any carrying of the weapons other than dirks and daggers described in section 1. This seems to us no more difficult than the exclusions necessary to be made from the ordinances upheld in the cases above cited.

[11-13] Defendant further contends that the ordinance provision in question is void because it "contains no ascertainable standard of guilt" and hence violates the Fourteenth Amendment. This attack is aimed particularly at the exceptions contained in subdivisions (a) and (e) of section 55.05, which are said to be so uncertain as to render the ordinance void. Subdivision (a) describes various weapons, each of which is classed by it as "a dangerous or deadly weapon". We cannot see in this language of description any lack of certainty. The reference to "any dangerous or deadly weapon within the meaning of any law of this state restricting the use thereof" doubtless includes the state law which we have been considering; and no other has been called to our attention to which it could refer. It is not claimed that any state law on the subject is in itself uncertain. Since "that is certain which can be made certain" (Civil Code, § 3538), and all persons are charged with knowledge of the law (People v. O'Brien, 1892, 96 Cal. 171, 176, 31 P. 45; In re Estate of Hein, 1939, 32 Cal.App.2d 438, 443, 90 P.2d 100; see also 10 Cal.Jur. 760, sec. 72), the reference to state law (whether there be one or many such laws) for description of the weapons within the purview of the ordinance introduces no uncertainty into the latter. Nor does uncertainty result from the exception of weapons carried "pursuant to a *valid* permit issued by a *duly authorized* governmental authority". The emphasized words are those on which defendant bases his argument. He who carries a weapon may properly be held to know by what proceedings and from whom he obtained any permit he may have to carry it, and reference to the law which, as already stated, he is bound to know, will enable him to determine whether the permit is valid and is issued by a proper authority. Had the words to which defendant objects been omitted from the ordinance, the same meaning would doubtless be given it by construction.

[14] The exception in subdivision (a) of "an ordinary rifle or shotgun lawfully carried for purposes of hunting or other lawful sport" might perhaps have been more categorically stated, but it is sufficiently certain for legislative purposes. As in case of the words last considered, a reference to existing law will furnish a sufficient key to the meaning of "lawful" and "lawfully". Insofar as a permit or license is necessary to make the carrying lawful, what has just been said in regard to a permit is applicable here. We cannot see that the use of the word "ordinary" in the description above quoted gives it any abstruse, esoteric or extraordinary meaning or otherwise renders it uncertain. "Ordinary" signifies "according to established order; accustomed; common; * * * customary; * * * normal; * * * usual". (46 Cor.Jur. 1132; City of Long Beach v. Boynton, 1911, 17 Cal.App. 290, 295, 119 P. 677.) The ordinary citizen, confronted with this ordinance, would have no insuperable difficulty in ascertaining what was an "ordinary" rifle or shotgun.

[15] Subdivision (e) of section 55.05 excepts the carrying of "ordinary tools or equipment carried in good faith for uses of honest work, trade or business, or for the purpose of legitimate sport or recreation". This shows that the framers of the ordinance had an "honest" intent to exclude

from its operation articles which, while capable of adaptation to violent and criminal purposes, would usually be carried by persons who had them and intended to use them for innocent and lawful purposes. While other words of more specific import might possibly have been found to express this intent, we do not regard those used as rendering the ordinance so vague or uncertain that it becomes void. "Legitimate", as here used, means simply "lawful" (Corison v. Williams, 1922, 58 Cal.App. 282, 288, 208 P. 331; 36 Cor.Jur. 988). The remarks already made about the words "lawful" and "ordinary" are applicable here.

[16, 17] Finally, the defendant contends that the complaint herein is bad because it does not negative all of the exceptions made by the ordinance. We have above set forth and discussed all of these exceptions. The complaint here expressly negatives the first exception contained in subdivision (a), that relating to a permit, and, as defendant rightly concedes, it impliedly negatives the second exception there made, that relating to a rifle or shotgun, by its description of the weapon carried as a ".38 Colt Revolver". Assuming that it fails completely to negative the provision of subdivision (e) that "this restriction shall not be deemed to prohibit the carrying of ordinary tools or equipment" etc., this provision is in the nature of an exception, rather than a part of the definition of the offense and need not be negatived. "Such exceptions and provisos were to be negatived in the pleading only where they are descriptive of the offense or define it, and where they afford matter of excuse merely, they are to be relied on in defense." (People v. H. Jevne Co., 1919, 179 Cal. 621, 625, 178 P. 517, 519; In re Lord, 1926, 199 Cal. 773, 777, 250 P. 714; People v. Pierce, 1939, 14 Cal.2d 639, 643, 96 P.2d 784.)

[18-20] It is stated in defendant's brief that the evidence at the trial showed that he did in fact carry the weapon concealed, and hence he violated the state law rather than the ordinance. This fact does not appear in the record, and we cannot presume its existence in the face of the trial court's finding that defendant was guilty of the offense charged, which, as we have already stated, was not a violation of the state law. If the fact be as claimed, no conviction of the defendant can be proper on the present complaint, and on the entry of a judgment against him he will have a remedy by motion for new trial or by appeal. The reversal of the order arresting judgment will return the case to the condition it was in before the order was made, and the court will proceed to judgment (People v. Lauman, 1922, 59 Cal.App. 144, 146, 210 P. 421).

The order arresting judgment is reversed and the cause is remanded for further proceedings upon the finding of guilt, not inconsistent with this opinion.

FOX and KINCAID, JJ., concur.

24 Cal.2d 283

McGREGOR v. STATE BAR OF CALIFORNIA.

S. F. 16969.

Supreme Court of California.

May 8, 1944.

1. Attorney and client 🔑46

The restitution of moneys wrongfully retained by an attorney, especially where made as a matter of expediency and under pressure, does not entitle attorney to any indulgence.

2. Attorney and client 🔑38, 44(2)

Conduct of attorney in permitting a layman to use his name as an attorney in the operation of a collection agency, which was so intermingled with attorney's legal affairs that it was difficult to distinguish them as regards rendition of services, and in commingling his client's funds with that of his own and failing promptly to report collection thereof, constituted "moral turpitude" as the term is used in bar matters, justifying disbarment. St. 1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6105, 6106.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

3. Attorney and client 🔑38

The right to practice law not only presupposes in its possessor integrity, legal standing, and attainment, but also the exercise of a special privilege, highly personal and partaking of the nature of a public trust, and the powers and privileges derived from it may not with propriety be delegated to or exercised by a nonlicensed person.

4. Attorney and client 🔑53(1)

The suspension of an attorney under an order which has become final was properly considered by the board in a subsequent disbarment proceeding. St. 1939, pp. 354, 355, 357, §§ 6067, 6068, 6103, 6105, 6106.

5. Attorney and client 🔑49

The purpose of the disbarment proceedings is not to punish the individual but to determine whether the attorney should continue in that capacity. St. 1927, p. 38 et seq.

In Bank.

Proceeding by Leslie F. McGregor against State Bar of California to review the findings and the recommendation of the Board of Governors that petitioner be disbarred from the practice of law.

Petitioner disbarred.

Leslie F. McGregor, of San Francisco, in pro. per.

Sam J. Anderson, of San Francisco, and Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the findings and the recommendation of the Board of Governors of the State Bar of California that the petitioner be disbarred from the practice of the law in all the courts of this state.

By an amended notice to show cause the petitioner was charged with the violation of his oath and duties as an attorney and with the commission of acts involving moral turpitude and dishonesty, Business & Professions Code, §§ 6067, 6068, 6103, 6106, St. 1939, pp. 354, 355, 357; and, in particular, with the violation of section 6105 of said code (lending his name to be used as an attorney by another person who is not an attorney) and Rule 9 of the Rules of Professional Conduct (commingling money belonging to clients with his own funds and failing to report promptly the receipt of money belonging to them, 213 Cal. c x v. The petitioner made written answer to these charges but did not appear either in person or by counsel at any of the three hearings held in this disciplinary matter before the appointed local administrative committee, and at which the complaining witnesses and the petitioner's implicated employee testified. From the evidence so before it the committee made findings of fact and conclusions of law adverse to the petitioner and recommended that he be disbarred. Thereafter the petitioner was notified of his privilege to appear before the Board of Governors for oral argument of his case, but he did not attend the meeting scheduled for the consideration of his matter or otherwise communicate with the board. Thereupon, after full discussion of the record, the board adopted, with slight modification, the findings of fact made by the local administrative committee and, by a vote of twelve to two, approved the recommendation of the petitioner's disbarment. In so fixing the degree of discipline, the board took into consideration that another disciplinary matter against the petitioner, likewise concerning contested issues of moral turpitude and dishonesty in connection with charges of his infraction of Rule 9 of the Rules of Professional Conduct, was pending before The State Bar and upon which hearings had been held by a local administrative committee at the time that the alleged misconduct involved in the present proceeding took place. In said prior matter the board recommended a suspension of ninety days, the petitioner did not seek a review in this court, and accordingly he was suspended from the practice of the law for the mentioned period by order of this court dated March 1, 1943 (In re Suspension of McGregor, Bar Misc. 1749), some six months before the board's recommendation of disbarment in the present proceeding.

Upon this application for review the petitioner advances two arguments: (1) the insufficiency of the evidence to sustain the determination of the board; and (2) the impropriety of its reference to his past record of suspension in fixing the measure of discipline herein.

In the findings, as modified, the facts involved in the present proceeding are recited substantially as follows: For some time prior to February, 1942, and for several months thereafter, the petitioner maintained his law office and a collection agency at the same location in San Francisco. To assist him in his business, the petitioner employed one Peter Lorenzo, who was not a member of the bar but who was given wide authority in the performance of his duties and allowed to use the petitioner's name as an attorney at law in carrying on correspondence and acknowledging receipts of money in connection with the conduct of the collection agency. The latter activity appeared to be so interwoven with the petitioner's legal business that it was difficult to distinguish between the two in the allocation of services rendered; however, Lorenzo was paid by the petitioner from his own funds, and not by the collection agency as a separate entity.

Sometime in February, 1942, one Harry Pickering called at the office of the petitioner for the purpose of employing him to collect the balance of $55 due on a promissory note made in favor of Pickering and his wife. Pickering was seeking the services of an attorney and not of a collection agency. He was interviewed by a man in the office whom he believed to be the petitioner, but who answered the description of Lorenzo; and it was then agreed between the two that the fee would be contingent upon the successful completion of the undertaking and in such event, would be one-half of the collection. Thereafter two progress reports written on the petitioner's letterhead—one dated February 25, 1942, and the other July 15, 1942—each bearing the petitioner's signature and setting forth the efforts being made to locate the debtor, were sent to Pickering. Lorenzo admitted having signed the petitioner's name to these reports and stated that on many other occasions he had followed the same practice with respect to communications written on the petitioner's legal stationery. Subsequent to the date last above mentioned the debtor under the note called at the petitioner's office on various occasions, paid the $55 balance in the course of several installments (August-October 10, 1942), and was given corresponding receipts therefor, each bearing the rubber stamp signature of the petitioner and none revealing any connection with the collection agency. Lorenzo stated that he placed the rubber stamp signature on the receipts in accordance with his customary procedure in handling such matters for the petitioner. Neither the petitioner nor Lorenzo made any accounting to the Pickerings with respect to the collection of the $55, or any part thereof; no part of said sum was ever paid to them; but admittedly without the consent of the Pickerings, the whole amount was commingled with the petitioner's funds and appropriated to his use and benefit. The Pickerings did not learn of the collection of the $55, or any part of it, until October 10, 1942, the date of the final payment, when the debtor advised them of the fulfillment of his obligation.

Turning to the record in this matter and, in the review thereof, according to the petitioner every favorable inference and intendment, the conclusion is inescapable that he has not met the burden of showing that the findings of the board, as above summarized, are erroneous or unsupported by the evidence. Business & Profession Code, 6083. The adverse determination of the factual issue as to whether the petitioner permitted his employee, Lorenzo, a layman, to use his name as an attorney at law in the operation of the collection agency is in direct line with the positive testimony adduced at the hearings in this matter. Thus, after observing that the petitioner's collection business and legal affairs were so intermingled that it was difficult to distinguish them as regards the rendition of services, Lorenzo stated that in the regular performance of his duties in the management of the petitioner's office he was authorized to interview clients and fix fees, write letters on the petitioner's legal stationery, sign the latter's name to the communications, and acknowledge moneys collected on claims by appropriate receipts bearing the petitioner's rubber stamp signature. In particular as here involved, Lorenzo identified the above-mentioned two progress reports addressed to the Pickerings in February and July, 1942, and the receipts given to the debtor under the Pickering note as typical of his authorized use of the petitioner's name in business transactions concerning the affairs of clients with the office. Pickering testified that when he entered the petitioner's office seeking the services of an attorney, he was interviewed by a man answering the description of Lorenzo but who, from the tenor of their discussion fixing the fee arrangements in connection with the collection matter, Pickering assumed was the petitioner. Lorenzo admitted Pickering's description and recalled, though vaguely in view of the lapse of time and the many similar matters he handled in the interim, the circumstances of the particular interview.

While the petitioner claims that he instructed Lorenzo to "close out" the collection business in the early part of 1942, a procedure which, according to the petitioner, would require several months to complete, Lorenzo emphatically denied that he had been so directed and maintained that he, as a trusted employee and during the petitioner's absence, only continued to manage the latter's office in the same manner as he had for some years previously. It appears that in the year 1942 the petitioner, by reason of his employment in a defense plant, was absent from his office a considerable portion of each day, frequently not going there until late in the afternoon or evening; yet, according to Lorenzo, the petitioner in his daily visits was maintaining an active contact with his business and was, in fact, "conducting" it when Lorenzo left the petitioner's employ in October of that year to do government work. Thus, Lorenzo testified that all moneys collected by him in the petitioner's absence were placed in a cashbox and called to the petitioner's attention on his return; that if he, Lorenzo, left the office when the petitioner was not there, he always would leave a note informing the petitioner of what had transpired in his absence, including a reference to any collections which might be found in the cashbox; and that the petitioner customarily took care of all bank deposits himself.

That there is no evidence that the petitioner ever heard of or dealt with the Pickering matter is of no consequence here. What is important under the circumstances is the fact that it can readily be inferred from the record that Lorenzo represented himself as the petitioner in all his dealings with the Pickerings and that he was authorized to do so as part of the regular performance of his office duties; and the petitioner admits, in his application for review by this court, that the "ultimate responsibility of the (Pickering) case would be" his.

[1] With respect to the issue of the petitioner's improper retention of funds belonging to the Pickerings as the result of the installment payments by the debtor under their note, the evidence is indisputably unfavorable to the petitioner. The two progress reports of February and July, 1942, as above mentioned, simply recited efforts of the petitioner's office to locate the debtor; the subsequent collection of the moneys due on the note apparently were never communicated by Lorenzo or the petitioner to the Pickerings, who first learned of the payments from the debtor on the day the last one was made, October 10, 1942. The receipts for the respective sums credited against the note—exhibits in the record—conclusively establish, of course, that the full $55 balance was paid into the petitioner's office. Although in his answer filed in this disciplinary proceedings, the petitioner averred that he "has ascertained that the money is due the said Pickerings and has caused to be issued a remittance to them," no evidence of such reimbursement was offered by him or in his behalf at the hearings before the local administrative committee or the Board of Governors. But even were the petitioner's allegation con-

ceded to be the fact, the restitution of moneys wrongfully retained, especially where made as a matter of expediency and under pressure, does not entitle an attorney to any indulgence. Maggart v. State Bar, 7 Cal.2d 495, 61 P.2d 451; Narlian v. State Bar, 21 Cal.2d 876, 136 P.2d 553.

[2-5] There is no legal justification for the petitioner's misconduct as thus charged and found upon compelling evidence. His method of doing business in the manner depicted, indicating a lack of those qualities essential to the maintenance of the dignity and integrity of the profession and the protection of the public, comes within the definition of "moral turpitude" as the term is used in bar matters. As was said in Townsend v. State Bar, 210 Cal. 362, 364, 291 P. 837, 838: "The right to practice law not only presupposes in its possessor integrity, legal standing, and attainment, but also the exercise of a special privilege, highly personal and partaking of the nature of a public trust. It is manifest that the powers and privileges derived from it may not with propriety be delegated to or exercised by a nonlicensed person." Moreover, as noted by the Board of Governors in its recommendation to this court, the misconduct subject of the present proceeding covered a period in part coincident with, and also extending beyond, the hearing of another disciplinary charge against the petitioner by a local administrative committee of The State Bar. Such prior matter, involving considerations of "moral turpitude" in connection with an objectionable accounting practice, terminated adversely for the petitioner; he did not challenge the consequent disciplinary recommendation of the Board of Governors; and finality was reached therein upon the order of this court in March, 1943, suspending him from practice for ninety days. In re Suspension of McGregor, Bar Misc. 1749, supra. As so concluded some six months prior to the board's determination of the present proceeding, the prior suspension was an appropriate consideration herein. Mills v. State Bar, 6 Cal.2d 565, 567, 58 P.2d 1273; Dudney v. State Bar, 8 Cal.2d 555, 562, 563, 66 P.2d 1199; Petersen v. State Bar, 21 Cal.2d 866, 871, 136 P.2d 561. Its particular significance here rests upon the fact that the petitioner, while undergoing investigation for the act of dishonesty there involved and subsequently established, committed still further acts of a similar nature. It is apparent therefrom that the disciplinary considerations inherent in the prior charge did not improve the petitioner's appreciation of the ethical standards of the profession or impress him with his responsibilities in handling the affairs of clients. The State Bar Act (Business & Professions Code, chap. 4, St. 1927, p. 38 et seq.) is designed to provide a procedure whereby those attorneys at law who prove recreant to their trust may be removed from the practice. As was said in Dudney v. State Bar, supra, 8 Cal. 2d at page 563, 66 P.2d at page 1202: "The purpose of disbarment proceedings is not to punish the individual but to determine whether the attorney should continue in that capacity." These considerations in conjunction with the facts in the present proceeding as disclosed by the record herein fully justified the action and determination of the board.

It is ordered that the petitioner be disbarred from the practice of law in all of the courts of this state and that his name be stricken from the roll of attorneys, this order to be effective thirty days from the filing of this decision.

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64 Cal.App.2d 415

SMITH v. SMITH et al.

Civ. 14421.

District Court of Appeal, Second District, Division 2, California.

May 19, 1944.

1. Divorce 🔑161

In divorce action if an application for relief is made in due time, court is justified in setting aside a default upon very slight showing since the state is interested in preserving the family relationship.

2. Divorce 🔑161

Evidence failed to establish that trial court abused its discretion in granting husband's motion to set aside default divorce decree, where husband showed that he had become a resident of Nevada, that he had employed an attorney to represent him in the divorce action, and that hearing prior to granting of interlocutory decree was advanced from date for which it had been set for trial without notifying husband's attorney.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by Myrtle E. Smith against George Charles Smith, also known as G. C. Smith, for a divorce, alimony, and the appointment of a receiver for certain real property of the parties. From an order granting defendant's motion to set aside the default judgment by which plaintiff was given an interlocutory decree of divorce, the plaintiff appeals.

Affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellant.

Russell H. Pray, of Long Beach (S. J. Nordorf and Henry F. Walker, both of Los Angeles, of Counsel), for respondent.

W. J. WOOD, Justice.

Plaintiff has appealed from an order of the superior court granting defendant's motion to set aside a default judgment by which she was given an interlocutory decree of divorce. It is claimed that the showing made by defendant was insufficient to justify the granting of the order.

Plaintiff filed an action in Los Angeles County on February 20, 1943, seeking a divorce, alimony and the appointment of a receiver for certain real property of the parties. An affidavit for publication of summons was filed on May 24, 1943, an order for the publication of summons was obtained and the summons was served on defendant at Las Vegas, Nevada, on June 4, 1943. A default was entered on September 7, 1943, and a second default was entered on September 15, 1943. An interlocutory decree was signed and filed by the court on September 20, 1943, granting plaintiff a divorce and an undivided one-half interest in the realty.

Defendant filed his notice of motion to set aside the defaults and the default judgment on October 15, 1943, and presented his proposed answer and cross-complaint. He also filed affidavits by himself and by Vern E. Garten, his former attorney. From these papers it appears that defendant became a resident of the State of Nevada on January 27, 1943, with the intention of residing permanently in that state; that on March 10, 1943, he instituted an action for divorce in the State of Nevada against the plaintiff herein; that summons and complaint in the Nevada action were personally served upon plaintiff herein on March 12, 1943; that she did not appear in the Nevada action, her default was entered therein, and a decree was rendered by the Nevada court on April 13, 1943, granting a divorce to the defendant herein; that the parties had agreed upon a property settlement which had been consummated by the execution of the proper conveyances.

In the affidavit of defendant it is stated that upon the receipt on June 4, 1943, of the copies of the summons and complaint in the present action defendant mailed these papers to Vern Garten, an attorney practicing in Long Beach, and employed him to defend the action; that defendant was advised by Mr. Garten that he would take care of the matter and would appear and present a defense in the action; that defendant believed that the attorney thus employed had taken proper steps to defend his interests in the action until October 1, 1943, when he learned for the first time that a default had been entered against him; that he thereupon employed Russell H. Pray as his attorney to take steps to set aside the default judgment.

In the affidavit of attorney Garten it is stated that Geo. A. Hart, attorney for plaintiff, had been contacted by the affiant on numerous occasions and that Hart "knew that the said Vern E. Garten was employed to represent the defendant in the above entitled action, and was going to make an appearance therein contesting the affidavit for publication as being false, and would otherwise appear and plead in said cause"; that on September 15, 1943, Mr. Hart had informed the affiant that request had been made to the clerk to enter the default of defendant and that the affiant had checked the records of the office of the county clerk and had seen a setting card in which the cause was set for trial for October 13, 1943; that "the attorney for plaintiff, well knowing that affiant was going to make an appearance on the part of defendant, secretly and without apprising affiant of the fact, had said cause heard on the 20th day of September, 1943, instead of on the 13th day of October, 1943, the only day on which an order of the court was made for the setting and trial of said cause." It is further stated in the Garten affidavit that because of a lack of office help he was not able to prepare proper papers for use in the action before October 1, 1943; that the affiant learned by a long distance telephone call from defendant, who was in Las Vegas, Nevada, that the default had been entered; that the affiant was preparing to take steps to set aside the default but he was notified by defendant that he was discharged.

A counteraffidavit was filed by Geo. A. Hart, attorney for plaintiff, in which it is stated that Mr. Hart requested Mr. Garten on several occasions to file an appearance in the action but that Mr. Garten had stated that "he was going to make a motion to set aside the service of summons on said defendant, George Charles Smith, on the ground that he had not informed the affiant as to the residence of said defendant and that the court had no jurisdiction to make the order for publication, and said Vern E. Garten further stated to affiant that he might bring an action for damages against the plaintiff for disparagement of title, * * *." It is further stated by Mr. Hart in his affidavit that the hearing of the application for the interlocutory decree was advanced from October 13, 1943, to September 20, 1943, to accommodate witnesses; that although the default of defendant had been entered on September 5, 1943, the affiant obtained a second order for the entry of the default on September 15, 1943, after attorney Garten had telephoned to him that he could find no record that a default had been entered; that no request was made of plaintiff's counsel for a stipulation extending time to answer or otherwise plead in the action.

[1] Plaintiff now points out that the essential statements in Mr. Hart's affidavit are not contradicted and that there is an entire absence of explanation on the part of defendant of his failure to make any appearance in the action before the entry of the defaults in September. He contends that defendant, notwithstanding he had ample opportunity to appear, was trying to obtain some legal advantage by his failure to file an appearance within the statutory time allowed therefor. In support of his contention that the failure to appear was inexcusable he cites several decisions in which it was held that the courts had erred in granting motions to set aside defaults in cases where the showings made were at least as strong as the showing made in the present proceeding. The decisions cited by plaintiff, however, were not rendered in actions in which the parties were seeking divorces. If the present action were an ordinary action in which a money judgment was being sought, plaintiff's argument would be very persuasive. But in divorce actions courts look with special favor upon applications for hearings on the merits. In a divorce action if an application for relief be made in due time the court is justified in setting aside a default "upon very slight showing." Hammond v. Hammond, 92 Cal. App. 212, 267 P. 893, 894; Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020. This rule is based upon the ground that the state is interested in preserving the integrity of the family relation, which cannot be destroyed merely by the consent of the parties.

Defendant argues that he expected to be accorded the privilege of appearing in court at the time set for the hearing and cites Hammond v. Hammond, supra, as justification for that expectation. In that case the default of the defendant had been entered and the court, after hearing the plaintiff's evidence, noticing the defendant in court called him to the witness stand and over the objection of the plaintiff elicited certain testimony which caused the court to continue the hearing. Thereafter an answer and cross-complaint were filed. Both parties were denied relief and the judgment was affirmed.

[2] At the time of the hearing on September 20, 1943, prior to the granting of the interlocutory decree plaintiff's counsel stated to the court that he was relying principally upon the fraud defendant "perpetrated on this woman in leaving for Nevada and getting a divorce without any notice to her at all". He further stated to the court that defendant had lived in Long Beach "practically all his life and is still here now". When the application to set aside the default was made the court had before it the verified answer and cross-complaint of defendant in which defendant stated that on January 27, 1943, he became a resident of Clark County, Nevada, with the intention to become and remain a bona fide resident of Nevada and that at the time of the verification of the answer defendant continued to be a bona fide resident of Nevada. It was the function of the court to weigh the value and effect of the contradictory statements on the subject of the residence of defendant. The court apparently wished to be satisfied that it had

not been misled and that no advantage had been taken of defendant. In passing upon defendant's application the court doubtless took into consideration the rule that in divorce actions a very slight showing is sufficient to justify setting aside a default. In granting the motion the court did not abuse its discretion.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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64 Cal.App.2d 393

BENITES et ux. v. ADAMS.

Civ. 14319.

District Court of Appeal, Second District, Division 1, California.

May 19, 1944.

1. Appeal and error 🔑842(4)

Where sidewalk pedestrian was struck by automobile backing out of private driveway, question whether pedestrian was guilty of contributory negligence was not one of law but one of fact to be decided by trial court in light of evidence.

2. Automobiles 🔑244(49)

Where sidewalk pedestrian was struck by automobile backing out of private driveway, evidence sustained finding that pedestrian was guilty of contributory negligence.

3. Appeal and error 🔑1008(1)

Where sidewalk pedestrian was struck by automobile backing out of private driveway, the fact that trial court may have concluded that pedestrian's conduct amounted to contributory negligence as a matter of law did not affect correctness of finding of fact to the same effect.

4. Appeal and error 🔑110

Order denying motion for new trial was not appealable.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Personal injury action by Solomon Benites and wife against Louis Adams. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Arthur C. Verge, of Los Angeles, for appellants.

Mark C. Allen, of Santa Monica, for respondent.

DORAN, Justice.

This is an action for damages for personal injuries sustained by plaintiff when struck by an automobile.

The trial was by the court without a jury. As a conclusion of law the court found as follows: "That defendant was not free from negligence in failing to observe the plaintiff's position at the time of the accident. That plaintiff was guilty of contributory negligence in failing to take due precautions for her own safety at the time of the accident and that such negligence on the part of the plaintiff, Rosa M. Benites, directly and proximately contributed to her injuries."

The facts are simple. They are recited in appellants' brief as follows. "Plaintiff left grocery store at the corner of Olympic and Sixteenth Streets about 75 feet north of where the accident occurred and walked southerly on the west side of Sixteenth Street. Plaintiff stayed on the sidewalk all the time. Along the westerly side of the sidewalk from the rear of the grocery to the northerly side of the defendant's driveway there was a picket fence 59 or 60 inches high. This picket fence connects at right angles at the sidewalk line with a fence or a hedge 5 feet high covered with bushes, foliage and shrubbery, adjacent to and paralleling on the north, the entire length of defendant's driveway. The hedge is thick in some places and has openings in others. Plaintiff by looking over picket fence and hedge fence as she approached defendant's driveway, could have seen defendant's car. Likewise, defendant could have seen plaintiff. Plaintiff did not look to see if there would be a car coming out of the driveway but looked straight forward and she did not see any car, or hear anything before she was struck. Prior to the collision defendant's car was standing on his driveway about 10 feet from the sidewalk. The driveway sloped about 10 inches in 14 feet down to the sidewalk level. In backing from defendant's position toward the sidewalk and street the first four feet is a slight slope; after getting over that point the slope goes down rather quickly and rapidly. Santa Monica City Ordinance No. 648 provides that in driving an automobile out of a private driveway over a sidewalk the driver must stop before passing over the sidewalk. Defendant started backing his car at the top of the slope aforesaid and did not stop before crossing the sidewalk but backed completely across same to the street at a speed of about 5 miles per hour but at an accelerating rate. Defendant blew his horn before starting his car. He looked back but did not see plaintiff until after the collision. In crossing the private driveway plaintiff was struck at her knees by defendant's car and rolled over into the street, suffering a comminuted fracture of the knee and other injuries."

The trial judge visited the scene of the accident and in that connection, at the conclusion of the trial, commented as follows:

"Mrs. Benitas, unfortunately, described the care that she exercised in going down to the street below Olympic boulevard, which is called Michigan, I believe, and she crossed there, but did not pay any attention, evidently, when she went up to the grocery store as to whether there was a car or was not a car there. At least, she did not testify on that subject, and when she came back she looked straight down, or downwards, at all times. She never looked to the right at any time. Had she looked to the right—she had two feet after she reached the corner by the fence before she reached the intersection of the driveway, she could have seen the car even before that, from that corner, but she didn't look at it and walked down, and unfortunately, the car was backing out and she was hit and seriously injured, but under these circumstances, the plaintiff, under the law, was guilty of contributory negligence.

"I think you have to exercise, in driving out a car, ordinary care, when you are going across an intersecting sidewalk, and the plaintiff has to exercise ordinary care as a pedestrian, and it is a little difficult to see that the defendant was not exercising ordinary care. His car was at a standstill when he started it. The Santa Monica ordinance, even though it be held admissible in evidence, and I have admitted it does not say you have to stop at the sidewalk edge. It says you must be at a stop prior to the time. His car was parked prior to the time and whether where it was stopped is a reasonable distance or not, there is no showing that he rushed backwards in a hurry. If a person had come out of there at a high rate of speed, backing, or something of that character, then you would have a different situation, but certainly a pedestrian is not entitled, in walking along a sidewalk to blindfold herself, so to speak, so as not to see cars coming across. She did not look to the right, and it is an extremely unfortunate accident, but it is just one of those things where I think this is an accident where both are to blame. I have a little difficulty, under the circumstances, in placing the blame on the defendant. Certainly, the plaintiff did nothing towards looking, at any time, from the grocery on down. Now, by the same token the defendant should have seen the plaintiff as she came down there, if she was walking along the sidewalk. If she was walking at some other spot, why, it would not have been so easy to see her even though he might have seen her unless she was too close to the intersection, but be that as it may, her own contributory negligence does not permit a recovery."

[1-3] It is contended that appellant was not chargeable with contributory negligence because the standard of ordinary care does not require that a sidewalk pedestrian maintain a lookout for the approach of vehicles which might be driven on the sidewalk. The question presented is not one of law but one of fact, to be decided by the trial court in the light of evidence. Brandes v. Freitas, 116 Cal. App. 459, 2 P.2d 830. Whether appellant in the circumstances here conducted herself as would an ordinarily prudent person, was for the trial court to decide; and the findings of that court in this regard are conclusive upon appeal, there being sufficient evidence to support them. Technically, the conduct of plaintiff could not be correctly described as contributory negligence as a matter of law. The record reveals it to have been a question of fact. The evidence does not bring plaintiff's conduct within that group of cases where the contributory negligence may be determined as a matter of law. The fact, however, that the trial court may have concluded that plaintiff's conduct amounted to

contributory negligence as a matter of law in no way affects the correctness of the finding of fact to the same effect.

[4] Appellants have attempted to appeal from the order denying their motion for a new trial. Such an order is not appealable.

The judgment is affirmed and the appeal from the order denying the motion for a new trial is dismissed.

YORK, P. J., and WHITE, J., concur.

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64 Cal.App.2d 409

PEOPLE v. LAMB.

Cr. 3785.

District Court of Appeal, Second District, Division 1, California.

May 19, 1944.

1. Criminal law ⚷274

Ordinarily an application made after imposition of sentence to withdraw a guilty plea comes too late. Pen.Code, §§ 1018, 1191.

2. Criminal law ⚷274

Where plea of guilty is obtained by duress, fraud, misrepresentation or was otherwise void, motion to withdraw plea after judgment must be supported by evidence. Pen.Code, §§ 1018, 1191.

3. Criminal law ⚷274, 998, 1147, 1149

An application to set aside a judgment and permit withdrawal of a plea of guilty is addressed to sound discretion of trial court, and its ruling thereon will not be disturbed in absence of a clear and convincing showing of an abuse of discretion.

4. Criminal law ⚷274

Upon record indicating that defendant was not imposed upon and realized consequences of pleading guilty to rape charge and voluntarily gambled on receiving probation or a county jail sentence, denial, after imposition of state prison sentence, of defendant's motion to withdraw plea was not an abuse of discretion. Pen.Code, §§ 261, subd. 1, 1018, 1191.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Marshall H. Lamb, upon his plea of guilty, was convicted of rape. From an order denying his motion to set aside the judgment and from an order denying motion to withdraw plea of guilty and enter plea of not guilty, he appeals.

Affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny and T. G. Negrich, both of San Francisco, for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, the defendant was accused of the crime of rape, allegedly committed upon a female of the age of 15 years, Subd. 1, Sec. 261, Penal Code.

On August 3, 1943, the defendant appeared for arraignment without counsel. The Public Defender was thereupon appointed to represent him, and the arraignment was continued to August 6th. On the last-named date, defendant appeared accompanied by his counsel and entered a plea of not guilty. The cause was set for trial for October 8th. Prior to the date of trial, and on September 24th, private counsel was substituted in the place and stead of the Public Defender as defendant's attorney.

On the date set for trial, the defendant appeared in court with his counsel and, upon his request, with leave of court, withdrew his plea of "not guilty", and upon his rearraignment interposed a plea of "guilty".

Leave to file an application for probation being granted, hearing thereon was set for October 27th. During the proceedings had at the time defendant changed his plea from "not guilty" to "guilty", the prosecutrix was sworn and testified. Hearing upon the application for probation was continued to November 3, and upon that date the report of the probation officer was filed. Police Officers Mary Ross and Daniel L. Shay were sworn and testified relative to certain matters contained in the report of the Probation Officer. Thereupon the application for probation was denied and the defendant was sentenced to imprisonment in the State Prison for the term prescribed by law.

Immediately following the pronouncement of judgment, defendant's counsel addressed the court as follows: "In this matter, if your Honor please, the defendant at this time moves to set aside the judgment heretofore imposed by this Court, and also makes a motion to withdraw his former plea of guilty for the purpose of entering a plea of not guilty. And may I say that the reason I am making application to set aside the guilty plea is that it is my opinion that in order for the Court to pass on the motion to set aside the judgment it is necessary also for me to make that motion."

Both the motion to set aside the judgment and for permission to withdraw the plea of guilty were denied by the court. Defendant's appeal presents the question of the legality of the two orders just mentioned.

Appellant's contention on this appeal is thus stated by him: "Appellant contends that the court abused its discretion in denying defendant his motions to set aside the judgment and permission to withdraw his plea of guilty and enter a plea of not guilty."

As we read appellant's brief we are impressed that he bases his contention that the court abused its discretion solely and alone upon the ground that the court did not grant probation or impose a county jail sentence instead of a term in the state prison. This claim is without merit.

Section 1018 of the Penal Code empowers the court to permit the withdrawal of a plea of guilty "at any time before judgment" and substitute therefor a plea of not guilty, but where a defendant, after having pleaded guilty, makes no move for relief therefrom in the interim between the time when he interposes such plea and the date fixed for the pronouncement of judgment, it is mandatory upon the court under section 1191 of the Penal Code to impose judgment.

[1, 2] Undoubtedly, for that reason, it is held that an application made after the imposition of sentence to withdraw a guilty plea ordinarily comes too late, and that in cases where, by reason of the fact that a plea of guilty was obtained by duress, fraud, misrepresentation, or is otherwise void, the motion to withdraw such plea must be supported by documentary or oral evidence, or both, in order to set aside the judgment and authorize the withdrawal of the plea (7 Cal.Jur. p. 1000, sec. 135). In the instant case, appellant was not influenced by any representations or inducements to enter his plea of guilty, neither was any duress or fraud practiced upon him. His action was free and voluntary, and taken while he was at all times represented by counsel. In People v. Schwarz, 201 Cal. 309, 314, 257 P. 71, 73, it is said: "This exceptional remedy applies only where no trial has been had on the merits and only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes."

The case at bar is entirely devoid of any showing that the appellant was in ignorance of his rights or of the consequences of his act in entering a plea of guilty, or that he was unduly or improperly influenced by hope or fear in the making of it. The record in this case presents a situation wherein appellant voluntarily "gambled" on receiving probation or a county jail sentence. Neither the facts nor the procedure herein are at all analogous to the cases of People v. Schwarz, supra; People v. Fuller, 133 Cal.App. 772, 24 P.2d 870; People v. McGarvy, 61 Cal.App.2d 557, 142 P.2d 92, wherein relief similar to that here prayed for was sought and granted.

[3, 4] An application to set aside a judgment and permit the withdrawal of a plea of guilty is addressed to the sound discretion of the court, and its ruling thereon will not be disturbed in the absence of a clear and convincing showing of an abuse of such discretion. People v. Moriarity, 61 Cal.App. 223, 214 P. 485; People v. Price, 51 Cal.App.2d 716, 125 P.2d 529. Where, as in the case with which we are here concerned, appellant had not been imposed upon in any way and fully realized the consequences of his act in pleading guilty, but speculated upon the anticipated clemency of the trial judge, attempting to retract his plea of guilty only when he learned that his expectation in this regard would not be realized, there is no showing whatever of an abuse of discretion, and the action taken by the court must stand.

The orders from which this appeal was taken are, and each of them is, therefore affirmed.

YORK, P. J., and DORAN, J., concur.

64 Cal.App.2d 382

PEOPLE v. SHUMAN.

Cr. 1857.

District Court of Appeal, Third District, California.

May 18, 1944.

1. Criminal law ⚷1163(3)

The appellate court cannot presume that injury to defendant, appealing from conviction resulted from erroneous admission of testimony as to his sanity, but burden is on defendant to show wherein such testimony was prejudicial. Const. art. 6, § 4½.

2. Criminal law ⚷1163(1)

It is not sufficient for defendant, appealing from convictions, merely to allege abstract error, but it is incumbent on him to show that alleged error was sufficiently prejudicial to require reversal of conviction. Const. art. 6, § 4½.

3. Criminal law ⚷1186(4)

On appeal from conviction appellate court must hold that defendant's contentions that trial court's instruction to jury was improper in form and argumentative are untenable, in absence of showing by defendant that error of which he complains therein resulted in miscarriage of justice. Const. art. 6, § 4½.

4. Criminal law ⚷1172(3)

A judgment on conviction will not be reversed on ground that instruction to jury assumed fact, not proved, that defendant's insanity was not permanent or habitual, in absence of any issue, raised by defendant during trial or on appeal, in relation to habitual or permanent insanity as distinguished from temporary insanity.

5. Criminal law ⚷722(2)

Prosecuting attorney was not guilty of "misconduct" in referring in argument to jury, to defendant's simulation of insanity while seated at counsel table during trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Robert Shuman was convicted of kidnapping and robbery, and he appeals.

Affirmed.

George E. Foote and E. R. Vaughn, both of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant herein was convicted of the crimes of kidnapping and robbery. From such judgment of conviction and from an order denying his motion for a new trial he now appeals to this court.

In 1940 the defendant was convicted of robbing a United States mail box and was imprisoned at Terminal Island, Los Angeles, California. He was transferred to McNeil Island and later from that prison was sent to the Medical Center at Springfield, Missouri, an institution for mental prisoners. On March 10, 1942, defendant was returned to Sacramento from the Medical Center, being accompanied by a doctor and a deputy from the latter institution. Upon his arrival in Sacramento a sanity hearing was begun in the Superior Court. Defendant's mother interceded with the court in his behalf and ultimately secured his care and custody. On November 4, 1942, while still in the custody of his mother, an information containing seven counts was filed against him by the district attorney of Sacramento county. The first count charged the crime of kidnapping, while the second to seventh counts alleged separate charges of robbery.

At the time of his arraignment the trial judge expressed doubt as to his present sanity and appointed two qualified physicians to examine him for the purpose of determining his mental condition. A trial was had on such issue on December 2, 1942. The court found him to be insane at that time and he was committed to the Mendocino State Hospital, with orders that upon his becoming sane he be redelivered by the superintendent of said hospital to the sheriff of Sacramento county for trial for the crimes charged in the information. In accordance with such instructions the acting medical superintendent of the Mendocino State Hospital, on June 25, 1943, issued a certificate directed to the District Attorney of Sacramento County, that in his opinion the defendant was sane, and certified to that fact in accordance with section 1372 of the Penal Code.

On July 6, 1943, the defendant appeared in court with counsel and entered a plea of "not guilty by reason of insanity" to each of the crimes alleged in the information, and the cause was set for trial on the sole issue thus raised.

Upon the conclusion of the trial the jury found the defendant sane at the time of the commission of each offense charged in the seven counts. The court adjudged the degree of the robbery set forth in counts 2 to 7, inclusive, to be robbery of the second degree, and further found that no bodily harm or injury was inflicted upon the victim of the kidnapping. A motion by defendant for a new trial was denied, and he thereupon was sentenced for the crime of kidnapping to San Quentin prison for life, with possibility of parole. For each of the other six counts he was sentenced to be imprisoned at San Quentin in accordance with law. The terms of such imprisonment to run concurrently with each other and concurrently with the term of imprisonment under count 1.

From said order and judgment denying his motion for a new trial the defendant appeals upon the grounds of (1) admission of incompetent and harmful evidence over the objection of appellant's counsel and insufficiency of the evidence to sustain the verdict; (2) erroneous and harmful instructions by the court, and (3) misconduct of the district attorney in the argument to the jury.

[1, 2] In regard to defendant's first contention it is argued that the testimony of one of the alienists appointed by the court was not based upon facts but was based upon hearsay and upon his personal examination of the defendant after he "had recovered or had largely recovered" from his mental illness.

It is further charged that other evidence by the same witness was admitted without a proper foundation for the same having been laid. However, it is not contended, nor does the record so disclose, that the alleged erroneous testimony was the only evidence before the jury upon such issue. Assuming, but not so deciding, that the challenged evidence was inadmissible, nevertheless this court could not presume that injury resulted therefrom. Const. Art. 6, Sec. 4½; Arnett v. Nall, 51 Cal.App. 194, 196 P. 291. It is not sufficient for the defendant merely to allege error in the abstract (Mintzer v. City of Richmond, 27 Cal.App. 566, 150 P. 799) but it is incumbent upon him to show that the alleged error was sufficiently prejudicial to require a reversal. Coleman v. Farwell, 206 Cal. 740, 276 P. 335. In the present case no attempt has been made at such a showing. The defendant merely has quoted certain abridged portions of the testimony and from such abstract statement he then concludes that such testimony was objectionable as above stated without a showing wherein the same was prejudicial. Under the rule herein enunciated the defendant therefore has not sustained the burden of showing prejudicial error.

Defendant's second objection is directed against two instructions which were included in the court's original charge to the jury, and which, after some deliberation on the part of the jury, were again read to the members thereof by the court in response to their request to be informed if they were to be (1) "interested in acting only on the character of this defendant" on the dates of the alleged crimes; (2) "his being abnormal: Is that a form of insanity?" and (3) did the fact of his "having been in an institution * * * have any bearing on the case * * *?" In response to such request the court reread the following two instructions:

"That insanity may be available as a defense to a crime charged, it must appear that the defendant, when the acts were committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has at that time reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity,—as, for instance, suffering from some insane delusion or hallucination,—still if he understands the nature and character of his action and its consequences,—if he has knowledge that it is wrong and criminal, and that if he does the acts he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts."

"A judgment, entered before trial, committing the defendant to a State Hospital for the care and treatment of the insane is not final and conclusive upon the question of his criminal responsibility; and where the insanity of said defendant is not permanent or habitual, no presumption can be indulged that such insanity had an existence at the time of the commission of the crime."

[3] Defendant dismisses his contention in regard to the first challenged instruction with the observation that although it is a correct statement of the law and is quoted from People v. Willard, 150 Cal. 543, 554, 89 P. 124, it is improper in form and is argumentative. No authority is cited by defendant for such statement. A cursory examination discloses the quoted portion of the Willard case to have been cited with approval in succeeding cases. See People v. Troche, 206 Cal. 35, 273 P. 767, and cases cited therein. Even assuming, but solely for the purpose of a discussion of the questions so raised, that defendant's objections to the instruction given are well founded, nevertheless this court would be compelled to hold such contentions untenable in that defendant has failed completely to show in any way whatsoever that the error of which he complains has resulted in a miscarriage of justice. Coleman v. Farwell, supra; Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 554, 147 P. 238.

[4] The defendant likewise dismisses his attack upon the second instruction with a similar statement that it is "argumentative, comments on the evidence and invades the province of the jury," and that it is further erroneous in that it "assumed something not proved, that the insanity of the defendant was not permanent or habitual." Again, no authority in support of such statement is given by defendant. The instruction so challenged is taken directly from the opinion of the court in the case of People v. Gilberg, 197 Cal. 306, 320, 240 P. 1000. The court therein cites the cases of People v. Willard, supra, and In re Buchanan, 129 Cal. 330, 61 P. 1120, 50 L.R.A. 378, wherein the same rule was announced. The apparent basis for this argument of defendant is an inference in certain instructions which he proposed and which were properly refused by the trial court, that he, once having been committed to the mental institution, though subsequently discharged therefrom, still remained under the disabilities which caused his original confinement. However, our attention has been directed to no issue raised by defendant either during the course of the trial or in this appeal in relation to habitual or permanent insanity as distinguished from temporary insanity. A comparable situation to that herein presented is found in the case of People v. Keyes, 178 Cal. 794, 801, 175 P. 6, 9, where the court, in passing upon a question raised by the defendant therein, alleging error on the part of the trial court in refusing certain instructions, among which was one stating in effect that if insanity was found to exist prior to the commission of the crime charged there arises a presumption that such insanity continues, and the burden is upon the state to show otherwise, stated: "No presumption of its continuance can be indulged in from proof of its prior existence."

[5] Lastly, defendant insists that the deputy district attorney who prosecuted the case was guilty of misconduct in his argument to the jury when he referred to the simulated insanity of the defendant while seated at the counsel table during the course of the trial. In support of such argument he cites the case of People v. Meyer, 118 Cal.App. 231, 4 P.2d 958. In the case last cited the district attorney not alone commented upon the appearance of the defendant, but also stated on his personal authority that the defendant was guilty. This court rightfully observed that such conduct was indiscreet, inexcusable and highly prejudicial. However, it is to be observed that no comparable statements are found in the record before us. The case of People v. Cornell, 203 Cal. 144, 263 P. 216, 217, comes more nearly being in point. There a plea of not guilty by reason of insanity was also at issue. On appeal the defendant raised certain questions in relation to remarks made by the prosecutor in regard to the actions and demeanor of the defendant while in court and in the presence of the jury. The court, in passing upon the issues so raised, stated: "If a defendant, being thus brought as of right into the presence of the court and jury, so conducts himself as to be suspected of simulation, we can perceive no reason why those who may have observed his actions and conduct elsewhere may not be heard to describe his normal appearance and actions for the purpose of exposing his deception. * * * In the instant case the inferences which the prosecution sought to present to the jury were strictly within the scope of the evidence which had been introduced before it relating to the defendant's actions and demeanor in and away from the presence of the jury.

In so arguing, the district attorney was clearly within his line of duty."

For the foregoing reasons the judgment and order appealed from are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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64 Cal.App.2d 388

In re OTTOVEGGIO'S ESTATE.
SCIASCIA et al. v. SCELSO.
Civ. 12613.

District Court of Appeal, First District, Division 1, California.

May 19, 1944.

1. Wills 🔑491

The construction of a will is a question of law.

2. Wills 🔑439, 440, 441

The purpose of interpretation is to ascertain, if possible, testator's intention as disclosed by language used, or from properly admissible extrinsic evidence.

3. Courts 🔑89

In construing will, each case turns on particular language, and precedents, except for establishment of general rules, are of little assistance.

4. Wills 🔑470

In construing will, entire document must be looked to and all its language considered to ascertain testator's intention.

5. Wills 🔑449

In absence of controlling language in will to the contrary, it will be presumed that testator intended to dispose of all of his property.

6. Wills 🔑449

If will indicates intention to dispose of entire estate of testator, interpretation that will prevent partial intestacy is to be preferred to one that would require such partial intestacy, but, to avoid intestacy, court cannot indulge in conjecture or read into document words not contained therein.

7. Wills 🔑493

Where holographic will written in Italian was almost completely devoid of punctuation and by tenth clause testatrix gave "my house of Santa Clara ten four seven together with the house of Santa Cruz one two seven Buena Vista", and such clause, continued at top of following page, provided that "All shares" of designated institutions were to be paid to named legatee, the devise of realty in tenth clause did not fail for incompleteness in failing to name a devisee.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutele, Judge.

Proceeding in the matter of the estate or Vincenza Ottoveggio, also known as Vincenza Sciascia, Vincinza Ancona, and Vincenza Filomo, deceased, wherein Pietro Sciascia and others, as general legatees, through the office of Alien Property Custodian, claimed that the deceased did not effectively dispose of certain real property to Pasquale Scelso. The executor petitioned the probate court for instructions. From an order, the general legatees appeal.

Affirmed.

Emmet B. Hayes, of San Francisco, for appellant.

J. M. Atkinson, of Mountain View, for respondent.

PETERS, Presiding Justice.

Vincenza Ottoveggio, a childless widow, died in Boston, Massachusetts, in October, 1941. Her holographic will, written in Italian and dated March 4, 1936, has been admitted to probate in Santa Clara County, her domicile at the time of her death. By this will the testatrix made several general and specific legacies. The estate is insufficient to pay the general legacies. The general legatees, who are brothers and sisters of the deceased, and residents of Italy, through the office of the Alien Property Custodian, maintained that the deceased did not effectively dispose of certain real property described in clause "Tenth" of the will and that, therefore, such real property was available to pay the general legacies. Dr. Pasquale Scelso contended that the property in question was devised to him. The executor petitioned the probate court for instructions. The only extrinsic evidence introduced at all relevant to the issue here involved was that after the will was executed, and shortly before her death, decedent made a gift to Dr. Scelso of the securities referred to in the tenth clause of the will. The trial court determined that, properly interpreted, by clause tenth the testatrix had devised the real property to Dr. Scelso. From this order the general legatees appeal. The record consists of an agreed statement under Rule 6 of the Rules on Appeal. Another portion of the will has already been before this court for interpretation. Estate of Ottoveggio, 62 Cal.App.2d 880, 145 P.2d 700.

The will, as already pointed out, is in the handwriting of the deceased and is written in Italian. It is almost completely devoid of punctuation. Clauses fourth to eighth contain the general bequests to appellants. They read as follows:

"Fourth I give and leave the sum of Two Thousand Dollars to Pietro Sciascia my brother

"Fifth I give and leave the sum of Two Thousand Dollars to my brother Salvatore Sciascia

"Sixth I give and leave One Thousand Dollars to my brother Vito Sciascia

"Seventh I give and leave Two Thousand Dollars to my sister Antonia Sciascia

"Eighth I give and leave the sum of Five Hundred Dollars to my sister Giovanna Sciascia"

Clause "Tenth," the interpretation of which is here in dispute, reads as follows: "Tenth I give and leave my house of Santa Clara ten four seven together with the house of Santa Cruz one two seven Buena Vista"—the testatrix had here reached the bottom of the second page. The second and third pages of the will are on the same sheet of paper, the single sheet being folded down the middle. When the sheet is opened out, the third page is on the same side of the open page as page two. When the testatrix wrote the last word above quoted she had not only reached the bottom of page two but was at the extreme right edge of page two. She then wrote "Third Page" at the top of the next page and continued clause "Tenth" as follows: "All shares of Transamerica as well as Bank of America as well as shares of Blair Corporation as well as all the money is to be paid to Doctor Pasquale Scelso but with the duty of giving me honorable burial that is Doctor Pasquale Scelso"

Clause "Eleventh" is incomplete and reads as follows: "I give and leave to my lawyer Richard V. Bressani"

By the twelfth clause she appointed Bressani trustee and executor.

The appellants contend that, properly interpreted, the first part of clause tenth is incomplete in failing to name a devisee, and the legacy must therefore fail; they argue that in drawing the fourth to eighth clauses she first named the gift and then the beneficiary; that in the ninth clause (not quoted above) she first named the recipient and then the bequest; that in clause tenth she must have intended to use the form she had used in the bequests to her brothers and sisters, but became "confused," and forgot to name the devisee; that this interpretation is borne out by clause eleventh in which she failed to designate the bequest; that "the testatrix had a mental lapse"; that the fact that in making the bequest of stock to Dr. Scelso, the validity of which is not contested, testatrix did not write down a new paragraph number is not determinative; that it is quite apparent that in "turning" the page decedent must have lost her train of thought and began a new bequest without reference to the bequest already started but not finished in clause tenth. They attempt to explain this alleged "mental lapse" on the ground of the testatrix' advanced age, the lengthy nature of the will (it covered three small letter sized pages) and the supposition that she did not read it over. It is urged that while the will contains but little punctuation it does indicate that the deceased understood the use of capital letters at the beginning of sentences; that the Italian word for "All" at the beginning of the first sentence on page 3 is capitalized; that the sentence so begun expresses a complete thought; that in order to sustain the construction given by the trial court the word "and" must be inserted before the word "All"; that the capital letter in "All" must be disregarded, as must also the phrase "is to be paid." Appellants also point out that after the will was executed and shortly before her death testatrix gave Dr. Scelso the securities referred to in clause tenth of the will, and argue that in making this gift the testatrix intended to give the donee everything she had left him by the will, and that her failure to give him deeds to the properties demonstrates that she did not intend that he should have these properties.

[1-6] The construction of a will is a question of law. In re Estate of Donnellan's Estate, 164 Cal. 14, 127 P.2d 166; In re Estate of Schaetzel, 44 Cal.App.2d 320, 112 P.2d 324. The purpose of interpretation is to ascertain, if possible, the testator's intent as disclosed by the language used, or from properly admissible extrinsic evidence. Each case must turn on the particular language used, and precedents, except for the establishment of certain general rules, can be of very little assistance. In re Estate of Henderson, 161 Cal. 353, 119 P. 496. Of course, the entire document must be looked to and all its language considered in order to ascertain the intention of the testator. In re Estate of Fair, 103 Cal. 342, 37 P. 406; In re Estate of Edwards, 126 Cal.App. 152, 14 P.2d 318, 15 P.2d 194; In re Estate of Northcutt, 16 Cal.2d 683, 107 P.2d 607. In the absence of controlling language in the will to the contrary, it will be presumed that a testator intended to dispose of all of his property. In re Estate of Blake, 157 Cal. 448, 108 P. 287; In re Estate of Wallace, 11 Cal.2d 338, 79 P.2d 1094; In re Estate of Spence, 57 Cal.App.2d 922, 135 P.2d 419. If the will indicates an intention to dispose of the entire estate of the testator, an interpretation that will prevent a partial intestacy is to be preferred to one that would require such partial intestacy. In re Estate of Spence, supra; In re Estate of Lawrence, 17 Cal.2d 1, 108 P.2d 893. However, in order to avoid a total or partial intestacy, the court is not permitted to indulge in conjecture or to read into the document words not contained therein. In re Estate of Peabody, 21 Cal.App.2d 690, 70 P.2d 249; In re Estate of Maloney, 27 Cal.App.2d 332, 80 P.2d 998.

[7] After reading the entire will, and keeping in mind these general rules of construction, we have no hesitancy in holding that the construction given the will by the trial judge is far more reasonable than the one contended for by appellants. In many respects parts of the will are awkwardly expressed, partially explained, perhaps, by the difficulties of translation. The tenth clause, when read as a whole, obviously deals with various bequests to Dr. Scelso. The whole argument of appellants is basically predicated on the theory that because the third page starts with a capital the testatrix intended on page three to frame a bequest separate and distinct and to a different person than the bequest mentioned in that part of clause tenth appearing on the last part of page two. This is slender support indeed for appellants' construction. It is far more reasonable to infer that the word "All" was capitalized simply because it is the first word on a new page. If that term had not been capitalized then the portion of clause tenth on page two and the portion on page three would all be part of the same sentence. That sentence, although somewhat awkwardly phrased (but no more awkwardly than other clauses), clearly designated Dr. Scelso as the legatee of the real property as well as of the securities. This construction is not based upon any surmise or conjecture, as is the assumed "mental lapse" argument of appellants. It is based upon the will itself. Appellants' construction requires surmise and conjecture to support it. For these reasons we think the interpretation given the will by the trial court is correct.

The order appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

SECKEL v. ALLEN et al. *

Civ. 12314.

District Court of Appeal, First District, Division 2, California.

May 19, 1944.

Rehearing Granted June 17, 1944.

1. Brokers 🔑102

A corporate real estate agency and broker acting for such agency, who were not parties to preparing of written listing of business property for sale, were entitled to accept such listing as tendered by owner and were not liable to person purchasing such property in reliance thereon for alleged fraudulent misrepresentations in listing, but owners and others participating in preparation of alleged fraudulent listing would be liable therefor.

2. Fraud 🔑30

Persons perpetrating fraud by inclusion of false representations in written listing with realty agency of business property for sale which induced another to purchase property would be liable in an action based on fraud.

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* Subsequent opinion 153 P.2d 394.

3. Fraud ⚷50

Fraud is never presumed.

4. Trial ⚷165

The rule that fraud is never presumed has no pertinency on motion for nonsuit in action based on claim of fraud, but if defendants desire to make use of such rule they should wait until submission of cause to jury and then argue for and against the presumption; it being for trier of facts to draw its own inferences and to apply such presumptions when whole case is submitted.

5. Trial ⚷165

On defendant's motion for nonsuit, if evidence is fairly susceptible of one of several inferences, court must take view most favorable to plaintiff and discard contradictory evidence, and plaintiff must be given benefit of every piece of evidence tending to sustain his averments and such evidence must be weighed in light most favorable to plaintiff's claim.

6. Trial ⚷165

In purchaser's action for fraud in sale of realty against vendor, real estate agency, and others, based in part on alleged false representation that ten-year lease on property was secured by cash deposit of $4,200, wherein lessee testified that he paid deposit to lessor who testified that he received deposit and put it away for safekeeping, and lease recited making of such deposit but called for no interest thereon, purchaser was entitled to argue, on defendants' motions for nonsuit, that inference might properly be drawn from the evidence that deposit was not in fact made. Code Civ.Proc. § 2055.

7. Fraud ⚷64(3)

In purchaser's action for fraud which induced purchase of business property, conflicting evidence as to broker's representations as to value of property presented jury question as to whether false representation was made in that respect.

8. Brokers ⚷106

Where owners employed corporate real estate agency to sell business property, evidence that broker employed by such agency, by misrepresenting value of property to be greatly in excess of its real value, induced plaintiff to purchase property, entitled plaintiff to hearing on such misrepresentation and to go before jury and argue case on merits and to claim that broker making misrepresentation was personally liable, that real estate agency, as broker's principal, was also liable, and that owner as principal of such agency was also liable. Civ.Code, §§ 2330, 2343.

9. Appeal and error ⚷172(1)

Where action for deceit was not pleaded in purchaser's complaint suing for damages to recover for fraudulent representations and no request was made to amend to conform to the proof, no issue of deceit was before trial court and would not be considered by appellate court. Civ.Code, §§ 1709–1711.

10. Corporations ⚷306

Where corporate real estate agency's president did not personally participate in agency's sale of realty to plaintiff, he was not, merely because he was president of such agency, liable for alleged fraud of such agency and its broker which induced plaintiff to purchase property.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Roderick Seckel against Lee W. Allen, Elsie M. Allen, his wife, and others, to recover damages for alleged fraud on plaintiff in the sale to plaintiff of real property. At the end of plaintiff's case the trial court granted defendants' several motions for nonsuit, and plaintiff appealed as to all such orders except as to the order granting the motion of defendant Elsie M. Allen.

Order in favor of defendant A. H. Wright affirmed, and orders in favor of other defendants, except Elsie M. Allen, reversed.

Theodore M. Monell, of San Francisco, for appellant.

William E. Ferriter and James C. Purcell, both of San Francisco, for respondent Lee W. Allen.

Dudley F. Miller, of San Francisco, for respondent W. A. Smith.

Gerald C. Halsey and Frederic T. Lee, both of San Francisco, for respondents J. F. McCormick, J. W. Wright & Co., and A. H. Wright.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendants to recover damages for fraud imposed on the plaintiff in the sale to him of a lot and garage building located thereon. He named many defendants, L. W. Allen as the owner, Elsie M. Allen as his wife, W. A. Smith as tenant, and several individuals as real estate agents. The defendants answered and the action was tried in the trial court before a jury. At the end of the plaintiff's case the trial court granted the several motions for nonsuit of the several defendants. The plaintiff consented to the granting of the motion of Elsie M. Allen but complains of the orders granting the other motions. He contends that the trial court erred in taking the case from the jury, and that on this appeal he is entitled to the benefit of all evidence that was substantial, including every inference reasonably to be drawn therefrom.

On the trial of the action the plaintiff, a man of about thirty years of age, took the stand and testified in his own behalf. Among other things he testified that the defendant McCormick represented the property as being of a value much in excess of $55,000. He also testified that McCormick represented to him that the property was leased to the defendant W. A. Smith and that there was a cash deposit of $4200 to secure the payment of the rent. The plaintiff testified that he believed the representations and acted thereon. Some of his witnesses were experts who testified that the property was worth only $35,000. Other facts deemed material will be stated as we proceed.

Prior to April 1, 1940, Lee W. Allen and Elsie M. Allen, his wife, were the owners of the lot and concrete garage building located thereon, number 640 O'Farrell Street in San Francisco. On April 1, 1940, they leased the property to W. A. Smith for a term of ten years for a total rental of $81,000. The lease provided that $650 per month should be paid as rental for five years and $700 per month for the next five years. Shortly afterwards the owners employed J. W. Wright & Co., a corporation, to negotiate a sale of the property. Mr. Allen executed a written listing thereof which he signed and delivered. Among other things that listing had written on the face thereof:

"Income:

"Leased to: W. A. Smith for 10 years from April 1st,

"1940 for total rental of $81,000.00.

"$650.00 Month for 5 years

"$700.00 Month for 5 years

"Average rental $675.00 Month $8,100.00 year.

"$4,200.00 cash security up on lease."

Prior to July 31, 1940, the plaintiff appeared at the office of J. W. Wright & Co. and there he met J. F. McCormick, a real estate broker acting for said company. In his complaint he alleged that: "Plaintiff did inform the defendants above named that he had no experience in the real estate business in San Francisco, nor in the State of California, nor in the United States of America, and that his principal place of business had been in South Africa and in London, England, and that he was relying upon defendants above named to properly assist, and instruct, and guide him in the purchase of property suitable for garage purposes." He also alleged other averments necessary to plead a cause of action for fraud. 12 Cal.Jur. p. 806. On the trial he testified that when he applied to Mr. McCormick the latter produced the list above mentioned and said, "'Here is something I would like to buy myself; this is a wonderful thing.' Then he pointed out that the lease was secured by a cash deposit of $4200. He thought I could get the lot and building for $55,000 and that it was worth much more than $55,000." The plaintiff also testified that McCormick also told him the property had a wonderful return, paying 44½% on the investment of $16,800 and 12¾% on the total value of the property and that it was worth much more than $55,000.

The plaintiff took the stand as a witness in his own behalf and was examined and cross-examined. Under section 2055, Code Civ.Proc., he called the defendant Lee W. Allen and the defendant W. A. Smith. Each was examined and cross-examined. There is no dispute in the testimony that the said list was exhibited to the plaintiff and the passage above quoted was specifically called to his attention by Mr. McCormick. Mr. Smith testified that he took from a strong box in his bureau $4200 and paid it to Mr. Allen as a deposit. The latter testified that he received the cash deposit and put it in a hollow brick for safe keeping. No other evidence of the payment was offered. The written lease was produced. On its face it recited the making of the deposit. It called for no interest to be paid thereon. The plaintiff stresses these facts and claims that he should have been allowed to present them to the jury and ask it to so hold and to infer that both Mr. Allen and Mr. Smith were not telling the truth and that there was not, in fact, any deposit for the security of the rental, and the entire leasehold claim was a fiction.

[1-6] J. W. Wright & Co. and J. F. McCormick, the broker, contend that they were not parties to the framing of the list and that they were entitled to accept it as tendered by their client, Mr. Allen. Restatement of the Law of Agency, § 348 p. 762. That claim we think is sound so far as the real estate agents are concerned. However, it is no reply so far as the owners and Mr. Smith are concerned. If in fact said recital contained in the list was a fiction and a fraud, those who perpetrated the fraud were liable in an action based on fraud. Hunter v. McKenzie, 197 Cal. 176, 185, 239 P. 1090; Cooper v. Kincaid, 151 Wash. 535, 276 P. 557, 558; Karst v. Seller, 45 Cal.App. 623, 626, 188 P. 298. The defendant L. W. Allen and the defendant W. A. Smith both cite authorities holding that fraud is never presumed. That, of course, is the law. However the rule has no pertinency when a motion for a nonsuit in an action based on a claim of fraud is the question involved. If defendants would make use of the rule, they should have waited until the cause was submitted to the jury and then argued for and against presumptions. In other words it was for the trier of the facts, in this instance for the jury, to draw its own inferences and to apply such presumptions, when the whole case was submitted, as the trial court might direct by the instructions which would then have been given. In Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, at page 197, 64 P.2d 946, at page 948, the court said: "Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given it must be disregarded. [In re] Estate of Arnold, 147 Cal. 583, 82 P. 252. The plaintiff must be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in a light most favorable to plaintiffs' claim. Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381." So in the instant case the plaintiff was entitled to argue that an inference might properly be drawn in favor of or against L. W. Allen and W. A. Smith.

[7, 8] Passing to the claim that the value of the property was greatly misrepresented, the most that can be said is that on that issue the evidence was conflicting. The plaintiff testified that Mr. McCormick represented the property as being of a value much in excess of $55,000. On the other hand Mr. McCormick denied that he made such a representation. It was therefore a question for the jury to determine whether the representation was or was not made. J. W. Wright & Co. was the agent of L. W. Allen and his wife. J. F. McCormick was a broker attached to the house of J. W. Wright & Co. He was their authorized agent and so far as the record discloses at all times acting within the scope of his employment. If he made a misrepresentation to the plaintiff, under the facts hereinabove set forth the plaintiff was entitled to a hearing thereon and to go before the jury and argue the case on its merits. Feckenscher v. Gamble, 12 Cal.2d 482, 492, 493, 85 P.2d 885. It may be added that under such facts the plaintiff was entitled to claim that J. F. McCormick was liable personally, Civ. Code, sec. 2343, that J. W. Wright & Co., his principal, was liable, Civ.Code, sec. 2330, and that L. W. Allen, the principal of the latter, was also liable, Civ.Code, sec. 2330.

[9] Something is said in the briefs touching the liability of the defendants as in an action for deceit. Civ.Code, § 1709–1711. We need not pause to discuss that contention. An action as for deceit was not pleaded nor was a request made to amend to conform to the proof. Therefore that issue was not before the trial court. Williams v. Spazier, 134 Cal.App. 340, 347, 25 P.2d 851; Camm & Hedges Co. v. Bank of Covelo, 208 Cal. 246, 280 P. 962.

[10] As noted above, A. H. Wright was named as a defendant. He was president of J. W. Wright & Co. Personally he did not participate in any part of the transaction. Merely because he was president of the corporation did not render him liable. O'Connell v. Union Drilling, etc., Co., 121 Cal.App. 302, 309, 8 P.2d 867. It is therefore clear that the order appealed from, as to him, should be affirmed.

As recited above the order made in favor of Mrs. Allen was made by consent and is not attacked. The order made in favor of the defendant A. H. Wright is affirmed. The orders in favor of the other defendants are reversed.

NOURSE, P. J., and SPENCE, J., concur.

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64 Cal.App.2d 462

MERLINO et ux. v. FRESNO MACARONI MFG. CO. et al.

Civ. 3147.

District Court of Appeal, Fourth District, California.

May 22, 1944.

Hearing Denied July 20, 1944.

1. Corporations 🔑607

Statutory provisions relating to defendants' avoiding appointment of receiver for corporation or dissolution by purchasing shares owned by plaintiffs at their fair value are mandatory, and, when prescribed conditions are met, court must recognize right given and must stay proceedings and fix value of shares owned by plaintiffs. Civ.Code, § 404(E).

2. Corporations 🔑621(6)

In suit for involuntary dissolution of corporation on ground of dissension among stockholders, in which defendants asked court to fix fair cash value of plaintiffs' shares of stock, but did not allege that parties were unable to agree upon value, court was neither authorized nor required to stay appointment of receiver. Civ.Code, § 404(E).

3. Corporations 🔑621(7)

In suit for involuntary dissolution of corporation on ground of dissension among stockholders, right of defendant to have court fix value of plaintiff's shares if parties were unable to agree thereupon was still available after appointment of receiver. Civ.Code, § 404(B) (E).

4. Corporations 🔑621(1)

Where complaint for dissolution of corporation alleged that plaintiffs, husband and wife, owned 50 per cent. of stock and that individual defendants, husband and wife, owned the other 50 per cent., that the two families were in disagreement as to how affairs of corporation should be conducted and unless receiver was appointed interests of corporation and of plaintiffs would suffer, court did not abuse discretion in appointing receiver. Civ.Code, § 404(B, D, E).

5. Appeal and error 🔑763

Contention advanced in supplemental brief filed after argument came too late.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Domenico Merlino and wife against Fresno Macaroni Manufacturing Company and others for the involuntary dissolution of the defendant corporation and for the appointment of a receiver pending a hearing and determination of the dissolution issue. From an order appointing a receiver, defendants appeal.

Affirmed.

Matt Goldstein and Fred W. Docker, both of Fresno, for appellants.

Morgan J. Doyle, Walter M. Gleason, and A. Dal Thomson, all of San Francisco, for respondents.

BARNARD, Presiding Justice.

The plaintiffs filed a complaint seeking the involuntary dissolution of the defendant corporation, based upon three of the grounds set forth in subdivision (B) of section 404 of the Civil Code. These grounds are that the holders of shares are so divided into factions that they cannot elect a new board of directors, that there is internal dissension and the two factions are so deadlocked that the business of the corporation cannot be conducted with advantage to its shareholders, and that the liquidation is reasonably necessary for the protection of the rights of the complaining stockholders.

The plaintiffs also secured an order to show cause why a receiver should not be appointed pending a hearing and determination of the dissolution issue. The request for the appointment of a receiver was heard and submitted upon the verified complaint, the verified answer of the individual defendants and an affidavit filed by the defendant Alfonso Borrelli. The court made an order appointing a receiver and the defendants have appealed from that order.

The main contention is that the individual defendants, who own 50% of the stock of the corporate defendant, have elected to purchase the shares of stock owned by the respondents and have thereby brought themselves within the provisions of subdivision (E) of section 404 of the Civil Code, which provide, generally speaking, that under such circumstances the court shall stay the proceeding and shall proceed to fix the value of the plaintiffs' shares in the manner therein provided; that these provisions are mandatory; and that it follows that the court erred in ordering the appointment of a receiver.

The respondents contend that these provisions of section 404(E) are directory and not mandatory, and that they merely authorize the court to proceed to a valuation of the plaintiffs' shares when it feels that the equities are such as to call for such action. The statute in question reads, in part, as follows:

"* * * provided, however, that in any such suit the holders of 50 per cent or more of the outstanding shares of the corporation shall have the right to avoid the appointment of a receiver or of the dissolution of such corporation by purchasing the shares of stock owned by the plaintiffs at their fair cash value. If 50 per cent or more of the outstanding shares of the corporation elect to purchase the shares owned by the plaintiffs and are unable to agree with the plaintiffs upon the fair cash value of such shares, and give bond with sufficient security to protect the interests and rights of the plaintiffs and to assure unto the plaintiffs the payment of the value of their shares, the court shall stay the proceeding and shall proceed to ascertain and fix the value of the shares owned by the plaintiff." (Here follows provisions for the manner in which the value of the plaintiffs' shares shall be fixed.)

[1] By the language thus used, the holders of 50% or more of the stock of such a corporation are clearly and definitely given the right to avoid the appointment of a receiver or a dissolution by purchasing the shares owned by the plaintiffs at their fair value. It is then provided that if they elect to purchase such shares, and are unable to agree with the plaintiffs upon the fair value thereof, and give a sufficient bond, the court shall stay the proceeding and shall proceed to ascertain and fix the value of the shares. We agree with the defendants that these provisions are mandatory and that when the prescribed conditions are met the court must recognize the right thus clearly given and must stay the proceeding and proceed to ascertain and fix the value of the shares owned by the plaintiffs.

We are unable to hold, however, that the individual defendants here met the conditions prescribed by this statute. In their answer, the individual defendants alleged that they were the owners of 50% of the outstanding shares of this corporation; and that they "have elected and hereby elect and offer" to purchase the shares owned by the plaintiffs. It is then alleged that if the plaintiffs and these individual defendants "are unable to agree upon the fair cash value" of the shares owned by the plaintiffs "then and in such event" these defendants request the court to proceed to ascertain and fix the value of such shares, pursuant to the provisions of section 404 of the Civil Code. The prayer is, among other things, that the election and offer by these defendants to purchase the plaintiffs' shares be approved and confirmed, that "if the plaintiffs and these defendants are unable to agree upon the fair cash value of such shares, then the court proceed to ascertain and fix" the same in the manner provided by section 404, and that the plaintiffs be paid the fair cash value of their shares "either as agreed upon between the plaintiffs and these defendants, or as ascertained and fixed by the court." In his affidavit, the defendant Alfonso Borrelli alleges that he and his wife have offered and elected to purchase the plaintiffs' shares "as appears from my answer" and that "if we are unable to agree with the plaintiffs upon such fair cash value, I shall ask that the court appoint three commissioners and fix the value of said stock." He then stated that he was willing to deposit with the court a sufficient bond to protect the interests of the plaintiffs and assure to them payment for their shares.

[2, 3] While it appears from the affidavit and the answer filed on behalf of the individual defendants that they desired and were then offering to purchase the shares owned by the plaintiffs it in no way appears that they "are unable to agree

with the plaintiffs upon the fair cash value of such shares." It appears from both of these documents that the individual defendants did not then know whether or not they would be able to agree with the plaintiffs upon the fair cash value of their shares and in both documents it is clearly set forth that "if (they) are unable to agree" upon the fair cash value of such stock these defendants would then ask the court to proceed to fix the value of such shares as provided for in section 404. As the matter was presented and submitted to the court there was no showing whatever that the parties were unable to agree upon a fair cash value of the stock in question. In fact, there was a specific showing that this matter was to be later determined. An element necessary to bring the individual defendants within the provisions of section 404, subdivision (E), was lacking and although the court might have continued the matter and permitted a further showing it was under no obligation to do so and was neither authorized nor required to stay the appointment of a receiver at that time. It may be observed in this connection that the rights and remedies provided by subdivision (E) of section 404 are still available to the individual defendants, upon the taking of proper steps therefor, since the provisions thereof do not limit the time within which the required steps may be taken.

[4] The only other point requiring consideration is defendants' contention that, irrespecitve of subdivision (E) of section 404, no sufficient showing was made by the plaintiffs to justify the appointment of a receiver. It is argued that the appointment of a receiver is a drastic remedy and one which will not be sustained in the absence of a clear showing of positive facts indicating great damage to the applicant therefor in the absence of such relief. Subdivision (D) of section 404 provides that the court may appoint a receiver in such an action if it has reasonable grounds to believe that otherwise the interests of the corporation and its shareholders will suffer pending a hearing. Among the grounds upon which a complaint for dissolution may be based, as provided for in subdivision (B) of that section, are: That the holders of the stock are so divided into factions that they cannot elect a board of directors, that there is internal dissension and two or more factions of stockholders are so deadlocked that the business of the corporation can no longer be conducted with advantage to its shareholders, and that the liquidation is reasonably necessary for the protection of the rights of any substantial number of the shareholders. The complaint here alleged that the plaintiffs owned 50% of the stock of this corporation; that the individual defendants owned the other 50%; that the plaintiffs and the individual defendants were, respectively, husbands and wives; that the two families constituted two factions; that the Borrellis, being both on the board of directors, had for more than five years perpetuated themselves in control by the expedient of failing or refusing to call an election; that great internal dissension has existed between the two factions for more than two years with respect to the matter of handling the business of the corporation; that the Merlino faction believes and alleges that the Borrelli faction has not been and is not now handling the affairs of the corporation in a proper and businesslike manner and to the best interest of the corporation and its stockholders; that the two factions, each owning an equal number of shares, cannot agree upon or elect a board of three directors; that the two factions are deadlocked and in disagreement as to how the affairs of the corporation should be conducted; that by reason thereof the business of the corporation can no longer be conducted with advantage to the shareholders; and that unless a receiver is appointed the interest of the corporation and of the Merlino faction will suffer and be damaged pending the hearing and determination of the action. While these matters are denied in the answer and in the affidavit filed by Alfonso Borrelli, and while he alleges that a part of the business handled and controlled by the corporation is being conducted at a profit, the allegations of the affidavit are most general and no attempt therein is made to set forth the actual situation with respect to the affairs of the corporation. While the allegations of the complaint may be largely conclusions, they rather closely follow the language used in section 404 of the Civil Code, upon which the action is based. That section seems designed to cover such a situation as that here appearing, the court is therein given considerable discretion with respect to the appointment of a receiver, and it cannot be said from the record before us that this discretion has

been abused. Boyle v. Superior Court, 176 Cal. 671, 170 P. 1140, L.R.A.1918D, 226; Misita v. Distillers Corp., Ltd., 54 Cal.App. 2d 244, 128 P.2d 888; Koshaba v. Koshaba, 56 Cal.App.2d 302, 132 P.2d 854.

[5] A further contention advanced by the plaintiffs in a supplemental brief filed after argument not only comes too late but is without merit.

For the reasons given the order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

GRUPE v. GLICK et al. *

Civ. 14152.

District Court of Appeal, Second District, Division 3, California.

May 15, 1944.

Hearing Granted July 10, 1944.

1. Courts 🔑90(4)

Where provisions of state Uniform Sales Acts relating to measure of damages for breach of warranty corresponded to provisions of Uniform Sales Act, cases applying to sections of the latter act have authoritative value. Civ.Code, §§ 1789(6, 7), 1800.

2. Sales 🔑442(1)

In action for breach of warranty of machines purchased for resale, where buyer when he resold machines agreed to procure business for purchasers at expense of between $300 and $500 for each machine resold, failure of trial judge to take such expense into account in fixing damages was error. Civ.Code, §§ 1789(6, 7), 1800.

3. Sales 🔑442(5)

Loss of prospective profits on future sales could not be charged as damages for breach of warranty involved in sales already made. Civ.Code, §§ 1789(6, 7), 1800.

4. Sales 🔑442(6)

In action for damages for breach of warranty of machines purchased for resale, plaintiff was entitled to recover for expenditure of time and money made in a reasonable attempt to make the machines function and for any liability incurred for like expenditures made by purchasers from plaintiff in reliance on plaintiff's warranties. Civ.Code, §§ 1789(6, 7), 1800.

5. Appeal and error 🔑110

An order denying defendants leave to introduce testimony in support of their motion for a new trial is not appealable.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by George G. Grupe, Jr., against Fred P. Glick, doing business as Fabriform Steel Products Company, and Fabriform Steel Products Company, for damages for breach of warranty in sale of certain machines purchased by plaintiff. From a judgment for plaintiff for $6,872.84, and from an order denying defendants leave to introduce testimony in support of motion for a new trial, the defendants appeal.

Judgment reversed and appeal from order dismissed.

Ben Gould, of Los Angeles, for appellants.

Turner & Wald, of Santa Ana, for respondent.

BISHOP, Justice pro tem.

The plaintiff purchased from the defendant three machines, paying the sum of $1500 for the three. It turned out that the greatest value the machines had was as junk, their value for that purpose being $75. In his complaint the plaintiff sought not only the $1425 which he had obviously lost, but enough more to total $31,993.94. The trial court did not award the plaintiff all that he asked, but did give him a judgment for $6,872.84, which we find to be more than was justified by the evidence.

[1] There is no controversy as to most of the facts which form the setting of this case, and in the main the principles of law to be applied are familiar. The machines were designed to re-refine oil, and were manufactured by the defendant. Plaintiff purchased the machines to resell, and this the defendant knew. Plaintiff sold each machine for three times the $500 he had paid for it, under a conditional sales contract, receiving a down payment of $500. In addition to the down payment, one of plaintiff's purchasers paid $125 and another

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* Subsequent opinion 160 P.2d 832.

paid $100, but no further payments were made, the possibility of getting the machines to work satisfactorily being given up. When the defendant sold the machines to the plaintiff, and when the latter sold them to the would-be-users, each in turn warranted that the machines were fit for the task they were designed to perform, that is, to "laundry" oil. The failure of the machines to function satisfactorily constituted a breach of defendants' warranty to the plaintiff and of plaintiff's warranty to those who purchased from him. The measure of damages for a breach of warranty is prescribed by subdivisions (6) and (7) of section 1789, Civil Code, in these words: "(6) The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from the breach of warranty. (7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty." These provisions of our Uniform Sales Act (see Civil Code, sec. 1800) correspond to those found in subdivisions 6 and 7 of section 69 of the Uniform Sales Act (1 Uniform Laws Annotated, p. 396), so that the cases applying the latter have authoritative value.

[2] The amount awarded by the judgment is the total of these items: $4425, $321.34, $526.50, $600 and $1000. It is the first and last of these items of which we are particularly critical. At first glance it would appear that the $4425 item finds support, in the findings, on two theories: First, that the figure represents "the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty"; second, that that sum is made up of two amounts: (1) the $1425 loss suffered when the plaintiff received $75 worth of junk for his outlay of $1500; and (2) $3000 profits lost when plaintiff's resales failed. A more careful reading of the findings, however, discloses that there is none which corresponds to subdivision (7) of section 1789, for while there is a finding that at the time the machines were delivered to the plaintiff each was worth only $25, the correlative finding is that if the machines "had been fit and suitable for the purpose of rerefining oil," that is, "if they had answered to the warranty," they would have been worth *"to plaintiff"* $1500 each. The emphasis is ours, but the words belong to the findings, and do not belong to subdivision (7) of section 1789. "Value," and "value to the plaintiff" on occasion may *be*, but they do not *mean*, and so may not be the same thing. Hurd v. Barnhart, 1878, 53 Cal. 97, 99; Shurtleff v. Marcus Land & Investment Co., 1922, 59 Cal.App. 520, 211 P. 244, 245. The two theories of the findings, then, merge into one; the value of the machines to the plaintiff, had they worked, would have been the price for which he had sold them, and their failure to work lost him the profits of the sales.

This theory of damages is sound; it gives us the loss directly and naturally resulting to the plaintiff, a dealer, in the ordinary course of events, when those to whom he sells finds the machines to be useless for the purpose for which they were designed and purchased. Parker v. S. G. Shaghalian & Co., 1923, 244 Mass. 19, 138 N.E. 236, 238; Hubshman v. Louis Keer Shoe Co., 7 Cir., 1942, 129 F.2d 137, 142. See also Germain Fruit Co. v. J. K. Armsby Co., 1908, 153 Cal. 585, 590, 96 P. 319. Obviously, even if there were machines of other makes on the market, designed to do the work for which defendants' machines were made, they could not be substituted, as one sack of sugar could be for another, to enable the plaintiff to save himself from the loss of profits on the sales he had made. However, in arriving at plaintiff's loss of profits one item that should have been taken into consideration was overlooked. It was the expense of drumming up business for the purchasers, which the plaintiff had agreed to do, probably in part to help him in making further sales, but nevertheless as a part of the sales already made. When asked: "You mean that when you sold this machine you also agreed to go out and get business for the purchaser of the machine?" plaintiff answered: "Absolutely," and in response to further questions stated that the expense to him of this service would be somewhere between $300 and $500 and that there was no extra charge for this service; it was included in the $1500. The plaintiff himself points out in his brief: "Nowhere in the record is there any evidence that respondent rendered this service to the purchasers of the machines sold by him" and "it would have been an idle gesture for respondent to spend any time or money in an effort to obtain business for a purchaser of a machine that would not work successfully." Plaintiff's anticipated net profit on the three machines appears, therefore, to be somewhere between $900 and $1500 less than the $3000 allowed him.

The fourth item which goes to make up the total awarded as damages, the sum of $1000, we find to be entirely without warrant. As a part of his complaint plaintiff alleged that after the delivery of the first machine and before the delivery of the other two, he and the defendant entered into a contract by which the defendant agreed to sell, for exclusive distribution "in all territory excepting the territory of Hawaii," and plaintiff agreed to purchase at least one a month of defendant's Model R–20 rerefining machines. With this as a basis, plaintiff complained that "as a proximate result of defendants' breaches of warranty" he "was forced to abandon" the sale of five additional machines at a sales price of $1800, which sales were "in the process of negotiation and would have been certainly consummated" but for the breaches of warranty. With reference to this claim of the complaint the trial court found: "that as a direct and proximate result of the defective design and construction of said oil rerefining machines * * * and the noncompliance with the warranties of defendants * * * plaintiff has been unable to make any other or additional sales of said oil rerefining machines and has been required to discontinue the effort, and has thereby suffered a loss of profits, to his further damage in the sum of one thousand ($1000.00) dollars."

[3] Loss of prospective profits on future sales cannot be charged, as damages, against the breach of warranty involved in the sales which have been made. If plaintiff has a cause of action against the defendant because the latter had contracted, but was unable, to construct and deliver machines which would work, that cause of action is not before us and is not to be confused with the one which is, that is, an action for the breaches of warranty involved in the sales which were already made. The blight which wilted the sales-to-be, was caused by the knowledge, or fear, that none of defendant's machines would work; and the result would have been the same had the defendant sold the first three machines with the express understanding that they were not warranted to work. Plaintiff's inability to make future sales doubtless resulted from the poor showing made by the machines, but the breach of warranty incident to those sales that had taken place was not a proximate cause of the failure of other sales to take place. That prospective purchasers from plaintiff have had their ardor cooled by the poor showing made by the machines already in use results in a loss too speculative to be recovered as damages. Van Deren Hardware Co. v. John H. Preston & Son, 1928, 224 Ky. 170, 5 S.W.2d 1052, 64 A.L.R. 881; Krone Die Casting Co. v. Do-Ray Lamp Co., 1938, 297 Ill.App. 602, 18 N.E.2d 100, 106; Henry Porter & Co. v. Lacy, 1937, 268 Ky. 666, 105 S.W.2d 818, 820.

[4] The three items of damage not yet discussed were the amounts incurred by the plaintiff and by two of those who purchased machines from him in an endeavor to make the machines function. Plaintiff was entitled to recover for the expenditure of time and money he had made in a reasonable attempt to make the machines function (Dahl Imp. & Lumber Co. v. Campbell, 1920, 45 N.D. 239, 178 N.W. 197; People's State Bank v. Randby, 1924, 158 Minn. 309, 197 N.W. 265; Plumbers Supply Co. v. Lanter, 1939, 280 Ky. 523, 133 S.W.2d 739, 741), and he may recover, too, for the liability he had incurred for the like expenditures made by those who had relied on his warranty. Fred Wolstenholme, Inc., v. Jos. Randall & Bro., 1929, 295 Pa. 131, 144 A. 909; and see Aldridge Motors v. Alexander, 1940, 217 N.C. 750, 9 S.E.2d 469, 472, 473. As the transactions took place in 1939, the extent of plaintiff's liability should now be known, and should be shown with greater certainty on retrial than seemed possible at the first trial.

[5] The judgment is reversed. The appeal from the nonappealable order, which denied the defendants leave to introduce testimony in support of their motion for a new trial, is dismissed.

DESMOND, P. J., and PARKER WOOD, J., concur.

GAVINA et al. v. SMITH.*

Civ. 3139.

District Court of Appeal, Fourth District, California.
May 18, 1944.

Rehearing Denied May 26, 1944.
Hearing Granted July 10, 1944.

1. **Quieting title** 🔑15

A contract which cannot be specifically enforced is not a defense in an action to quiet title.

2. **Specific performance** 🔑32(1)

In order to enable court to specifically enforce a contract, the remedy must be mutual to both its parties.

3. **Quieting title** 🔑15

Option agreement to lease for oil and gas, having blank form of lease attached and containing provision that lessee could surrender or quitclaim lease at any time, was executory in character and furnished no defense to landowner's action to quiet title, there being no mutuality of remedies as to specific enforcement.

◆

Appeal from Superior Court, Kings County; Arthur C. Shepard, Judge Assigned.

Action to quiet title by John F. N. Gavina and another against Lon V. Smith. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Hanna & Morton, of Los Angeles, Borton, Petrini, Conron & Borton, of Bakersfield, and J. G. Crichton, of Fresno, for appellant.

Sidney J. W. Sharp and M. Wingrove, both of Hanford, for respondents.

GRIFFIN, Justice.

This is an action brought under the usual simple form of pleading, to quiet title to 2309.50 acres of land in Kings and Tulare counties. Defendant answered, admitted plaintiffs' ownership of title and possession of the land described. It failed to set forth the nature of defendant's claimed right in or title to the land. A second amended answer was filed, by leave of court, by which defendant admitted plaintiffs' ownership but alleged defendant had an interest therein by reason of an option agreement to lease for oil and gas. (A copy of the written agreement was attached to the answer and made a part of it.) A general and special demurrer to the second amended answer was interposed. The trial court sustained them without leave to amend. Judgment for plaintiffs followed. Defendant appealed. The "Agreement to Lease for Oil and Gas" is dated March 18, 1942, and, so far as material here, reads in part: "For * * * ($100.00) * * * the * * * owner * * * does hereby grant to * * * Smith * * * ('Optionee'), * * * option of leasing" the described land. "The lease to be executed shall be made upon the following terms and conditions": (1) According to form attached; (2) rental to be paid to owner as follows: $1 per acre for one year payable in advance; (3) royalty to be ⅛; (4) all monies payable to lessor to be deposited to lessor's account in a certain named bank; (5) if optionee elects to exercise option he shall pay or tender to lessor money necessary to complete cash payment of advance rental, or he may deposit it in escrow with instructions to pay it to lessor upon receipt of executed oil and gas lease to optionee; (6) if option is exercised plaintiffs agree to execute and deliver to optionee a completed oil and gas lease "on the form attached"; (7) the option may be assigned and shall continue to March 25, 1942. It then provides that "this option cannot be recorded" and that the lease is only assignable to one of the major oil companies.

This option agreement was signed only by John F. N. Gavina and A. F. Silveira, and not by optionee Lon V. Smith. The blank form of lease attached to the agreement contains the usual provisions in reference to oil and gas leases and a provision that the lessee shall, in good faith, conduct drilling operations thereon as provided in the lease. It then recites:

"* * * in consideration of One Dollar * * * lessor * * * does * * * lease to lessee * * * for a period of ——— years * * * ——— acres * * *." "Lessee will pay to Lessor on account of rent or royalty the equal of ⅛ part of the value of all oil sold or removed * * *." *"Lessee may at any time and from time to time quitclaim all or any portion of said lands and at such time all obligations and rights of lessee as to said surrendered lands shall cease and determine,* * * *." "A quitclaim deed shall be effective when mailed or delivered to the lessor or when filed for record by either party." "* * * The lessee shall have no right to assign this lease, either in whole or in part, without the written consent of lessor first had and obtained, except to a responsible oil operator. It is hereby agreed that in the event this lease shall be assigned as a whole or as to part or parts of the above described lands, the herein lessee shall thereupon be released from all further obligations under this lease as to the lands assigned and the obligations of the several parties owning the lessee's interests under this lease shall be several and any default or forfeiture by one party holding any of the * * * lessee's rights under this lease shall in no way operate to defeat or affect this lease * * *." (Italics ours.)

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* Subsequent opinion 154 P.2d 681.

[1, 2] It is well-settled law in this state that a contract which cannot be specifically enforced is not a defense in an action to quiet title. Sheehan v. Vedder, 108 Cal. App. 419, 292 P. 175. In order to enable the courts to specifically enforce a contract the remedy must be mutual to both its parties. Pimentel v. Hall-Baker Co., 32 Cal. App.2d 697, 90 P.2d 588. George v. Weston, 26 Cal.App.2d 256, 79 P.2d 110, is factually similar to the instant case except it was an action whereby the plaintiff sought to obtain *specific performance* of an agreement to lease for oil and gas. The agreement was unilateral, signed only by the landowner. The only material difference between the instant case and that case, in addition to the difference in type of action under which the optionee sought to establish his alleged rights, is that in the cited case the proposed form of lease was not attached to or made a part of the option agreement but was merely referred to therein by number. The court there pointed out that the proposed form of lease contained *the usual provision giving the lessee the right to surrender or quitclaim the lease at any time either in its entirety or as to part of the acreage covered thereby.* It was there held that the proposed lease was lacking in mutuality.

In Dabney v. Key, 57 Cal.App. 762, 207 P. 921, following the authority of Sturgis v. Galindo, 59 Cal. 28, 43 Am.Rep. 239, and followed by Sheehan v. Vedder, supra, it was held that a contract to make a lease of land for the purpose of developing oil wells thereon is not specifically enforceable when the proposed lease reserves to the lessees the right to surrender it at such time as the lessees see fit but purports to bind the lessors for a term of years.

In Sheehan v. Vedder, supra [108 Cal. App. 419, 292 P. 176], the oil drilling contract contained a clause to the effect that "The party of the second part at any time before or after the discovery of oil on said premises may quitclaim said property or any part thereof to the parties of the first part, their successors or assigns, and thereupon all rights and obligations of the parties hereto, one to the other, shall * * * cease and determine as to the premises quitclaimed." This court, relying on Sturgis v. Galindo, supra, and Dabney v. Key, supra, held that the lessee's right to abandon robbed the contract of mutuality and made it impossible to require its specific performance, and that under those circumstances it afforded no defense to an action to quiet title brought by the lessors. A somewhat similar situation was considered and a like view taken of the matter by this court in Moore v. Heron, 108 Cal. App. 705, 710, 292 P. 136.

[3] It is the claim of appellant's counsel that so far as the destruction of mutuality by a right reserved to the lessee to surrender the lease is concerned, the cases last mentioned are contrary to the holding in Callahan v. Martin, 3 Cal.2d 110, 43 P. 2d 788, 101 A.L.R. 871, and they rely mainly upon the holding of that case in which it was held that an oil and gas lease creates an interest or estate in real property. Callahan v. Martin, supra, has no application to the case at bar because in that case the owner of the land involved had *executed* an oil and gas lease thereon and there is no analogy between a lease that is perfectly valid in itself but subject to conditions subsequent that may at some future time bring it to an end and an instrument that so far lacks mutuality that it can be terminated at any time by the lessee under it. In other words, in Callahan v. Martin, supra, the lease involved had already been fully executed, but George v. Weston, supra, involved merely an agreement to execute a lease, no lease having been executed. The courts of this state have consistently followed and applied the rule of law adopted in George v. Weston, supra, in cases where the lease had not been fully executed and completed and there was only an agreement to execute a lease. There is nothing inconsistent between the two lines of cases,

the distinction being whether the contract is executed or executory. Comparing the facts pleaded in the instant case with the facts stated in the cases above cited by respondent, we are unable to observe any distinction. We therefore must hold that the oil drilling contract or agreement to lease for oil and gas is and was executory in character and furnished no defense to an action to quiet title. Therefore the judgment of the lower court cannot be disturbed.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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64 Cal.App.2d 406

In re WHITE'S ESTATE.

JONES v. BROWN, Public Adm'r, et al.

Civ. 14398.

District Court of Appeal, Second District, Division 1, California.

May 19, 1944.

1. Husband and wife 🔑49½(8)

In proceeding by deceased wife's previously deceased husband's niece for letters of administration in wife's estate, husband's quitclaim deeds to wife of such interest as he had in realty previously acquired by wife as separate property under grant deeds to her were insufficient to show that she received portion of realty as gift from husband of his interest in community property. Civ.Code, § 164.

2. Appeal and error 🔑1011(1)

In proceedings by deceased wife's previously deceased husband's niece and public administrator for letters of administration in wife's estate, whether realty, of which wife died possessed, was community property or any of it came to wife from husband by gift, descent, devise, or bequest was fact question for trial court on conflicting evidence, which sustained his finding that all of such realty was wife's separate property not so derived from husband, so as to entitle public administrator to letters. Civ.Code, § 164; Probate Code, § 422.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge pro tempore.

Proceedings by Violet Jones and Ben H. Brown, Public Administrator of the County of Los Angeles, respectively, for letters of administration in the matter of the estate of Maggie Mae White, deceased. From an order granting the Public Administrator's petition and denying the petition of Violet Jones, she appeals.

Affirmed.

Monta W. Shirley and Frank Hemminger, both of Los Angeles (Benj. T. Weimstein, of Los Angeles, of counsel), for appellant.

J. H. O'Connor, Co. Counsel, and Wm. E. Lamoreaux, Deputy Co. Counsel, both of Los Angeles, and Max M. Gilford, of Hollywood, for respondents.

DORAN, Justice.

The appellant, Violet Jones, filed a petition for letters of administration in the matter of the estate of Maggie Mae White, deceased, with the will annexed, and the respondent Ben H. Brown, public administrator of the County of Los Angeles, filed a petition for letters of administration in said estate. The petitions came on for hearing and at the conclusion of the trial the court found that Maggie Mae White died June 13, 1942, intestate, and left neither spouse or issue surviving her; that Violet Jones is the niece of Will White, the previously deceased husband of Maggie Mae White, who died in June, 1936, and who left no issue surviving him; that said Violet Jones is a bona fide resident of the State of California, but that no portion of the estate of Maggie Mae White was community property of said decedent and her previously deceased spouse Will White, or came to decedent from Will White by gift, descent, devise or bequest. The court further found that Violet Jones, not being entitled to share in said estate, is of the tenth class of persons entitled to administer under section 422 of the Probate Code, and that Ben H. Brown, public administrator, being of the eighth class of persons, is prior in right to Violet Jones; and the court thereupon ordered that the petition of Ben H. Brown, public administrator, for letters of administration of said estate, be granted and that the petition of Violet Jones be denied. From that order the petitioner Violet Jones appeals. Appellant contends that the findings of fact and conclusions of law in favor of the public administrator are not sustained by the evidence.

According to appellant, the estate of deceased Maggie Mae White consists of two parcels of real property in California valued at about $3500 each, two parcels of real property in Arizona valued at about $2200, $250 in cash, an automobile, household furniture and personal property.

Appellant contends that the evidence is conclusive that Maggie Mae White and Will White were in possession of community property, namely, their earnings while they were residing together; that Will White contributed some money for the purchase of the real property in question, and that Maggie Mae White received a portion of the property from her previously deceased husband, Will White, by gift through quitclaim deeds to his interest in the community real property.

[1, 2] The record reveals that the real property in California was acquired by Maggie Mae White by grant deeds to her. Section 164 of the Civil Code provides that: "whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, * * * unless a different intention is expressed in the instrument." As respondent points out, the quitclaim deeds to Maggie Mae White, from her husband, purporting to convey such interest in the property as the said husband may have had, are insufficient to show that Maggie Mae White received a portion of said real property as a gift from her husband. Evidence as to the manner in which the real property in question was purchased is in conflict. The evidence does not conclusively show that any of the property of which Maggie Mae White died possessed was community property of herself and her previously deceased spouse or that any of said property came to decedent from said spouse by gift, descent, devise, or bequest. The question of the character of the property of deceased was one of fact for the determination of the trial court (Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905); and the evidence sustains an inference that all of the property of deceased was her separate property, not derived from her previously deceased spouse by gift, descent, devise or bequest.

The order is affirmed.

YORK, P. J., and WHITE, J., concur.

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64 Cal.App.2d 343

LIEBENGUTH v. PRIESTER.

Civ. 14406.

District Court of Appeal, Second District, Division 2, California.

May 12, 1944.

Rehearing Denied May 26, 1944.

Hearing Denied July 10, 1944.

1. Mortgages 🔑330

The statute prohibiting deficiency judgment on note secured by deed of trust or mortgage upon real property "hereafter executed" in any case in which real property has been sold by mortgagee or trustee under power of sale contained in such mortgage or trust deed did not apply to note and trust deed executed some five years previously. Code Civ.Proc. § 580d.

2. Mortgages 🔑375

In action for balance due on note after applying to principal amount of note the sum obtained at trustee's sale, finding of amount due on note at time of foreclosure sale was sustained by the evidence.

3. Mortgages 🔑377

Superior court rule fixing attorneys' fees in mortgage foreclosure cases did not apply to sale of property pursuant to power of sale contained in deed of trust expressly stating amount to be charged for attorney's fees. Rules of Superior Court of Los Angeles County, rule 12.

4. Attorney and client 🔑167(2)

Where there is properly before a jury an issue regarding the reasonable amount of attorney's fees, the jury may fix the amount without independent testimony on what constitutes a reasonable fee.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by J. F. Liebenguth against Mary Priester to recover balance due on note after applying to principal amount of note the sum obtained at a trustee's sale held pursuant to power of sale in trust deed executed as security for such loan. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Edmund Nelson and John E. Walter, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff, after trial before a jury, in an action to recover the balance due upon a promissory note after applying to the principal amount of the note the sum obtained at a trustee's sale held pursuant to the power of sale contained in a trust deed executed as security for the note, defendant appeals.

The essential facts are these:

May 15, 1936, defendant executed and delivered to plaintiff's assignor a promissory note in the principal sum of $95,850 which contained a final maturity date of May 15, 1941. This note was secured by a trust deed on certain parcels of land located in Los Angeles County. The note was not paid according to its terms, and on January 2, 1943, the trustee named in the trust deed sold the property described in the trust deed pursuant to the power of sale contained therein for the sum of $50,000. This present suit is for the balance due on the promissory note.

Defendant relies for reversal of the judgment on three propositions which will be stated and answered hereunder seriatim.

First: *Under the provisions of section 580d of the Code of Civil Procedure the trial court erred in entering a judgment upon the verdict in favor of plaintiff.*

This proposition is untenable. Section 580d of the Code of Civil Procedure reads thus:

"No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property *hereafter executed* in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such a mortgage or deed of trust." (Emphasis added.)

[1] This section became effective on March 6, 1941, nearly five years after the note here in question was executed. It is clear that by the use of the words "hereafter executed" in the section, such section does not apply to the note here involved.

Second: *There was not sufficient evidence to sustain the trial court's findings that at the time of the trustee's sale there was due plaintiff the following sums, to wit: (a) principal, $93,531.52; (b) counsel, and other fees, $5,665.61; (c) taxes, $3,332.53; (d) interest, $1,449.58; and (e) posting, publishing, etc., $32.*

[2] This proposition is also untenable. Mr. Eltinge, a witness for plaintiff, testified that at the time of the foreclosure sale there was due on the note for (a) principal, $93,531.52; (b) counsel and other fees, $5,665.61; (c) taxes $3,332.53; (d) interest, $1,449.58; and (e) posting, publishing, etc., $32. This evidence clearly supports the questioned findings.

Third: *The amount of attorney's fees to which plaintiff was entitled was fixed by rule 12* of the Superior Court of Los Angeles County.*

[3] This proposition is likewise without merit. By the very wording of rule 12,

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* Rule 12 reads thus:

"When attorneys' fees are allowed in mortgage foreclosure cases the following percentages shall, unless an additional allowance be made for extraordinary services rendered, be deemed reasonable compensation:

"In default cases: For the first $1000 or part thereof at the rate of ten per cent with a minimum of $75.00; for the next $9000, at the rate of three per cent; for the next $40,000, at the rate of two per cent; for the next $50,000, at the rate of one per cent; and for all above $100,000, at the rate of one-half of one per cent.

"In contested cases or cases required to be set for trial: For the first $1000 or part thereof at the rate of ten per cent, with a minimum of $100; for the next $9000, at the rate of four per cent; for the next $10,000, at the rate of three per cent; for the next $30,000, at the rate of two per cent; for the next $50,000, at the rate of one per cent; and for all above $100,000, at the rate of one-half of one per cent.

"All applications for compensation for extraordinary services rendered in mortgage foreclosure or probate proceedings must be accompanied by an itemized statement of services rendered."

such rule is restricted to the allowance of attorney's fees in mortgage foreclosure cases. The rule does not apply to the sale of property pursuant to a power of sale contained in a deed of trust. In the instant case the amount to be charged for attorney's fees was expressly set forth in the deed of trust. The deed of trust fixed five per cent of the amount remaining unpaid and secured by the trust deed as the sum to be allowed for attorney's fees. It was therefore proper to include as attorney's fees the amount computed on the basis prescribed in the trust deed.

[4] It is further to be noted that when, as in the present case, there is properly before a jury an issue regarding the reasonable amount of attorney's fees, the jury may fix the amount of such fees without independent testimony as to how much constitutes a reasonable fee. (Kirk v. Culley, 202 Cal. 501, 509, 261 P. 994; Spencer v. Collins, 156 Cal. 298, 307, 104 P. 320, 20 Ann.Cas. 49; Mitchell v. Towne, 31 Cal.App.2d 259, 266, 87 P.2d 908.)

Since no errors appear in the record, the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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64 Cal.App.2d 355

LAHERTY et al. v. CONNELL et ux.

No. 12598.

District Court of Appeal, First District,
Division 1, California.

May 15, 1944.

1. Appeal and error 🔑989

Where sufficiency of evidence to support trial court's finding is questioned, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, that supports the finding.

2. Appeal and error 🔑996

Where two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

3. Deeds 🔑211(1, 4)

Evidence supported judgment setting aside deeds executed shortly before death by 82-year-old grantor to his son and son's wife when grantor was suffering from incurable cancer and was living with grantees, on grounds of incapacity and undue influence.

4. Deeds 🔑196(3)

In suit to set aside deeds from father to son and son's wife, evidence that father executed deeds while 82 years old, while suffering from incurable cancer, and while living with grantees, established confidential relationship casting burden of proof on grantees.

5. Deeds 🔑70(6), 72(3)

Where confidential relationship exists between grantor and grantee, lack of independent legal advice to grantee is of some importance but is not conclusive as to fraud and undue influence.

6. Appeal and error 🔑994(3)

In suit to set aside deeds for incapacity and undue influence, credibility of witnesses was for trial judge.

7. Cancellation of Instruments 🔑60

A judgment canceling deeds from father to son and son's wife, and stating that grantees had no title or interest in realty but that title was vested in father on his death and that grantees were enjoined from claiming any interest in realty under deeds, was not too broad and did not prevent grantees from claiming as legatees.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Suit by Bessie Laherty and others against Joseph J. Connell and wife to set aside certain deeds. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Lloyd J. Cosgrove, of San Francisco, for appellants.

Joseph F. Leonard, of San Francisco, for respondents.

PETERS, Presiding Justice.

Bessie Laherty, Mary Dalpino and William Connell, three of the children of James Connell, brought this action against their brother, Joseph J. Connell, and his wife, alleging that two deeds executed by James Connell shortly before his death, and naming defendants as grantees, had been executed as a result of the undue influence of defendants and while the grantor was mentally incompetent. The trial court entered judgment setting aside the deeds and restoring the real property involved to the estate of the grantor. Defendants appeal, urging that the evidence is insufficient to support the findings, and that, in any event, the relief granted by the judgment is in excess of the relief to which plaintiffs are rightfully entitled.

[1, 2] The appellants, by emphasizing the evidence produced by them, and by discounting or disregarding some of the evidence produced by respondents, make a quite persuasive showing that the evidence is insufficient, as a matter of law, to support the findings. In order to prevail on this ground, the appellants must demonstrate that there is no material, credible evidence or no reasonable inference from the evidence to support the challenged findings. As was stated in the frequently cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184: "* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted" that supports the findings, and that when "two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." See also Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, 73 P.2d 217; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660; In re Estate of Bristol, 23 Cal.2d —, 143 P.2d 689.

Keeping these fundamental rules in mind, and resolving all material conflicts in favor of respondents, the evidence most favorable to them shows the following: The deeds of gift by which the two parcels of realty were conveyed to appellants, and by which, after the death of the grantor, it was discovered he had thus conveyed away his entire estate, were executed on October 30, 1941. At that time the grantor was 82 years of age, and was suffering from an advanced incurable cancer of the bladder, from which he died on November 16, 1941.

For the major portion of ten years prior to his death, James Connell lived with one or the other of his children. His wife had died in 1931. From July, 1931, to May, 1940, except for a two year period when he lived alone, he stayed with his daughter, the respondent Bessie Laherty. In 1940, because his failing health required more care than Mrs. Laherty could give him, Connell went to live with his other daughter, Mary Dalpino, with whom he lived until October 29, 1941. On that day Joseph Connell removed his father to his home. He remained with Joseph until November 10, 1941, when he was taken to the hospital, where he died six days later.

Prior to his removal to the home of Joseph, the father was friendly toward all four of his children. To them and others he frequently expressed an intention to leave all his property to them share and share alike. He not only expressed this intent but took active steps to carry it out. In 1938, he drafted a will leaving everything of which he died possessed equally to the four children. This will was unrevoked at the time of his death, and has been admitted to probate. In 1939 he sold a piece of property for which he received a substantial sum in cash. He divided nearly all of the proceeds among his four children. Although there is some evidence that the division was not exactly equal, the evidence shows that at that time each of the children received about $1600. He had joint tenancy bank accounts with Joseph, Mary and Bessie in varying amounts, but he equalized this with William by selling him a piece of property for less than its actual value.

Until about May of 1941, James Connell, considering his age, was in reasonably good health and mentally alert. About May, or shortly thereafter, he began to require constant medical care. His condition grew progressively worse. Bessie Laherty testified that after her father left her home to live with Mary, she saw him almost daily; that on several occasions she had heard appellant, Joseph Connell, attempt to undermine his brother William in the affections of James Connell; that starting about May, 1941, her father became quite ill and grew progressively worse; that he became very feeble and could not walk without assistance; that his hearing was very bad; that he had to be assisted to the bathroom; that he wouldn't talk very much; that his memory "wasn't so good"; that appellant Joseph Connell, for the six months period prior to his father's death, attempted to handle and direct his father; that by October 29, 1941, when Joseph removed his father to his home, the father's condition was "very bad"; that she didn't see her father during the few days he stayed with Joseph, but that she did see him daily after he entered the hospital; that during that period he was under the influence of opiates; that while in the hospital her father was too sick to engage in conversation.

A friend of the family, Anthony Malarkey, testified that he saw the deceased frequently during the last six months of his life; that he was a "very sick man"; that he had to be helped to bed; that he only spoke a few words.

Jack Dalpino, husband of Mary Dalpino, testified that about six weeks before his death James Connell became very sick and weak; that for two months before James was removed to the home of Joseph the doctor would call every day, and sometimes twice daily; that while James was staying with the Dalpinos, Joseph would sometimes tell his sister Mary to go out of the room so that he, Joseph, could be alone with his father; that his wife, Mary, had to feed, bathe and put her father to bed; that the day before Joseph took his father away from the Dalpino home Joseph and Mary got into an argument over the fact that James gave Joseph $150; that at that time James was so sick "he didn't know at that time whether he was coming or going."

William Connell testified that his father frequently stated to him and the other children that "if anything happened to him he wanted it [his property] divided equally" among the children; that in 1938, at his father's request, he took him to a notary public who drafted a will for him. He also testified that he took his father to the hospital on November 10, 1941; that on that day he was "a very, very sick man"; that he couldn't walk or talk or sit upright in the car.

Mary Dalpino corroborated her sister Bessie as to most of her testimony. She also testified that about May, 1941, her father began to pass blood in his urine and grew progressively worse; that Joseph would visit James at her house and order her out of the room in order to be left alone with their father; that in her presence Joseph would frequently disparage brother William to their father by accusing William and his wife of being spendthrifts; that her father frequently stated he wanted his property to be divided equally among the children; that by September, 1941, her father's condition was so bad that he no longer attended church which he used to do daily; that by October he was so ill he couldn't read his own writing and was weeping continuously; that by that time his mental condition was failing; that the night before her father left her home she and Joseph got into a dispute over $150 that James gave Joseph; that the next morning (October 29, 1941) Joseph arrived at her home at 6:15 a. m. and shaved her father and started to remove his clothes from the house; that she begged her father not to leave and Joseph threatened her with bodily harm if she interfered; that her father paid no attention to her; that he acted "just like he was in a stupor"; that Joseph had to assist the old man down the stairs; that she next saw him in the hospital; that he was then in a "terrible condition" and grew worse until his death.

The hospital record shows the following entries made upon entrance to the hospital: "Examination unsatisfactory because of lack of cooperation * * * senility."

As opposed to this testimony, Joseph testified that while his father was at his home he was quite active; that he walked around the house unassisted and dressed and bathed himself; that his father asked to come to live with him because Mary had protested over the fact that the father had given Joseph $150; that on the morning of October 30, 1941, his father gave him two deeds containing descriptions of the properties here in question, and told Joseph to have deeds to the property made out in his and his wife's names; that he protested, but his father told him he wanted him to have the properties; that the father's health and physical condition was then "very good," and his "mental condition was perfect"; that for some years he had acted as his father's business advisor and associate, and counseled and advised him, but his father acted on his own judgment; that he didn't suggest to his father that he should get a lawyer; that he took the two old deeds to a notary public whom he knew and who had an office on his "beat" (Joseph was a police officer); that he told the notary to make out the deeds and to bring them out to the house because his father was unable to come in; that he paid nothing of value for the properties; that he brought the notary out to the house and was present while the notary supervised their execution; that his father read them and the notary asked him if that was his wish, and his father replied affirmatively; that the notary handed the signed deeds, after acknowledging the signature, to his father and his father handed them to him stating "I want you and your wife to have this property."

The notary corroborated Joseph in most respects, and testified that James, Joseph and Joseph's wife were present while the deal was consummated. Joseph's wife, although a party to this proceeding, was not called as a witness to explain what took place at the time of the execution of the deeds, nor was her absence explained. The notary further testified that the old man seemed to know what he was doing, and looked in good health.

Several of the attending physicians were called. They disclosed that James was suffering from an extensive and incurable cancer of the bladder. They gave it as their opinion that around the time of the execution of the deeds, considering the age of James, he was essentially normal and was mentally sound.

On this testimony the trial court found that "on October 30, 1941, decedent James Connell was of the age of approximately eighty-two (82) years; that he was suffering from incurable cancer and in a weak and debilitated condition as a result of the ravages of said disease; that while in such condition he was in a condition, both mental and physical, to be easily influenced and imposed upon by designing and artful persons, and in particular, those in whom he reposed trust and confidence; that he was unable to realize the objects of his bounty, the nature and extent of his property, and to properly care for the same"; that Joseph "was a man of strong and aggressive disposition and of a dominating and controlling nature and personality"; that Joseph removed decedent to his home against the will of decedent; that "defendants, after getting decedent into their home, gained and exerted such an influence over him so as to render him submissive and subject to their will and desires, and they were enabled to and did persuade decedent to transfer said property by said alleged deeds, contrary to the will and wish of said decedent"; that the defendants secured the conveyances "by the use of undue influence over him and by an abuse of the confidence reposed in them by decedent and by the real and apparent authority and control exerted over decedent by them and the fiduciary relationship existing between decedent and his son, Joseph Connell and thereby imposed upon and obtained an unfair advantage over decedent"; that the execution of the deeds was "not the free and voluntary act of decedent," but that such execution "was caused and procured by and through the unfair advantage taken of decedent by defendants and the undue influence exerted over decedent by defendants and by and through an abuse of the trust and confidence reposed by decedent in said Joseph Connell and the unlawful authority exercised over the will and mind of decedent by defendants"; that when the deeds were executed "decedent was not of sufficient mental or physical strength to resist the influence, pressure and importunity exercised over him by defendants" and the deeds were secured without consideration and without decedent having any independent advice. The court also found that on October 30, 1941, James Connell was "mentally incapacitated from executing said documents."

[3, 4] The above summarized evidence, and the reasonable inferences therefrom, support these findings. The evidence shows a man of advanced age suffering from an incurable disease that was sapping his strength. He was physically and mentally in a condition so that undue influence could undoubtedly be exercised, particularly by a son who for years had counseled and advised him. The trial court was justified in finding, if in truth it was not compelled to find, that a confidential relationship existed between Joseph and his father. **Hatch v. Penzner**, 44 Cal.App.2d 874, 113 P.2d 295; Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336; Mead v. Mead, 41 Cal.App. 280, 182 P. 761; Forman v. Goldberg, 42 Cal.App.2d 308, 108 P.2d 983; Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31. This throws on the beneficiary of the transaction the burden of

showing fairness in the transaction. Campbell v. Genshlea, supra; Nobles v. Hutton, 7 Cal.App. 14, 93 P. 289; Piercy v. Piercy, 18 Cal.App. 751, 124 P. 561; Payne v. Payne, 12 Cal.App. 251, 107 P. 148; Myrick v. Bruetsch, 13 Cal.App.2d 219, 56 P.2d 591. The fact that there was no independent legal advice is of some importance. Nobles v. Hutton, supra; Myrick v. Bruetsch, supra; Fowler v. Enriquez, 56 Cal.App. 107, 204 P. 854.

[5, 6] Appellants cite a number of cases holding that the question of whether or not the grantor had independent legal advice is immaterial when the deed is made freely, voluntarily and with a full understanding of all the pertinent facts. Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332; Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910; Creason v. Creason, 123 Cal.App. 455, 11 P.2d 451; Best v. Paul, 101 Cal. App. 497, 281 P. 1089; Walker v. Smith, 58 Cal.App. 145, 208 P. 157; Broaddus v. James, 13 Cal.App. 464, 110 P. 158. Those cases undoubtedly state the law correctly. The point is that in all six cases the trier of the facts had expressly or impliedly found that the deeds there involved had been executed freely, voluntarily, and with a full understanding of all the facts. In each case the court held that the evidence supported this finding and affirmed the judgments for defendants. The lack of independent advice, even where there is a confidential relationship, does not conclusively establish fraud and undue influence. But here the trial court found, and the finding is based on the evidence and reasonable inferences therefrom, that the deeds were not executed freely, voluntarily and with a full understanding of all the facts. In such event, the lack of independent advice, when coupled with the existence of the confidential relationship, the age of the grantor, his physical and mental condition, under the cases above cited, raised a presumption of fraud and undue influence sufficient to cast the burden on the grantees. Appellants contend that they sustained the burden by the testimony of Joseph Connell and the notary. The trial judge was not required to believe, and, as his findings indicate, did not believe, these witnesses. Their credibility was for the trial judge. Security-First Nat. Bank v. Bruder, 44 Cal.App.2d 767, 113 P.2d 3. The respondents could not prove what happened when the deeds were executed. But they did prove the facts that threw the burden upon appellants to explain and justify the transaction. Whether they satisfied that burden was a question exclusively for the trial court.

[7] Appellants also contend that the judgment is too broad. The judgment sets aside, cancels and annuls the deeds which form the basis of appellants' claims, and then states "that the claims of said defendants, and each of them, and all who claim title under them or either of them, in and to either or both of said parcels of real property are without any right whatsoever, and defendants have no right, title or interest in, upon or to said parcels of real property; that the title to said parcels of real property was vested in James Connell at the time of his death and defendants and all persons claiming under them are debarred and enjoined from claiming or asserting any estate, right, title or interest in said parcels of real property under or by virtue of said two purported deeds." The appellants express the fear that the portion of the judgment first above quoted is so broad as to prevent them from claiming their one-fourth interest in the property by reason of the provisions of the will of James Connell. The judgment cannot reasonably be so interpreted. When read as a whole it simply cancelled and annulled the two deeds, and decreed that appellants have no claim or right to the property by virtue of these deeds. It then recited that the properties were vested in James Connell at the time of his death and enjoined all persons claiming under or through the deeds from claiming any title or interest under the deeds. It is obvious, and respondents so concede, that any claim that Joseph Connell may have as a legatee or heir of his father, is not affected by the judgment.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

64 Cal.App.2d 412

DE CAMP v. FRESHWATER.

Civ. 14299.

District Court of Appeal, Second District, Division 2, California.

May 19, 1944.

1. Attorney and client ⚿166(3)

In action to recover reasonable value of legal services, evidence sustained finding that attorney's fee was contingent upon receipt of funds from client's debtor and that such funds had not been received.

2. Attorney and client ⚿76(1)

Client's insistence that attorney respect terms of settlement agreement between client and his debtor, including provision for stay of execution on judgment against debtor, did not effect a discharge of attorney.

3. Attorney and client ⚿166(4)

Evidence sustained finding that attorney was not discharged by any action of client so as to entitle attorney to recover reasonable value of legal services rendered on contingent fee basis though contingency had not happened.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by O. B. DeCamp against Carl Freshwater to recover the reasonable value of legal services rendered at the special instance and request of defendant. Judgment for defendant, and plaintiff appeals.

Judgment affirmed.

Samuel J. Crawford, of Santa Monica, for appellant.

O'Melveny & Myers and Lauren M. Wright, all of Los Angeles, for respondent.

W. J. WOOD, Justice.

In this action plaintiff seeks a judgment in the sum of $5400, alleged to be the reasonable value of legal services rendered at the special instance and request of defendant. The trial court found that, in accordance with the allegations of defendant's answer, plaintiff's fee was to be contingent upon the receipt of funds from Samuel Bronstein and that such funds had not been received. Plaintiff also claims that he was discharged by defendant and the trial court found against him on this issue. It is contended on this appeal that the evidence does not support these findings.

Following his employment by defendant in November, 1940, plaintiff obtained a judgment on behalf of defendant against Bronstein on a note for $5000. He also acted for defendant in the defense of a suit which had been commenced against him. Defendant paid to plaintiff the sum of $350, which, because of lack of funds, he had borrowed for the purpose. Defendant held another note of Bronstein's in the sum of $20,000. Negotiations were entered into with Bronstein, resulting in a written agreement between defendant and Bronstein settling all of their differences, in which it was stipulated that there would be a stay of execution on the judgment already entered and that Bronstein would pay to defendant twenty percent of "all money earned and received by him from whatever source derived" until the entire sum of $30,000 should be paid.

[1] Plaintiff and defendant had several conversations concerning the payment of fees for plaintiff's services. There is a conflict in the testimony of the parties concerning these conversations. Defendant testified:

"Q. When was the next time that the question of a contingent fee for Mr. DeCamp was discussed after the time you mentioned around April? A. Well, we discussed it off and on and it was not decided upon until the arrangement with Mr. Bronstein was worked out.

"Q. And at that time what was said between you and Mr. DeCamp? A. Well, Mr. DeCamp wanted 20 percent of all moneys collected on the $30,000.00, and I said we had a judgment note of $6000.00, and I felt he should not be entitled to twenty percent on that, so we reached a compromise of ten percent on the $6000.00, and twenty percent on the $30,000.00."

He further testified that he asked plaintiff to confirm his understanding of the agreement by letter and that plaintiff sent him a letter, the material portion of which being as follows: "This will confirm our oral understanding with reference to my fee in the Matter of Freshwater v. Bronston et al. I am to receive 20% of any money paid to Samuel Bronston up to $24,000, and 10% of any money over and above the $24,000, the total fee, based on the settlement, will amount to $5,400, with interest as and when paid by Bronston and received by you." Plaintiff argues that since the letter in question was not signed by defendant it was not binding upon the parties. It is noteworthy that plaintiff did not send with his letter a copy to be signed by defendant and returned to him. We are satisfied that the evidence is ample to sustain the trial court's finding that plaintiff's fee was to be contingent upon payment by Bronstein.

Plaintiff further contends that if it be assumed that his employment was on a contingent basis, nevertheless he is entitled to demand the reasonable value of his services because of the fact that, as claimed, he was wrongfully discharged. He bases his contention upon the fact that in March, 1942, he was told on the telephone by Bronstein that he, Bronstein, was dealing directly with defendant; that he then called up defendant, who told him that he had had a conference with Bronstein and that "he was going to handle the collection of the money from there on out"; and that defendant told him that he was going to use his own judgment as to what should be done.

[2] It also appears in evidence that plaintiff had previously insisted on having an execution issued against Bronstein and had proposed that another action be commenced against Bronstein. Defendant insisted that these moves "would keep us all from getting any money". Defendant testified: "I did not talk to Mr. DeCamp on the phone for quite a while, and he called one night and repeated that he felt Bronstein should be sued and I listened to him. Finally he said: 'I am going to levy on that execution against Bronstein', and I said, 'You are going to do what?' He said: 'I am going to levy on that execution', and I said, 'You are not going to do it unless I instruct you to', and he said, 'That is just what I wanted you to say', and banged up the receiver". The moves proposed by plaintiff would have been in violation of the settlement agreement which defendant had made with Bronstein. Defendant did not effect a discharge of plaintiff as his counsel by insisting that the terms of the agreement made with his debtor be respected.

[3] No substitution of attorney was sought or filed in the action in which judgment had been entered against Bronstein. We find nothing in the record which requires a finding by the trial court that plaintiff was prevented from rendering his services in accordance with the agreement he had made with defendant or that he was discharged by any action of defendant.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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64 Cal.App.2d 397

SEEGER et al. v. ODELL et al.

Civ. 14382.

District Court of Appeal, Second District, Division 1, California.

May 19, 1944.

Rehearing Denied June 9, 1944.

Hearing Denied July 17, 1944.

1. Appeal and error 🔑989

When judgment appealed from is assailed as unsupported by evidence, appellate tribunal can only determine whether record contains any substantial evidence supporting trial court's finding on ultimate issue involved.

2. Appeal and error 🔑1010(1)

The triers of fact are judges of effect and value of evidence addressed to them, except in case of evidence declared by law to be conclusive proof of fact to which it relates. Code Civ.Proc. §§ 1847, 2061; Const. art. 6, § 19.

3. Appeal and error 🔑1010(1)

An appellate court may review evidence only when it is insufficient on its face to support trial court's finding on ultimate issue involved.

4. Appeal and error 🔑1008(1)

The fact that testimony in respondents' behalf discloses unusual circumstances does not justify review thereof by appellate court, which does not sit as jury to determine fact issues, witnesses' credibility, or weight of their testimony.

5. Mines and minerals 🔑54½, 58

In suit to cancel oil and gas lease, set aside mortgage foreclosure sale, obtain accounting of moneys received by defendants as royalties, and quiet plaintiffs' title to mortgaged land, evidence sustained finding against plaintiffs on issue of falsity of defendants' claimed representations that plaintiffs had lost all their rights, title, and interest in land by execution sale thereof.

6. Appeal and error ⚷931(1)

On appeal, every intendment is in favor of trial court's finding on question of respondents' fraud.

7. Appeal and error ⚷996

The appellate court cannot disturb trial court's findings, warranted by testimony in record, with inferences fairly deducible therefrom.

8. Witnesses ⚷206, 219(3)

In suit to cancel oil and gas lease, testimony on cross-examination of attorney, who represented plaintiffs in execution of lease, as to such attorney's letter, stating purposes for which he was employed by plaintiffs, was properly admitted over objection that communication was privileged, in view of discussion of such testimony in presence of others than plaintiffs and previous testimony of plaintiffs and such attorney as to subject matter of letter. Code Civ.Proc. § 1881, subd. 2.

9. Witnesses ⚷219(3)

Testimony as to attorney's letter, containing statements respecting what was said and done during conference between parties to action and their attorneys, was properly admitted for purpose of refreshing writer's memory as witness and impeaching his testimony on direct examination as against objection that letter was privileged communication, in view of open, public discussion of letter and testimony as to subject matter thereof while writer was testifying. Code Civ.Proc. § 1881, subd. 2.

◆

Appeal from Superior Court, Orange County; Kenneth Morrison, Judge.

Action by Nettie L. Seeger and husband against A. J. Odell and others to cancel an oil and gas lease, set aside a mortgage foreclosure sale, obtain accounting of moneys received by defendants as royalties, and quiet plaintiffs' title to the mortgaged land. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Daniel A. Knapp, of Los Angeles, for appellants.

Hardy & Hardy and Carlos S. Hardy, all of Los Angeles, for respondent W. I. Titus, administrator, estate of William G. McAdoo.

Merrill Brown, of Los Angeles, for respondent R. T. Colter.

Louis N. Whealton, of Long Beach, and O. A. Jacobs, of Santa Ana, for respondent A. J. Odell.

WHITE, Justice.

This is an appeal by plaintiffs from an adverse judgment rendered by the Superior Court of Orange County sitting without a jury. This is the second appeal taken in the case. Following the rendition of a judgment on the pleadings in favor of defendants an appeal was taken to the Supreme Court resulting in the reversal of said judgment. Seeger v. Odell, 18 Cal. 2d 409, 115 P.2d 977, 136 A.L.R. 1291. For an epitome and analysis of plaintiff's second amended complaint, reference is hereby made to the foregoing decision of the Supreme Court. The nature of this action may be briefly summarized by saying that it is one by which plaintiffs seek to cancel an oil and gas lease; to set aside a foreclosure sale; to obtain an accounting of moneys allegedly received by defendants by way of royalties; and to quiet title in plaintiffs to the land in question, subject to such rights as may have been acquired by innocent and bona fide sub-lessees.

By their answers, defendants pleaded general denials and set up separate defenses of estoppel, waiver, laches, the statute of limitations, non-joinder, and that plaintiffs were not the real parties in interest.

Because of its relevance to and bearing upon the case at bar, it seems advisable to here make mention of other litigation between the parties herein, because it relates to the land here involved which is sought to be recovered by plaintiffs.

In that regard the record reveals that in 1926 plaintiffs herein acquired title to a piece of realty 25 x 50 feet, located in the oil fields at Huntington Beach, California. On August 26, 1926, they executed an oil lease on the property to defendants herein McAdoo and Colter. Plaintiffs' land was part of two residential lots numbered 19 and 21, and on September 28, 1926, the owners of the balance of the two lots, people named Wooton, executed a similar lease on their land to the above named defendants.

At the time of the execution of this lease with McAdoo and Colter by the Seegers, the former paid an outstanding obligation in the sum of $2255, which was owed by plaintiffs and for which their land was security. In consideration of this payment, McAdoo and Colter received from the Seegers a note and mortgage on the land.

Both leases, with the Seegers and the Wootons, provided that they, as lessors, should receive a small royalty from an operating well owned by said defendants nearby. This royalty was to continue until oil was obtained from a well which was to be drilled upon the properties of plaintiffs and the Wootons. There was also contained in the leases a provision whereby the lessees could terminate all of their obligations by a quitclaim deed. On November 20, 1927, said lessees exercised their right of termination and executed a quitclaim deed. So far as plaintiffs herein are concerned, it appears that the royalty payments which were made prior to the date of the quitclaim deed were applied upon plaintiffs' note, which, by that time, had been reduced in the principal sum to $1194.47.

On February 11, 1928, Mr. and Mrs. Seeger and the Wootons filed separate actions against McAdoo and Colter, charging them with fraud in connection with the execution of the aforesaid leases. These two actions were consolidated for trial, which resulted in a judgment for the defendants therein. Upon appeal, a judgment entered as applying to each case was affirmed and a petition for hearing in the Supreme Court was denied. Wooton et al. v. McAdoo et al., 110 Cal.App. 48, 293 P. 694. As a result of this litigation, McAdoo and Colter obtained a cost judgment which was subsequently satisfied by an execution sale of the aforesaid land belonging to the Wootons. The right of redemption was not exercised. This sale assumes importance for the reason that plaintiffs in the instant case claim that the fraud herein consists in the defendants herein representing to them that the execution sale was of their property.

On May 12, 1930, and while the foregoing litigation was still pending, McAdoo and Colter assigned all of their interests in the Seeger note and mortgage to Mary Gibbs, a defendant herein. On May 19, 1930, Mary Gibbs filed a foreclosure action against the Seegers, alleging that they had paid nothing on their note after the above mentioned royalty payments ceased. Mr. and Mrs. Seeger contested this action and again charged fraud. The trial resulted adversely to plaintiffs and such adverse judgment was affirmed by the District Court of Appeal, a hearing being denied in the Supreme Court. Gibbs v. Seeger, 130 Cal.App. 123, 19 P.2d 514.

Upon the going down of the remittitur in the last named case, foreclosure sale of the Seegers' property was set for August 12, 1933. At such sale, Mary Gibbs bid the full amount of her foreclosure judgment, thereby eliminating a deficiency judgment against Mr. and Mrs. Seeger. There is evidence that such bid was the result of an agreement with the Seegers at the time they executed the lease involved in the instant action, to wit on July 27, 1933. Plaintiffs did not redeem this property and it is the foreclosure sale in regard thereto which took place August 12, 1933, that they seek to set aside in this action.

On July 27, 1933, Mary Gibbs, concededly acting as agent for defendants McAdoo and Colter, together with plaintiffs herein, executed an oil and gas lease of plaintiffs' property to defendant Odell. This lease is the usual and ordinary oil and gas lease, under the terms of which plaintiffs were to receive a royalty interest of 2½ per cent, and Mary Gibbs an interest of 12½ per cent.

On August 1, 1933, defendant Odell assigned his lessee's interest to the Two and One Oil Company Ltd. The last named Company was made a defendant in this action, but, by reason of a stipulation between it and plaintiffs, was not required to present an active defense.

After the assignment of August 1, 1933, drilling was commenced on the land of the Seegers and the Wootons acquired by defendants McAdoo and Colter under the above mentioned execution sale. Oil was obtained and plaintiffs received royalties under the lease of July 27th amounting to $1532.70. In August, 1934, plaintiffs gave all of their royalty payments to one Frances T. Robertson, the sister of plaintiff Nettie L. Seeger, the latter of whom it seems had for many years acted as the agent and advisor of the plaintiffs.

On September 20, 1934, plaintiffs herein, by deed, granted to Frances T. Robertson an undivided one-half of one per cent interest in all mineral substances in the land, and, on the same date, Mrs. Robertson made a similar deed of the same interest to one Verna Castaman.

On October 19, 1934, plaintiffs assigned to S. Seeberg and Hazele M. Seeberg the remaining two per cent of their royalty interest under the lease of July 27, 1933. Because of the claim that none of these interests have been reserved by plaintiffs and further because neither Verna Castaman, the Seebergs, or the successors in interest of either or both of them, if any, were made parties to the present action, it is defendants' contention that plaintiffs herein are not the real parties in interest. On July 17, 1936, plaintiffs herein served upon defendants notice of rescission of the lease of July 27, 1933, and shortly thereafter filed the action with which we are here concerned.

Plaintiffs' cause of action in the case at bar is grounded upon the claims contained in their second amended complaint that at the time of the execution of the oil and gas lease they were "an extremely poor and aged couple"; that prior to such execution of the lease they were cognizant of the cost judgment in the Wooton v. McAdoo action, supra, but were unable to pay it because of "financial reverses". That defendants A. J. Odell and Mary Gibbs represented to plaintiffs that they were friendly with the latter and wanted to help them; that, to that end, said defendants requested plaintiffs to confer with them concerning the property; that at the conference, defendants McAdoo, Colter, Gibbs and Odell were represented by an attorney; that the latter told plaintiffs that, as an attorney, he had superior knowledge of many facts concerning the land and that plaintiffs could rely upon all he had to say; that such attorney further represented that defendants McAdoo and Colter were going to submit to the above mentioned foreclosure sale which had been set for August, 1933, and would not exercise their equity of redemption. According to plaintiffs' contentions, defendants' attorney went on to assure plaintiffs that he and his clients were their friends and would make an unselfish proposal for the purpose of enabling the plaintiffs to receive some return from the land, out of which they would otherwise get nothing. The proposal made by the attorney was that plaintiffs join with defendant Mary Gibbs in a lease of the land to defendant Odell for the purpose of drilling for oil, the understanding being that plaintiffs would receive a specific royalty from the oil produced.

Plaintiffs herein further contend that they believed the representations made by defendants' attorney that their land had been sold at an execution sale to defendants Colter and McAdoo. That solely because of this belief they joined in executing the lease to Odell and refrained from making any attempt to pay the mortgage debt or to exercise their equity of redemption after the foreclosure sale, notwithstanding that, during this period, several persons offered to lease the land from them and to advance sufficient money to cover the mortgage indebtedness. Plaintiffs further contend that after defendant Mary Gibbs bought in the property at the foreclosure sale in August, 1933, defendant Odell took possession under his lease and drilled a well from which he received profits in excess of $100,000. Plaintiffs assert that in truth and in fact no execution had actually been levied on their portion of the land and that the representation that the land had been sold to defendants McAdoo and Colter was false and that the falsity thereof was known to the attorney and his clients; that it was made to induce plaintiffs to refrain from paying the mortgage indebtedness or from exercising their equity of redemption and for the further purpose of inducing them to join in leasing the property to Odell. Plaintiffs alleged that they did not discover the falsity of the representations until May of 1936, and advanced as reasons therefor the fact that the land was situated in a city and county at some distance from the place where plaintiffs resided; that they are both elderly; that neither drove an automobile or possessed one; and that they had no reason to suspect, prior to the last mentioned date, that the representations were false.

[1, 2] It is at once apparent that the gravamen of plaintiffs' cause of action in the instant case is the alleged falsity of the claimed representations made to them by defendants that the former had lost all their right, title and interest in and to the property in question by reason of the execution sale thereof. Upon this issue the court found against plaintiffs, and such finding is attacked upon this appeal as not being supported by the evidence. When a judgment is assailed as being unsupported by the evidence, the power of an appellate tribunal in passing upon that question

begins and ends with the determination whether there is in the record any substantial evidence, contradicted or uncontradicted, to support the ultimate issue involved. Reviewing judges obviously being in no position to determine the credit which should be given to witnesses or to weigh their testimony, the legislature, in accordance with the constitutional mandate (Art. VI, Sec. 19, Constitution of California), has provided that the triers of fact shall be the exclusive judges of the credibility of witnesses (Sec. 1847, C.C.P.), and, except in those instances where it is declared by law that evidence shall be conclusive proof of the fact to which it relates (Sec. 2061, C.C.P.), the triers of fact are the judges of the effect and value of evidence addressed to them.

[3, 4] Only in cases where it may justly be held that upon its face the evidence is insufficient to support the ultimate issue involved may an appellate court review evidence. Manifestly, in such a case, the review is not of a question of fact, but purely one of law. Neither does the fact, as claimed by appellants, that testimony in behalf of respondents discloses circumstances which are unusual, justify review thereof by the appellate court, which does not sit as a jury to determine the issues of fact, the credibility of witnesses, or the weight to be given their testimony.

In the case at bar, appellants' counsel stated to the trial court: "So far as the credibility of witnesses are concerned, the case is directly one line of witnesses contradicted by another."

[5, 6] In connection with the meeting between appellants, their attorney, certain of respondents and the latters' attorney, it is true that both of the appellants and Mrs. Frances T. Robertson testified at the trial that at such conference respondents' attorney told all present, including appellants and their attorney, that title to the property in question had been lost to appellants through the execution sale; that said attorney for respondents was aware of this fact because he personally handled the execution sale for respondents McAdoo and Colter; and that said respondents were, because of their friendly interest in appellants, making the latter a virtual gift of the 2½ per cent royalty interest by permitting them to join in the lease. However, respondents' attorney categorically denied making the foregoing statements, or any representations similar thereto. In this testimony such attorney was corroborated by respondent Odell. Furthermore, appellants' own attorney, testifying as a witness, added verity to the testimony of respondents' attorney when, as a witness, he testified as follows:

"Q. Now, in all fairness, Mr. Webster, did Mr. Neblett say to you, or in your presence to anybody else, the Seegers have lost all interest in this property because of an execution sale and sheriff's deed and they have no interest in this property, or any words to that effect? A. No, he didn't make any such statement as that directly to me.

"Q. Did you hear him make it to anybody else in your presence? A. Not as you put it.

"Q. Well, I said 'to that effect'. A. I would have to answer that 'No'. * * *."

With reference to the above mentioned conference, respondents' attorney testified that the proposition offered by him to appellants and their lawyer was that, if appellants would join in the execution of the lease, they would receive a 2½ per cent royalty and that respondent Mary Gibbs would bid the full amount of her foreclosure judgment at the foreclosure sale, thereby protecting appellants against a deficiency judgment. Also, appellants' attorney, himself, testified that at the conference he asked respondents' attorney "if he would give me some assurance in writing to the effect" that "they would buy the property in for the full amount of the mortgage debt" and "he did give me a writing". Therefore, the conclusion reached by the trial court cannot be said to be without support based upon any rational view of the testimony. Every intendment being in favor of the finding made upon the question of fraud, we are not authorized under the circumstances present to overthrow such finding.

[7] The trial court also found "that it is not true that the plaintiffs were extremely poor, or at all poor, but on the contrary were well able financially to undertake any reasonable inspection of the above described property" and "that neither of the plaintiffs were gullible nor ignorant"; that a few days prior to July 27, 1933, appellants undertook to make an investigation of their interests in the real property in question, and of the desirability of executing the oil and gas lease as pro-

posed by respondent Odell; and for the purpose of such investigation appellants employed an attorney. While these findings may also be said to be based upon conflicting evidence, nevertheless, there is in the record testimony which of itself coupled with inferences fairly deducible therefrom, warranted the trial court in making the findings complained of. Under the familiar rules hereinbefore stated, we cannot, therefore, disturb the conclusion arrived at by the court, who, as a necessary corollary to the rules hereinbefore announced, was authorized, if it felt warranted in so doing, after full and fair consideration thereof, to reject the testimony which might have been contradictory to that given by respondents and to disbelieve the testimony of appellants and Mrs. Robertson given in connection with facts immediately surrounding and leading up to the execution of the lease here in question, in connection with the execution of which appellants' cause of action for fraud and misrepresentation must stand or fall.

It would unduly prolong this opinion to here set forth other findings challenged by appellants, because the foregoing findings are determinative of the ultimate issue involved herein, and consequently the judgment rendered would not be adversely affected by findings made upon other issues which, in the light of the foregoing findings, become subordinate to the main and decisive issue of alleged fraud in connection with the execution of the oil and gas lease here under consideration.

[8] Finally, appellants question the correctness of certain rulings of the trial court on the admissibility of evidence, contending that such adverse rulings were prejudicial to their rights. In this regard, the record discloses that during the cross examination of the attorney who represented appellants in connection with the execution of the lease, a letter was produced, written by said attorney, wherein he stated the purposes for which he was employed by appellants in regard to the execution of said lease. Objection was made to any question in connection with such letter on the ground that the communication was privileged under section 1881, subd. 2, Code of Civil Procedure. In overruling the objection no error was committed by the trial court, for the record clearly indicates that the testimony objected to was, upon other occasions, the subject of discussion in the presence of others than appellants who were the clients of the witness. Furthermore, appellants themselves had testified as to the subject matter referred to in the letter, as had the witness himself on direct examination by appellants' counsel.

[9] Objection was also interposed to a letter written by appellants' attorney on January 1, 1936. This letter contained statements by the attorney respecting what was said in the July, 1933, conference hereinbefore referred to, and which took place in the office of respondents' attorney, and such statements were at variance, it was claimed, with what the writer of the letter testified to as a witness. Reference was made to the letter for the purpose of refreshing the memory of the witness and in an attempt to impeach certain of his testimony given on his direct examination. Objection was made on the ground that the letter was a privileged communication. Sec. 1881, subd. 2, C.C.P. The subject matter of the letter had, however, been openly and publicly discussed and testified to. We perceive no error in the ruling of the trial court permitting the reference to be made to this letter for the purpose of refreshing the recollection and attempting impeachment of the writer thereof as to the matters therein contained which had theretofore been publicized and referred to while the witness was testifying.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

64 Cal.App.2d 420

McCLAIN v. BERCUT-RICHARDS PACKING CO.

Civ. 7014.

District Court of Appeal, Third District, California.

May 19, 1944.

1. Estoppel ⚷52

The office of an "equitable estoppel" is to protect one from a loss which, but for the estoppel, he could not escape, and the vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

2. Estoppel ⚷52

In general, four things are essential to the application of the doctrine of "equitable estoppel": First, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury.

3. Sales ⚷52(5)

In action by seller of pears for balance allegedly due, evidence showed that seller knew what the words "prorate grade" used in contract meant, that he entered into contract with full understanding that it was for fruit of "prorate" and not hail damaged grade; and that the 10 per cent. tolerance mentioned in contract meant that hail damage to the pears which were otherwise to be of No. 1 grade was not to exceed 10 per cent. and that buyer was not estopped to rely upon written contract.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Donald McClain against Bercut-Richards Packing Company to recover balance due for pears sold defendant. From a judgment for defendant, plaintiff appeals.

Judgment affirmed.

Thomas B. Leeper, of Sacramento, for appellant.

Downey, Brand & Seymour and Morgan V. Spicer, all of Sacramento, for respondent.

ADAMS, Presiding Justice.

This is an action to recover a balance alleged to be due to plaintiff for pears sold to defendant during the canning season of 1941. Plaintiff in his complaint alleges that he entered into a contract to sell to defendant what he describes as "hail damaged" pears, at $45 per ton, that defendant paid $45 per ton for a portion of the fruit delivered, but allowed only $38.50 per ton for the balance because same was "hail damaged"; and plaintiff contends, first, that defendant was bound by the contract to pay $45 per ton for all the pears delivered, and, second, that it is estopped from claiming that the contract provided that the pears should be free from "hail damage". The contract, copy of which is attached to the complaint as an exhibit, was the standard form adopted by the Canners League of California and recites that the seller has sold, and the buyer has bought, "upon the terms and conditions expressed below and on the back hereof, the quantity, quality and variety hereinafter specified of fruit * * *" 250 tons more or less, Bartlett Pears, at $45 per ton, inches in diameter not less than 2⅜, "10% Tolerance Prorate Grade." On the back of the contract appears what plaintiff refers to as a "hidden" clause, which provides that: "1. Seller shall deliver, at point of delivery, promptly after harvesting, all fruit covered by this contract of good shape, quality, and in good condition for canning, at the state of maturity Buyer may require, free from doubles, worms, scab, frost rings, hail or rain damage, red streaks in flesh, windfalls, split pits, hard-end, black-end, mildew, decay, water berries, Spanish measles, sunburn, cracks, gum, parasites, fungi, bruises, spray residue, or other imperfections, and all fruit shall be of a color and texture suitable for canning into Choice grade as such Choice grade is generally understood in the canning trade. * * * (d) No. 1 Pears shall be 2⅜ inches or more in diameter, shall produce two perfect peeled halves and shall be of a length not less than 1¼ times the diameter of the Pear."

Plaintiff's theory appears to be that the foregoing contract was one for the sale of pears of a "Hail Damaged Grade", and not "Prorate Grade" as recited therein. He alleged that defendant is estopped from denying this or from relying upon the so-called hidden clause in the contract because it knew at the time the contract was entered into that plaintiff's pears were damaged by hail, that the contract form was furnished by defendant, that the provision that the pears should be free from hail damage was printed on the back of the contract in very small type and was not called to plaintiff's attention, that plaintiff did not know that it formed a part of said contract, that defendant led plaintiff to believe that no such provision was in the contract, that just prior to the execution of the contract plaintiff and defendant inspected plaintiff's orchards and defendant was informed that hail damaged pears were the only pears that plaintiff had to sell, that defendant made a thorough inspection of said crops and commented on the fact that the pears were badly hail damaged and that in view of said hail damage he would pay but $45 per ton for same; also that at the time of the execution of the contract defendant told plaintiff that they were governed by the prorate regulations relating to Bartlett pears for the year 1941 which governed the kind of hail damaged pears that could be delivered to the canneries, and that said regulations and the words "10% Tolerance Prorate Grade" meant that defendant was buying plaintiff's hail damaged pears that could pass inspection. Plaintiff then alleged that he believed the said representation of defendant and was induced thereby to sign the contract; that he could have sold said pears to other parties for $45 a ton, and that he would not have entered into said contract with defendant if defendant had not led him to believe that hail damaged pears was the subject of said contract; also that the contract was executed under and pursuant to the Agricultural Prorate Act, and the 1941 grade regulations on canning Bartlett pears as approved by the authorities of the State Department of Agriculture, and that all of the provisions of said act and said regulations were by law made a part of said contract.

Defendant answered and admitted the execution of the contract, but alleged that the Department of Agriculture had provided two grades of pears which could be sold to canneries, said grades being No. 1 or "Prorate Grade", and "Hail Damaged Grade"; that No. 1 or prorate grade was the grade contracted to be sold by plaintiff, but that the principal grade delivered by plaintiff was the hail damaged grade. It admitted that it had received pears of hail damaged grade, known by it and by plaintiff to be such, alleged that it had paid $45 a ton for such pears of prorate grade as had been delivered to it, and that by subsequent agreement between it and plaintiff it had agreed to pay $38.50 per ton for the pears of hail damaged grade delivered to it. It denied the matters alleged by plaintiff to constitute estoppel.

Trial was had before the court sitting without a jury, and at the conclusion of plaintiff's testimony a motion by defendant for a nonsuit was granted. A judgment dismissing the action followed, and this appeal was taken therefrom.

The record before us shows that plaintiff, in support of the allegations of his complaint, called Charles T. McAllister, agent for defendant, who had negotiated with plaintiff for the purchase of the pears and signed the contract for defendant, and examined him as an adverse witness. He also testified in his own behalf. The testimony of plaintiff does not differ materially from that of McAllister. Both stated that prior to the execution of the contract they had inspected plaintiff's orchards and noted hail damage to the fruit, and it is obvious from their testimony that what was purchased by defendant was fruit that had been, to some extent at least, damaged by hail. Neither testified, however, that the contract covered or was intended to cover pears of the "Hail Damaged Grade." On the contrary, both testified that the language of the contract, "10% Tolerance Prorate Grade," meant that the pears were to be No. 1 or Grade A pears with a tolerance or allowance of ten per cent for damage by hail. Plaintiff himself stated:

"Well, he made the contract out and before I signed it I said, 'How about this hail damage?' He said, 'The 10 per cent tolerance takes care of that.' He said, 'That's what the Prorate Board set that up for so that you could ship that hail damage.'

* * * * *

"Q. Now, I will show you the contract here: Here is the contract you signed.

Now what portion were you referring to a moment ago—A. (Interposing) This 10 per cent tolerance.

"Q. What was said, what did he tell you about that? A. That that took care of the hail damage grade. In the past all contracts had been made out prorate grade, which is Number One, and this 10 per cent in addition to the prorate grade took care of that.

"The Court: * * * Did I understand you to say that in the past those contracts provided for Grade A?

"Witness: Prorate grade.

"The Court: And later on they liberalized the contract by allowing a 10 per cent tolerance, is that what you said? A. This is the Prorate Board. You see the canneries cannot turn around and buy a cull, according to the Prorate; this set up by the State; they have to buy the grade set up by the Board.

"Mr. Leeper: Q. And what was this change made in 1941? A. Well, due to the extensive hail damage throughout, not only on this river, why they changed this law to take in hail damage so that a limited amount of pears not too badly hail damaged could be canned.

* * * * *

"Mr. Leeper: The 10 per cent tolerance let them buy up the hail marked pears.

* * * * *

"[Witness]: A. Well, just at the time of the contract he told me what the 10 per cent included, that it was to get the hail damaged pears through the grade.

* * * * *

"A. He told me that the 10 per cent would take care of this hail damage grade and then he went on to explain the depth that would be allowed and how many hail marks per pear."

Mr. McAllister testified that he and plaintiff figured that the ten per cent tolerance on the Prorate Grade would take care of any hail damage plaintiff had, but that it ran heavier than ten per cent—which appears to be conceded by plaintiff himself.

We find nothing in the testimony that gives any significance to the so-called hidden clause in the contract. There is no evidence that the reduced price paid for a portion of the fruit was due to the provision in the clause that fruit should be free from hail damage, and, we might add, that plaintiff did not testify, as alleged in his complaint, that he was in ignorance of this provision or that defendant led him to believe that there was no such provision therein. It sufficiently appears that both parties knew that plaintiff's pears had suffered from damage by hail but that they both believed or thought that, with the ten per cent tolerance allowed for such damage, the fruit would measure up to the Number One, Grade A, or "Prorate Grade" provided in the contract.

[1, 2] Nor does the evidence show facts sufficient to constitute an estoppel. It is said in 10 Cal.Jur., at pages 626, 627: "The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape. The vital principle of equitable estoppel, it has been said, is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position involves fraud and falsehood, and the law abhors both. In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury."

There is no evidence here that plaintiff was led by any language or conduct of defendant to do something which he would not otherwise have done, that defendant by any act or omission, intentionally and deliberately, or at all, led plaintiff to believe anything to be true which he thereafter attempted to falsify, or that plaintiff was ignorant of the true state of affairs. Plaintiff did not testify that he could have sold his pears to anyone else for a better price than was paid him by defendant, or that the price paid for the fruit damaged in excess of the ten per cent tolerance was not a fair price therefor. He did state that prior to his negotiations with McAllister he had had an offer of $42.50 per ton for the pears from one orchard, but that defendant's offer was to buy the fruit from all of his land. He did not testify that defendant represented to him that his pears would pass inspection by the inspectors for the state in excess of the ten per cent tolerance, or that he would not have entered into the contract if he had not been led to believe that he was selling pears of the "Hail Damaged Grade" instead of Prorate Grade with ten per cent tolerance.

[3] We are satisfied that giving plaintiff's evidence its fullest effect it shows that he knew what the words "Prorate Grade" used in the contract meant, that he entered into the contract with a full understanding that it was for fruit of Prorate and not Hail Damaged Grade and that the "10% tolerance" meant that hail damage to the pears which were otherwise to be of No. 1 grade was not to exceed ten per cent.

Our attention is called to nothing in the Agricultural Prorate Act, nor do we find anything in the Grade Regulations of 1941 approved by the Agricultural Prorate Advisory Committee and the Director of Agriculture, which aids plaintiff. Those regulations provided that the committee *might* limit the delivery of Bartlett pears for canning by excluding those of quality below the following specifications, towit: "Pears which are hand picked (1), firm (2), fairly well formed (3), free from scald, hard end, black end, internal break down, decay, worms and worm-holes, and from damage (4) caused by broken skins, limbrubs, sprayburn, sunburn, scab, russeting, bruises, hail, frost, drought spot, disease, insects or by mechanical or other means." They further provided that "'Damage' means any injury or defect which materially affects the canning quality of the fruit. Pears showing surface blemishes shall be considered damaged when the injury cannot be completely removed in the ordinary process of paring for commercial use. Peeling shall not be over 1/8 of an inch in thickness. Due to the marking of pears by hail in 1941, pears so damaged *shall be permitted to be delivered for canning purposes during the 1941 season,* provided such pears shall not have more than three hail marks one-eighth of an inch or more in depth, and of these not more than one hail mark may be more than one-eighth of an inch but not more than three-sixteenths of an inch in depth, and provided also that such pears be offered for inspection in separate lots and be certified as hail damage pears, and otherwise meet the grade requirements of the Program. * * * In order to allow for variations incident to proper grading and handling, not more than 10%, by weight, of the pears may be below the requirements of the specifications. * * *" (Italics ours.)

Apparently the contract in controversy was drawn to conform to those provisions, but the hail damage to plaintiff's pears was found, on inspection, to exceed the ten per cent allowance for variation.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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64 Cal.App.2d 296

NEWMAN v. HYE et al.

Civ. 14288.

District Court of Appeal, Second District, Division 1, California.

May 9, 1944.

1. Taxation 🔑733

Where one purchasing a street bond describing certain lot bought the same lot for taxes, whether merger of estates and title resulted so as to preclude foreclosure under the bond was question of intention, mere purchase of property at tax sale not being conclusive.

2. Municipal corporations 🔑519(1)

Where one owning street bond describing certain lot bought the same lot for taxes, the liens were separate and holder could foreclose street bonds without affecting the other lien.

3. Municipal corporations 🔑567(6)

In action to foreclose street bond, defendant could not attack regularity and validity of proceedings under which bond was issued, where no such issue was raised by pleading.

4. Taxation 🔑733

Where one owning street bond describing certain lot on which the last installment was due Jan. 2, 1940, bought the same lot for taxes on April 11, 1941, installments subsequent to April 11, 1941 were not "wiped out" so as to leave nothing due and preclude foreclosure of the bond.

* * *

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Mina A. Newman against Thomas Hye and another to foreclose a street bond. From a judgment for plaintiff, defendants appeal.

Affirmed.

Benjamin Chipkin, of Los Angeles, for appellants.

Earl D. Killion, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment against defendants in an action to foreclose a street bond.

Defendants and appellants Thomas Hye and Mattie Hye are husband and wife and at the time of the filing of the within action, to wit, September 10, 1941, were the owners of a town lot in the City of Los Angeles against which a street bond had been issued in November, 1929, in the sum of $859.50. Said bond was one of a number issued under the procedure provided by the Street Improvement Act of 1911, p. 730. Appellants' brief recites, "that the term of said bond was for nine years from the second day ot January next succeeding the 15th day of next November following its date and shall be due and payable on the 2nd day of January in equal proportions following the 15th day of next November after its date and interest was to be paid semi-annually. Provision was made in the bond for accelerating the payments in the event of default." It appears from the record that the bond in question was purchased by respondent in November, 1940. It does not appear whether any of the installments provided for in the bond were ever paid. The record further reveals that the town lot described in the bond was sold for taxes April 11, 1941, and purchased by respondent, the owner of the bond in question.

[1, 2] Appellants contended at the trial and renew the same argument on appeal that the purchase of the property at the tax sale resulted in a merger of estates and title, as a result of which plaintiff's right of action to foreclose under the bond was barred. The trial court found against defendants on such issue and the evidence supports the finding. Whether a merger results in such circumstances is a question of intention. Sheldon v. La Brea Materials Co., 216 Cal. 686, 15 P.2d 1098. The mere purchase of the same property at a tax sale is not conclusive. The liens are separate and the foreclosure of one does not affect the other. La Mesa Lemon Grove, etc., v. Hornbeck, 216 Cal. 730, 17 P.2d 143; Neary v. Peterson, 1 Cal.2d 703, 37 P.2d 82.

[3] At the trial defendant sought to attack the regularity and validity of the proceedings under and by virtue of which the bond in question was issued. The court sustained an objection to the introduction of any evidence for such purpose. The ruling was correct; no such issue was raised by the pleadings.

[4] It is contended on appeal that the court erred in computing the penalties and interest, as a result of which the amount of the judgment is incorrect. No offer of assistance was made by defendant at the conclusion of the trial in this connection, nor does it appear that any effort was made to correct the findings, if, as appellants now contend, the court's figures were incorrect. The argument is based on the premise that the tax deed "wiped out" the bond. Appellant also argues as follows, "It is the contention of appellants that since the last installment was due on January 2, 1940, all subsequent installments, that is subsequent to April 11th, 1941, were wiped out and there was nothing due." There is no merit to the contention.

Finally, an examination of the record discloses that appellants' contention that the trial judge was biased and prejudiced is likewise without merit.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

64 Cal.App.2d 375

TURNER et al. v. DONOVAN.

Civ. 14172, 14173.

District Court of Appeal, Second District, Division 3, California.

May 17, 1944.

Hearing Denied July 10, 1944.

1. Execution 🔑234

It is not essential to validity of execution sale to judgment creditor that cash shall pass back and forth between sheriff and such creditor.

2. Execution 🔑222(1)

The fact that judgment debtor had no knowledge that execution had been levied or that his own judgment against garnishee was to be sold on such execution did not of itself invalidate sale of such judgment to execution plaintiffs, especially where debtor failed to demand notice of sale by registered mail, as authorized by statute. Code Civ.Proc. § 692a.

3. Execution 🔑250

Where price received on execution sale of judgment debtor's judgment against garnishee to execution plaintiff was not greatly disproportionate to market value of judgment sold, appeal from such judgment was pending when plaintiffs made their bid, and value thereof was further reduced by claims prior to garnishment, discrepancy between amount of such judgment and purchase price did not show bad faith warranting vacation of sale.

4. Execution 🔑3, 49

An execution sale of judgment debtor's judgment against garnishee to such debtor's judgment creditors was not unauthorized because of proviso, added to statute after entry of judgment on which execution was issued, that no judgment as such should be subject to levy or sale on execution, as there was nothing in amendatory statute indicating legislative intent that it should affect existing creditors' rights and there was no authority for such sale even before amendment. Code Civ. Proc. § 688.

5. Execution 🔑247

An execution sale of judgment debtor's judgment against garnishee to such debtor's judgment creditors should have been set aside as mere purported sale unauthorized by law.

6. Appeal and error 🔑790(3)

Appellate court's reversal of order denying motion to vacate execution sale rendered "moot" an appeal from order denying second motion to vacate sale after taking of appeal from previous order.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Appeal".

◆

Appeals from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by John W. Turner and others, copartners, engaged in business under the fictitious name and style of Turner, Seaberry & Springer, against James Donovan, in which a judgment was entered against defendant, a writ of execution was issued thereon, a garnishment was served on H. W. Bateman, a judgment debtor of defendant, and the judgment against garnishee was sold to plaintiffs. From two orders denying defendant's motions to vacate such sale, defendant appeals.

Order denying the first motion to vacate the sale reversed, and appeal from order denying the second motion dismissed.

James Donovan, of Los Angeles, in pro. per., for appellant.

Vernon Bettin, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

The defendant in this case appears as both a judgment debtor and a judgment creditor. He obtained a judgment for $3,544 against one H. W. Bateman, a resident of Montana, in the United States District Court for the District of Montana. A judgment was entered against the defendant, in the Los Angeles County action before us, in 1939. Making use of a writ of execution issued upon the Los Angeles County judgment, the sheriff of Siskiyou County served a garnishment upon Bateman, who accommodatingly appeared in this State for the purpose, and thereafter sold the $3,544 judgment to the plaintiffs for $250. The defendant moved to have the sale set aside, and from the order denying his motion took an appeal. We have determined that the order denying his motion should be reversed.

A somewhat fuller statement of facts is essential to an understanding of the appeal's problems. The writ of execution was issued under date of August 14, 1941, and the plaintiffs forwarded it to the Siskiyou County sheriff with instructions to serve it upon Bateman who, the sheriff was informed, would be at the latter's office "sometime on Monday, August 25th, to accept service on this writ and presumably make a return." Plaintiffs' prediction that Bateman would appear at the sheriff's office in Yreka, California, was based upon an understanding reached with Bateman's attorneys that that judgment debtor would come within arms' reach of California process so that the claim of defendant Donovan against him, evidenced by the Montana judgment, might be sold to Donovan's judgment creditors, the plaintiffs, it being agreed that should they acquire the judgment, and should it be affirmed upon the appeal which was then pending, upon the payment to Donovan's creditors of $1500, the $3544 judgment would be satisfied so far as they were concerned. Some outstanding claims against the judgment, amounting to $1000 or more, were to be taken care of by Bateman.

Judgment debtor Bateman appeared as agreed and was served by the Siskiyou sheriff with this notice: "To Dr. H. W. Bateman *and to whom it may concern* You will please take notice, that all moneys, goods, credits, effects, debts due or owing, James Donovan and all other personal property, in your possession, or under your control belonging to the defendant named on the writ, of which the annexed is a copy, or to either or any of them, are levied upon by virtue of said writ; and you are hereby notified not to pay over or transfer the same to *to* anyone but myself. Please furnish a statement. Ben J. Richardson, Sheriff by A. E. Weed, Undersheriff Dated August 25, 1941." In response to the sheriff's courteous request for a statement, Bateman replied that he owed no money to Donovan, nor did he owe him any liability, contingent or otherwise, saving and except the judgment for $3544. Then, following the instructions of the plaintiff, the sheriff proceeded to "sell" Donovan's debt-judgment against Bateman, the plaintiffs being the purchasers through a local agent. What magic words were used when the sale was made we do not know; the article offered for sale may have been called "debt," "claim," "judgment," or something else. No money was paid to the sheriff in support of the bid of $250 which he accepted, nor did the plaintiff's agent receive the $244.25 net returns from the sale for which he receipted. Just what notices of the sale were posted or published, the record does not disclose, but defendant Donovan had no actual notice of the sale, and knew nothing of it or of the garnishment until December 15, 1941. In their first letter of instructions to the sheriff the plaintiffs voiced a request that he mail a notice of the sale to defendant Donovan, but this was not done.

[1-3] The defendant based his motion to vacate the sale upon several grounds. Those which we find to be without a sound foundation we shall refer to very briefly. Where the judgment creditor buys at an execution sale it is not essential to the validity of the sale that cash shall pass back and forth between the sheriff and the purchasing creditor. Mitchell v. Alpha Hardware & Supply Co., 1935, 7 Cal.App.2d 52, 56–58, 45 P.2d 442. The fact that the defendant had no knowledge that the levy had been made or that a sale was to take place does not of itself invalidate the sale (Spellacy v. Young, 1919, 44 Cal.App. 174, 177, 186 P. 368, and see Hamilton v. Carpenter, 1942, 52 Cal.App.2d 447, 448, 126 P. 2d 395 and cases cited), especially where the defendant failed to avail himself of the protection now afforded by section 692a, Code of Civil Procedure. Mortimer v. Young, 1942, 53 Cal.App.2d 317, 319, 127 P.2d 950. Holding the sale a thousand miles from the defendant's residence, without notice to him, might well have furnished a good reason for setting the sale aside, had the price received been grossly inadequate. Haish v. Hall, 1928, 90 Cal.App. 547, 550, 265 P. 1030. The conclusion impliedly reached by the trial judge upon the hearing of the motion to dismiss, that the price received upon the "sale" of the judgment was not greatly disproportionate to its market value, cannot be said to be without warrant. It is true that Bateman was financially able to pay the judgment against him, but that did not give it a present worth anywhere near its face value. The trial court thought so little of it that he had granted a new trial on Bateman's motion. The order granting a new trial had been set aside, but an appeal had been taken and was pending when the plaintiffs made their bid. (The judgment was ultimately affirmed. See Bateman v. Donovan, 1942, 9 Cir., 131 F.2d 759.) Claims, apparently prior to plaintiffs' garnishment, reduced the value of the judgment still further. Under the circumstances, the discrepancy between the amount awarded by the

judgment and the sum received on its sale does not signify that bad faith and oppression which warrants the vacating of an execution sale.

[4, 5] Inherent in the sale of a claim whose validity is not admitted is the likelihood that its owner will be deprived of it at a figure far below its actual worth. Perhaps that is the reason for the amendment made to section 688, Code of Civil Procedure, in 1941, consisting of the addition of the proviso at the end of this sentence: "Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be levied upon or released from levy in like manner as like property may be attached or released from attachment; *provided, that no cause of action nor judgment as such, shall be subject to levy or sale on execution.*" It is argued that because of the prohibition of the proviso, the sale with which we are concerned was unauthorized. We are of the opinion that it cannot be said that the sale was unauthorized because of the addition of the proviso to section 688, for two reasons. The first reason is that there was nothing in the act of the legislature, Stats.1941, p. 2856, indicating that it was the legislative intent to have the amendment affect existing creditors' rights, and so it is not to be given such a construction. Ware v. Heller, 1944, 63 Cal.App.2d 817, 148 P.2d 410, and cases cited, especially Medical Finance Ass'n v. Wood, 1936, 20 Cal.App.2d Supp. 749, 63 P.2d 1219. The second reason is that we are of the opinion that even before the amendment there was no authority for the sale, so that the lack of authority was not due to the amendment. We do not intend to support our conclusion, that the sale of the Donovan-Bateman judgment should have been set aside, because it was but a purported sale, unauthorized by law, by any extended argument. This is so because the argument we would make and the Supreme Court cases we would cite already appear in an opinion of the Appellate Department of the Los Angeles Superior Court reported in Sunset Realty Company v. Dadmun, 1939, 34 Cal.App.2d Supp. 733, 88 P.2d 947, and we see no useful purpose in republishing its contents.

The ultimate conclusion, in the case of Sunset Realty Company v. Dadmun, was that the trial court had had no authority to hold a hearing on a third party claim. That to which a claim had been made was a debt which had been reduced to a judgment, not yet final, and the levy upon the debt-judgment had been by service of a garnishment upon the judgment debtor. The ultimate conclusion was rested heavily upon a prior one, which was (34 Cal.App. 2d Supp. at page 737, 88 P.2d at page 949) "that the law, in harmony with reason, gives the levying officer neither the duty nor the power to sell a debt which has been garnisheed." The validity of the ultimate conclusion, we think it will be found, depends upon the validity of the one just quoted. The citation of the Sunset Realty Company case in support of the conclusion that in the case of a garnishment a third party claim hearing is not authorized is, therefore, to be regarded as an approval of the basis on which the conclusion rests. This is plainly so in the case of Bank of America v. Riggs, 1940, 39 Cal.App.2d 679, 684, 104 P.2d 125, 127, where we find this statement: "The right of a third party claimant to try the title to an indebtedness due by a garnishee to such third party claimant received the studied consideration of the appellate department of the superior court in the case of Sunset Realty Co. v. Dadmun, 34 Cal.App.2d Supp. 733, 88 P.2d 947. Said opinion reviews the several code sections and the cases explanatory thereof. From a thorough review of the authorities, it is there made clear that *when a debt is garnished, the right to collect it is vested thereafter solely in the judgment creditor,* Sec. 544, Code Civ.Proc., and when collected, it is credited directly on the judgment. Inasmuch as the sheriff did not gain possession of the moneys owing, they remained in the same custody where they rested prior to the levies. To remove them, an entirely new action was requisite." The case from which the quotation, with its own emphasis, was taken in turn is cited as authority, in Partch v. Adams, 1942, 55 Cal. App.2d 1, 9, 130 P.2d 244, 249, for these two sentences: "As a matter of law, the judgment in the third party proceeding was void. Such a proceeding does not lie where * * * an indebtedness has been attached." A third opinion adds its approval to the basic conclusion of the Sunset Realty Company case, for in Nanny v. H. E. Pogue Distillery Co., 1943, 56 Cal. App.2d 817, 822, 133 P.2d 686, 688, we find: "until Sawelson paid the purportedly garnished debt to the marshal, respondent was not in position to file a third party claim thereto. Sunset Realty Co. v. Dadmun * * *."

There is a conflict between the conclusion reached in the Sunset Realty Company case and those cases which rely upon it, and the conclusion reached in the four cases to which we now turn our attention. How great the conflict is depends in part upon the strength of the distinction which is made between the two modes of serving a writ of execution to lay hold upon a debt. In the case under review, as in the Sunset Realty Company case, service was upon the debtor. In Meserve v. Superior Court, 1934, 2 Cal.App.2d 468, 472, 38 P.2d 453, service had been made upon the plaintiff, the creditor, and it was held that the pending cause of action could be sold. This case was cited with approval in Everts v. Will S. Fawcett Co., 1937, 24 Cal.App.2d 213, 216, 74 P.2d 815, where four tort causes of action were levied upon and sold, and where emphasis was placed upon the fact that the levy had been made upon the plaintiffs, those who claimed that damages were due them, and not upon the claimed debtors, thus avoiding a conflict with Arp v. Blake, 1923, 63 Cal.App. 362, 218 P. 773, where the debtor had been served. The Meserve and Everts cases were not regarded by the court, in the Sunset Realty Company case, as controlling upon it, because in the former, service had been made upon the creditor, in the latter a true garnishment had taken place, that is, the debtor had been served. This same distinction is again recognized in Mortimer v. Young, supra, 53 Cal.App.2d 317, 320, 321, 127 P.2d 950, 952, where a tort cause of action was held to have been validly sold, emphasis being placed upon the fact that the claim had not been garnished, but "the levy was made by notifying, not the supposed debtor, but the plaintiff herself."

The fourth case at odds with the conclusion reached in the Sunset Realty Company case is Lantin v. Biscailuz, 1939, 35 Cal.App.2d 422, 427, 95 P.2d 962. Indeed, this case agrees with none of those we have been considering. There, a debt reduced to a final judgment was the subject of garnishment, levy having been made upon the debtor. The court held, first of all, that the only valid manner of levying upon a debt is by service upon the debtor, not by service upon the creditor. Then it held that a garnishment upon a "debt" could be followed by a sale of the debt, the holding in the Sunset Realty Co. case being frowned upon, the Supreme Court cases relied upon in that case being distinguished upon the ground that they dealt with a sale of "judgments" not "debts." We note with interest that the court which decided the Lantin case also decided the case of Nanny v. H. E. Pogue Distillery Company, supra, 56 Cal.App.2d 817, 133 P.2d 686, with its citation of the Sunset Realty Company case.

[6] Because we are of the opinion that the debt-judgment owed to defendant Donovan by Bateman could not be sold by the sheriff under the situation presented by this case, the order denying the motion to vacate the sale is reversed. A second motion to vacate the sale, made after an appeal had been taken from the order just reversed, was also denied. Even if an appeal would lie from this second order of denial, which is doubtful, it has become moot by our reversal of the first order, so that it is dismissed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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DOYLE et al. v. CHIEF OIL CO. et al.

Civ. 14110.

District Court of Appeal, Second District, Division 1, California.

May 9, 1944.

As Modified May 29, 1944.

1. Evidence 🔑352(1, 5)

In action for fraud arising out of oil and gas lease, documentary evidence consisting of reports of defendant company and two companies which purchased major portion of oil produced from lease were admissible, in view of testimony identifying documents by showing that they were made in the regular course of business. Code Civ.Proc. §§ 1953e to 1953h.

2. Evidence 🔑351

The purpose of Uniform Business Records as Evidence Act is to enlarge operation of business records exception to the hearsay evidence rule. Code Civ.Proc. §§ 1953e to 1953h.

3. Evidence ⚿351

The common-law business records exception to hearsay evidence rule is based on assumption that records kept in general course of business usually are accurate and may be used, in case of necessity, as evidence of the matter recorded.

4. Fraud ⚿58(2)

In action for fraud arising out of oil and gas lease based on alleged difference between production accounted for to lessors and amount actually produced from lease, evidence supported finding as to amount and value of oil not accounted for to lessors.

5. Fraud ⚿30

Officers of oil company, who were in actual control of oil well and who actively participated in plan to deceive lessors of land on which well was located in regard to amount of oil produced from well, could be held liable to lessors, even though they were not parties to the contract and were not made liable by its terms.

6. Fraud ⚿61

Defendants' acts in failing properly to account to lessors under oil and gas lease for oil produced from well on lease, though fraudulent, were related to and affected certain obligations "arising from contract", and hence exemplary damages were not allowable. Civ.Code. § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising From Contract".

◆

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge.

Action by John J. Doyle and another against Chief Oil Company, E. E. Fairbanks, W. M. Schultz, W. L. Luke, and others, for fraud arising out of an oil and gas lease. From a judgment in favor of the plaintiffs the named defendants appeal.

Judgment modified and, as so modified, affirmed.

C. Roy Smith, of Long Beach, for appellants.

Cameron & Perkins, of Long Beach, for respondents.

YORK, Presiding Justice.

Defendants appeal from a judgment rendered in favor of plaintiffs for the sum of $3315.66 and interest, as actual damages, and the further sum of $500, as exemplary damages, in an action for fraud arising out of an oil and gas lease.

The respondents Doyle, as owners and lessors, on March 26, 1934, entered into an oil and gas lease with one C. G. Truitt, as lessee, covering certain premises situate in the City of Signal Hill, under the provisions of which lessors were to receive as royalty 12½% of all oil and gas produced from such premises. On November 2, 1934, said Truitt and his wife, as lessors, executed a sub-lease to appellant Chief Oil Company, which reserved to the lessors "as royalty the equal one-sixth part of the value of all oil removed from the leased premises" after making customary deductions, and also provided that "24. All payments which may fall due under this lease shall be made 12½% to J. J. Doyle and 4.6% to C. G. Truitt, one of the above named lessors, in the manner herein stated."

Thereafter, appellants drilled an oil well upon said land and placed the same on production on or about January 13, 1935. Said well which was commonly known as Chief Well No. 2, Doyle Lease, continued on production until sometime during the month of September, 1935, producing large quantities of oil and gas. Appellants accounted to respondents from month to month for the latter's one-eighth landowners' royalty, based on a total production of 28,536.64 barrels of oil, or, as alleged in the complaint, "deposited monthly what the defendants represented was the plaintiffs' royalty of 12½% of the proceeds thereof * * * to the account of the plaintiff, John J. Doyle, in the Security First National Bank of Los Angeles * * * accompanied with written statements purporting to show the amount of all the oil and gas sold by defendants and all the sums of money realized therefrom."

Respondents instituted the instant action sounding in fraud, alleging that the statements and representations so made by appellants as to the total number of barrels of oil produced from said premises were false and fraudulent, were known by appellants to be false and fraudulent and were made and caused to be made by appellants with the purpose and intent of cheating and defrauding respondents out of their royalty on 18,450 barrels of oil, which was the difference between the production accounted for and the amount actually produced by the said well during the period in question.

Respondents also alleged that while said well was on production and at the time the complaint herein was filed, they were residents of the State of North Dakota, had no means of knowing that appellants were falsifying their statements as to production and remained unaware and did not discover the falsity of such statements of appellants until August, 1940.

The court found that the total production was 50,842.60 barrels; that appellants had accounted to respondents for a total production of 28,536.64 barrels; and that appellants had failed to account to respondents for a total of 22,305.96 barrels of oil, and gave judgment accordingly, as hereinbefore indicated.

Appellants make the following specific assignments of error on the part of the trial court:

1. The admission in evidence of certain documents which were hearsay only and utterly incompetent as evidence;

2. That certain findings of fact are not supported by the evidence;

3. That it was error to render a judgment against the individual appellants who were not parties to the contract or liable thereunder;

4. That exemplary damages are not allowable in an action for accounting based upon an express contract;

5. That the judgment for exemplary damages in the sum of $500 is not sustained by the findings of fact.

The oil well here in question was not connected with any pipe line, consequently, when the oil was sold it was necessary to haul it in tank trucks. To facilitate delivery of the oil to the trucks, two large tanks 25 feet in height, each having a capacity of several hundred barrels, referred to as Tank No. 1 and Tank No. 2, were maintained at the site of the well and were filled in rotation with oil therefrom. Appellants employed as their pumper one Albert A. Dickinson, who had charge of the production of oil at the well. Among others, it was his duty to gauge or measure the oil in the tanks and prepare it for shipment. In order to keep a record of the production of the well and the amount of oil sold therefrom, appellants followed the customary practice of the oil industry, and furnished Dickinson with books known as pumper's daily gauge reports made especially for that purpose, in which said Dickinson was required to mark down the number of the tank being gauged and the different gauge readings each time the tank was measured. The owners of the well and those in charge of its operation are furnished with a chart, or "strappings" so-called, to be used in measuring the oil in the tanks. This chart shows how much oil is in the tank at all various depths measured in feet and inches. As an illustration of this method of measuring oil in the tank: When a purchaser wished to buy oil, the pumper in charge of the well would take a steel tape with a plumb bob at the end and drop it into the tank until the plumb bob touched the bottom of the tank. The steel tape would be withdrawn from the oil and the gauger would note the depth of the oil in the tank as shown by the mark on the steel tape. The gauger would then turn to the chart or "strappings" which showed the gauger, without any computation on his part, the exact number of barrels of oil in the tank at the particular depth.

Whenever oil was sold from the well here involved, the pumper Dickinson and the agent of the purchaser would take the high gauge of the tank from which the oil was being delivered, and the low gauge thereof after the oil was withdrawn. By referring to the chart the amount of oil that had been removed from the tank was ascertained. High, low and intermediate gauges were shown on the pumper's daily gauge reports. Much of the oil produced by the well in question was purchased by the Los Angeles Refining Company which had in its employ a gauger by the name of Smith, who took the high and low gauges of the tank which was being shipped, and reported the figures to his company, together with a notation of the location of the well from which the oil was taken. Thereupon the refinery would issue crude oil invoices (also referred to as receipts or run tickets), stating the amount of oil thus received. Operators Oil and Refining Company of Long Beach was also a frequent purchaser of oil from the well and also issued "run tickets" for the oil shipped to it.

Beginning with the month of March, 1935, Dickinson kept in a blue book, plaintiffs' exhibit 4, a record of oil sold and shipped from the well, together with the names of the purchasers to whom shipped and sold. In 1940, respondent Doyle came to California and visited Dickinson at Taft, where he was then employed, and procured from him the pumper's daily gauge reports, plaintiffs' exhibits 2 and 3; and the blue book, plaintiffs' exhibit 4, showing the shipments and sales of oil made from this well, as recorded by said Dickinson. By comparing these exhibits with the monthly statements rendered by appellants to respondent Doyle while the well was on production, the discrepancies which form the basis of the instant litigation were discovered.

The documents as to the admission of which appellants particularly object include (a) two pumper's daily gauge reports, (plaintiffs' exhibits 2 and 3); (b) the blue book, (plaintiffs' exhibit 4); (c) several bundles of crude oil invoices or run tickets (plaintiffs' exhibit 6), taken from the files of Operators Oil and Refining Company; and (d) several bundles of crude oil invoices (plaintiffs' exhibit 7), which were taken from the files of the Los Angeles Refining Company. These two companies, as heretofore stated, purchased the major portion of the oil produced by Chief Well No. 2, Doyle Lease, during the period referred to.

Referring to the two pumper's daily gauge reports, exhibits 2 and 3, it should be noted that these were books of appellant corporation and were kept in the usual course of business. Appellant Schultz gave the blank books to the witness Dickinson and told him to use them in keeping track of the production of the well. The books were kept under the supervision of the witness Dickinson and appellant Schultz. While the witness Dickinson testified that his brother and his son assisted him and took gauges and made entries thereof in the pumper's daily gauge reports, as they had been directed to do by appellant Schultz, he (Dickinson) visited the well every day and saw to it that the gauges were taken and the oil shipped, and in addition he examined the said record to see that it was kept up.

With respect to the blue book, exhibit 4, the witness Dickinson testified that each day that oil was shipped a record was made of the number of barrels shipped that day out of the particular tank, together with the name of the purchaser. Such information was obtained from the high and low gauges of the tanks and from the drivers of the trucks. That the gauge was taken "just as the oil went off the lease." Also, "* * * we had a calendar in the doghouse—we wrote this down on the calendar, the high and low gauge and who got the oil and the number of barrels and all, and the pencil and everything, and the book all stayed right here, both. We wrote upon both of them." This witness also stated that he transferred such information from the calendar to the blue book every day or every other day, and that when a truck driver received a tank load of oil or fluid from this tank he would give the pumper a receipt for so many gallons or so many barrels of oil. That "the amount of oil that was shipped out of the tank would show the high gauge that was taken and the low gauge that was left in the tank"; that the calendar, upon which these original entries were made as the oil was shipped, was kept by the witness, his brother and his son, and that the entries in the book and on the calendar constituted the first permanent record of any kind that was made. Said witness also testified that he was present when the shipments of oil were made and when the high and low gauges were taken.

In connection with the several bundles of crude oil invoices (exhibit 6), taken from the files of the Operators Oil and Refining Company, the witness Hively, auditor for said company, testified in answer to the question, "By Mr. Cameron: Mr. Hively, how were these records prepared—what was the manner of their making?", stated: "Well, the manner of their making was, the shipment would come from the well in a truck and trailer, unloaded at the refinery, signed for by one of our operators, showing that the crude oil was received in the refinery and at the time of the complete shipment, why, the high and low gauge and the barrels, gravity and temperature would be brought into our office, showing that so many barrels of oil were shipped from the well as so stated, and we would verify that we had received the amount of oil from that well into our refinery." Also, that he had possession of these records in his office; knew where they were kept and filed; that they were kept in the regular course of business, and that they constituted a record of the oil purchased, the amount of money paid for it and to whom said money was paid; that he used these records in connection with his work during the period in question. While this witness testified on cross-examination that he made none of the entries on the tickets, and was not present when others made such entries, he also testified that the books of the company were kept in such a way that a person could check this data to see whether or not the amount of oil shown thereon was paid for. Further, that he relied upon the validity and accuracy of the tickets in his conduct of the business; that he was in the employ of the company when the records were made and that the run tickets had been in the possession of the company ever since they were made.

The witness Cate, auditor for Fletcher Oil Company, successor to Los Angeles Refining Company, testified respecting several bundles of run tickets or crude oil invoices, introduced as plaintiffs' exhibit 7, which were taken from the files of said refining company. On voir dire examination in answer to the question: "You personally don't know whether those figures are or are not accurate, do you?", said witness replied: "Only in so far as after I went back there in September, for the purpose of State and Federal gasoline taxes, I made inventory reconciliations covering the whole year of 1935, at which time reconciliation inventories are based on the crude oil received according to these run tickets."

The appellant Fairbanks, who was vice president of the Chief Oil Company during the year 1935, admitted that the readings taken by the pumpers at the well "would be correct as to the amount of fluid—gross fluid." Also, that the Chief Oil Company was not selling oil from any other well from the middle of January until July 22, 1935, except from the Doyle well.

Appellants, in connection with their contention that the documentary evidence presented at the trial herein was hearsay and therefore inadmissible, contend that "every single exhibit is essential if plaintiffs are to prevail"; that exhibits 2 and 3 cover only a portion of the period involved; exhibit 4 likewise covers only a portion, and exhibits 6, 6a and 7 cover only a portion of such period; and that while some of the exhibits constitute competent evidence against the corporate appellant, respondents' case must fall if any single link in the chain does not measure up to the standard required for competent evidence.

By the testimony produced, it has been shown that the pumper's daily gauge reports, exhibits 2 and 3, were kept in the usual course of business and for the purpose of showing the amount of gross fluid produced by the well during the time it was on production, and the appellant Fairbanks admitted that they were correct for that purpose. Plaintiffs' exhibit 4, the blue book, so-called, maintained by the witness Dickinson in which he kept a record of the oil that was shipped and sold beginning with the month of March, 1935, showed in one column the dates when the shipments of oil were made, in the next column the number of barrels shipped and in the next column the place to which the oil was shipped. These figures agreed exactly with the gauges or tank measurements appearing in the pumper's daily gauge reports, as well as with the record of the two refineries, plaintiffs' exhibits 6 and 7. Moreover, the witness Dickinson testified that the entries in this book were correct.

Many of these shipments recorded in the blue book, especially those therein stated to have gone to the Los Angeles Refining Company and to the Operators Oil and Refining Company through the agency of one Doc Rhea, were not accounted for by appellants to respondents, but the records of these two refineries which were later introduced in evidence as exhibits 6, 6a and 7, showed that these identical shipments had been received by the refineries on the dates specified in the said blue book.

[1] With respect to all of this documentary evidence, i. e., the run tickets or crude oil invoices taken from the files of the two refineries, the pumper's daily gauge reports and the blue book, it was clearly admissible under the provisions of sections 1953e to 1953h, inclusive, of the Code of Civil Procedure, denominated as the "Uniform Business Records as Evidence Act." Section 1953f, thereof, provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

It must be conceded that the testimony of the witnesses Hively and Cate, employees of the refining companies, was sufficient to establish the identity of the run tickets, the mode of their preparation and that they were made in the regular course of business of these two companies. This is also true of the records kept by the witness Dickinson for the corporate appellant.

Section 1953g, supra, requires that: "This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it."

[2, 3] In discussing these sections of the Code of Civil Procedure in the case of Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1, 5, our Supreme Court stated: "The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. The common law exception is based on the assumption that records kept in the general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded. * * * But the exception has been hedged about with so many burdensome restrictions that legislation has been necessary to secure widespread use of such records. Speaking of the desirability of similar legislation, the United States Supreme Court, in the recent case of Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719, stated: 'The several hundred years of history behind the Act (Wigmore, supra, §§ 1517–1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed.' * * * It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or the event. It is not necessary that the person making the entry have personal knowledge of the transaction."

In an analysis of the Uniform Business Records as Evidence Act which appears in 15 So.Cal. Law Review 37, 39, it is stated: "As worded, the act renders it unnecessary to call the various employees in the business or to account for their absence. The records may be adequately verified by the 'custodian or other qualified witness.' This is a point of departure from precedent. The traditional, accepted principle has been that the person or persons participating in the transaction and the recording thereof must be called unless an acceptable excuse for not calling them is furnished. It is true that many courts have adopted a liberal policy in this regard, but the practice has been far from uniform and litigants frequently have been met with troublesome and unnecessary handicaps and needless time has been consumed. * * * Such records can be readily admitted, whether offered in litigation with his own customers to which he is a party, or whether only relevant to litigation between third parties. * * * Moreover, 'qualified', as used in the act, probably was intended to mean only that the witness was sufficiently acquainted with the books to identify them and to testify as to routine of the business in the matter of making its records—the interpretation maxim 'ejusdem generis' would relate the 'other qualifications' to those similar to custodianship."

[4] Appellants next contend that finding of fact No. 14 is not supported by any competent evidence. Said finding reads as follows: "That in said written statements made by the defendants to the plaintiffs concerning the total number of barrels of oil produced from said well for the months of January and February and March and April, 1935, the defendants also set forth in each monthly statement the amount of gross barrels of oil purported to have been produced and sold from said well and from which the number of net barrels of oil was claimed to have been obtained, and at the time of trial the plaintiffs introduced in evidence the records of the defendant corporation in the form of 'run tickets' and being a part of plaintiffs' 'Exhibit 1' and which purported to show the gross number of barrels of oil produced and sold from said well and which 'run tickets' formed a record of the production of all the gross barrels of oil accounted for by defendants to the plaintiffs, and which defendants claim was all of the gross barrels of oil produced and sold from said well; that by dividing the net sum of money received by the defendant corporation in any one month by the gross number of barrels of oil produced and sold in said month according to the records of said defendant corporation, there is obtained the average price per gross barrel for the oil so produced and sold in said month according to defendants' records, * * * that said method of computation is adopted for the reason that much of the proof of plaintiffs as to the amount of oil produced and sold from said well was given in terms of gross barrels as said term was used by defendants in accounting to plaintiffs as said term is used in said 'run tickets.'" Then follows a table composed of seven columns:

(1) Showing the number of gross barrels produced from said well for each month; (2) the number of gross barrels accounted for to plaintiffs; (3) the number of gross barrels not accounted for; (4) the value of the oil not accounted for; (5) plaintiffs' royalty on the oil sold and not accounted for; (6) the accrued interest on the royalty from the date it became due to the time the complaint was filed herein; (7) the total amount of principal and interest due to plaintiffs on April 9, 1941.

In view of what has heretofore been said regarding the evidence adduced at the trial herein and the fact that this is an action for fraud and not for an accounting, as appellants frequently suggest in their briefs, it would appear that finding of fact No. 14 is amply supported. Moreover, respondents did not seek to recover from appellants any greater price, and were not awarded any greater price for the oil which was unaccounted for, than for the oil which was accounted for by appellants. In the circumstances presented, it would appear that the method used by the court in computing the value of the oil unaccounted for was eminently fair and just.

[5] With respect to appellants' contention that the court erred in rendering a judgment against the individual appellants Fairbanks, Schultz and Luke, because they were not parties to the contract and were not made liable by its terms, the record herein conclusively reveals that these three men as officers of the Chief Oil Company were in the actual control and management of the well here in question and actively participated in the plan to deceive respondents regarding the amount of oil produced and sold from the well. Having participated in the fraudulent plan, they are liable in damages therefor.

[6] Appellants urge that exemplary damages are not allowable in an action for accounting based upon an express contract, and in support of this contention cite section 3294 of the Civil Code which provides for exemplary damages "In an action for the breach of an obligation *not arising from contract,* where the defendant has been guilty of oppression, fraud or malice, express or implied * * *." Although the acts of appellants were fraudulent, such acts were related to and affected certain obligations "arising from contract", the violation of which resulted in the alleged damage to respondents; therefore, the award of $500 as exemplary damages herein cannot be sustained.

For the reasons stated, the judgment is modified by striking therefrom that portion of paragraph numbered 1, which awards to respondents the sum of $500 as exemplary damages, and as so modified, the judgment is affirmed. Respondents to recover their costs on appeal.

DORAN and WHITE, JJ., concur.